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REPORTS

OF CASES RELATING TO

MARITIME LAW:

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom,

AND SELECTIONS FROM THE MORE IMPORTANT DECISIONS

IN

The Colonies and the United States.

EDITED BY

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ERRATA.

Page 16, col. 2, line 3 from bottom, *for* "defendant" *read* "plaintiff."

Page 34, col. 1, line 15 from bottom of head-note, *after* "bill of lading" *insert* the word "incorporate."

Page 34, col. 1, last line of foot-note, *for the word* "former" *read* "shipowner."

Pages 360-368, *for* "Stormvart Maatschappy" *read* "Stoomvart Maatschappy."

Page 523, col. 1, line 23 from bottom, *for* "8th sub-section" *read* "9th sub-section."

Page 540, col. 1, line 11 from top, *for* "allowed" *read* "disallowed."

Page 567, col. 2, line 10 of head-note, *after the words* "loss sustained" *insert* "by."

Page 589, col. 2, line 17, *after the word* "defendants" *insert* "(see 4 Asp. Mar. Law Cas. 526; 46 L. T. Rep. N. S 630.)"

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no conversion of the cargo by the shipowner, and the owners of cargo are only entitled to nominal damages for the breach of contract, the non-delivery of the cargo being occasioned by their own act in instructing the consignees to make a deduction from the freight not authorised by the charter-party. (Ct. of App.) *Jones* v. *Hough*.....*page* 248

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10. *Delivery of cargo—Charter-party—Safe port—"Always afloat."*—Where by charter-party, a vessel is to call for orders for a safe port (or as near thereunto as she can safely get, and always lie and discharge afloat) she is entitled to be sent to a port which she can enter loaded, and in which she can always lie and discharge afloat at all times of the tide; and, if she be ordered to a port in which she cannot do so, she is entitled to proceed to the nearest port to the said port in which she can do so, and there discharge. (Ct. of App., reversing Adm.) *The Alhambra*..... 334, 410

11. *Delivery of cargo—Charter-party—Bill of lading—Custom of port of discharge—Reasonable time.*—Where a charter-party provides that a ship shall deliver her cargo as fast as the custom of the port of discharge will allow, and the bill of lading provides that the cargo shall be delivered to the consignee or assigns, he or they paying freight as per charter-party, and there is no custom of the port as to delivery, the contract in both charter-party and bill of lading is that the cargo shall be delivered within a reasonable time. (Ct. of App.) *Fowler* v. *Knoop*..... 68

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14. *Demurrage—Bill of lading—Charter-party—Liability of consignee.*—When a bill of lading or charter-party (the terms whereof are incorporated in the bills of lading) contains a clause providing that the cargo of the ship shall be discharged in a certain number of days or demurrage paid, a consignee of part of the cargo whose goods are not discharged within the lay days provided, is liable for demurrage, although the delay has been caused by no default of his, but by the default of other consignees whose goods are stowed above his in the ship, provided there is no default on the part of the shipowner. (Ct. of App.) *Porteous and others* v. *Watney and others*..... 34

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16. *Deviation—Salvage—Life—Loss of cargo—Liability of the shipowner—Perils of the sea.*—The owner of a ship who has contracted not to be liable to

the freighters for loss of cargo, by perils of the sea, is, nevertheless, liable to them for such loss, during a deviation from her course for the purpose of saving a ship in distress and her cargo, if such deviation was not (or was prolonged until it ceased to be) reasonably necessary in order to save life. (Ct. of App., affirming Lindley, J.) *Scaramanga and Co.* v. *Stamp and Gordon* .....*page* 161, 295

17. *Freight—Sale of cargo by shipowner while afloat —Part payment by purchaser—Implied contract.*— Where the plaintiff, a shipowner, sells a cargo of wheat, while afloat on board his ship, to H., at the price of 65*s* per 500lb., including freight and insurance: "freight for United Kingdom to be reckoned at 60*s*. per ton," and while the cargo is still afloat, H. sells to L., and L. to the defendant, upon similar terms, and upon the arrival of the ship, the defendant pays 1000*l*. on account of freight, and invites the master to complete delivery of the cargo, which is done, the conduct of the defendant amounts to an implied contract on his part with the plaintiff to pay freight at the agreed rate for all the cargo delivered. (Ct. of App.) *Swann* v. *Barber and Co.* 264

18. *Freight — Amount payable — Measurement— Timber—Loss of part—Charter-party.*—Where, by a charter-party, freight is payable on the intake measure of quantity delivered, and the measurements of a cargo of timber at the place of shipment are entered by the shipper in his specification, and also chalked on each piece of timber, and part of the cargo is lost, and on the rest some of the marks remain, and some do not, and there is evidence that the timber lost was of average dimensions, the shipowners are entitled to deduct from the specification the proportion which the lost part of the cargo bears to the rest, and to recover freight on the residue, and are not bound to have the unmarked pieces measured *de novo* (Q. B. Div.) *Spaight and others* v. *Farnworth and another*..... 251

19. *Lien for freight — General ship — Shipper— Charter-party—Notice.*—The goods of a shipper in a general ship are not affected by a clause in a charter-party between the person working the ship and the shipowner, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charter-party, where the shipper has no notice or knowledge of the charter-party or its terms. (Adm.) *The Stornoway* 529

20. *Lien for freight — General ship — Shipper — Charter-party—Notice—No bills of lading.*— *Semble*, the fact that no bills of lading were given, for the goods makes no difference in this respect as to the rights and liabilities of the parties.—(Adm.) *The Stornoway* 529

21. *Practice — Interrogatories —Irrelevancy—Non-delivery—Action by owners of cargo—Insurance.*— Where a shipowner is sued by the owners of the cargo and charterers for non-delivery of cargo, and the defendant alleges that the non-delivery was caused by perils of the sea excepted in the charter-party and bill of lading, interrogatories asking the plaintiffs whether the cargo was insured, and if so, with whom, by whom, and to what amount, are irrelevant and therefore inadmissible. (C. P. Div.) *Bolckow, Vaughan, and Co.* v. *Young* 301

22. *Voyage—End of—Charter-party—"As near as she may safely get"—Demurrage — Delay.*— Where by a charter-party it is provided that a ship shall carry a cargo of timber from the Baltic to the Surrey Commercial Docks, "or so near thereto as she may safely get and lie always afloat," and shall deliver the same on payment of freight, "the cargo to be received at port of discharge as fast as steamer can deliver," and when she arrives in the Thames the Surrey Commercial Docks are so crowded that she cannot be received in them, and it appears from the evidence that she cannot be admitted for many weeks the, delay is so great as to make it unreasonable for the ship to wait for admission into the docks, so that the alternative in the charter party comos into operation, and the voyage is at an end when the ship is moored in the river, ready to discharge her cargo, and the charterers' liability for demurrage begins from this date. (H. of L. from Ct. of App.) *Dahl and Co.* v. *Nelson, Donkin, and Co*.....*page* 172, 392

23. *Voyage—End of—Charter-party—"As near as she may safely get—Construction—Physical obstruction—Unreasonable delay.*— The primary obligation of a ship under charter is to proceed, if possible, to the place named in the charter-party; but it is not necessary, in order to free the ship from this obligation, and to substitute an alternative destination, that she should be prevented by a permanent physical obstruction, if the obstruction is such as to cause a delay so unreasonable as to make the prosecution of the voyage impossible from a mercantile point of view. (H. of L. from Ct. of App.) *Dahl and Co.* v. *Nelson, Donkin, and Co* 172, 392

24. *Voyage—End of—Charter-party—"As near as she may safely get"—Lighterage.*—Where a charter-party provides that the ship shall carry a cargo to a port in the United Kingdom or on the continent between Havre and Hamburgh, as ordered on signing bills of lading, or so near thereto as she might safely get, the cargo to be brought to and taken from alongside at merchant's risk and expense, and the ship is ordered to a place up a canal, and on arrival at the mouth of the canal, the master finds that the ship draws too much water to get up the canal without discharging more than a third of the cargo, and the consignee makes no arrangement to lighten the ship or to take delivery or give directions where the ship has arrived, the master is justified in considering the voyage at an end at the place of discharge or at the mouth of the canal, and if he discharge part of his cargo into lighters and then take the rest on in the ship to the port named, he will be entitled to recover the lighterage from the charterers. (Q. B. Div.) *Capper and Co.* v. *Wallace Brothers* 223

25. *Warehouseman—Merchant Shipping Act* 1862 *ss*, 66, 78—*Goods landed.*—A warehouseman with whom goods have been warehoused under the provisions of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), ss. 66, 78, is in the same position as the shipowner or master, and is entitled to the same protection. (H. of L.) *Glyn, Mills, and Co.* v. *East and West India Dock Company* 580

See *Collision*, No. 19—*County Courts Admiralty Jurisdiction*, No. 3 — *General Average* — *Marine Insurance*, No. 23—*Stoppage in Transitu.*

CASUALTY.

See *Wrecks and Casualties.*

CAUSA PROXIMA.

See *Marine Insurance*, No. 2.

CENTRAL CRIMINAL COURT.

See *Jurisdiction*, No. 1.

CERTIFICATE.

See *Master's Wages and Disbursements*, No. 1.—*Wrecks and Casualties*, No. 1.

CESSATION OF RISK.

See *Bottomry*, No. 3.

CHARTERER.

Carriage of Goods, No. 5—*Mortgage*, No. 1.

CHARTER-PARTY.

1. *Cancellation*—"*To be cancelled*"—*Construction.*—Where a charter-party provides that in the event of "war, blockade, or prohibition of exporting preventing loading, this charter to be cancelled," the charter-party comes to an end *ipso facto*, on the happening of any of the contingencies mentioned, without any act of the shipowners or charterers being necessary to cancel it. (Q. B. Div.) *Adamson and another* v. *The Newcastle Steamship Freight Assurance Association* ... *page* 150

2. *Demurrage—Arrival in dock—Commencement of running days—Liability of charterer.*—Where a charter-party provides for the loading of a vessel in a named dock in a port, and that she shall be loaded and discharged in a given number of running days, or if longer detained be paid demurrage at so much a day; and she proceeds to and enters the dock, but by the dock regulations cannot obtain a berth for some days, the running days commence from the time of entering the dock, and the charterer is responsible for the delay, and must pay demurrage. (Ct. of App.) *Davies* v. *Mc Veagh*..... 149

3. *Demurrage—Detention—Discharge—Custom of port.*—A charter-party in which there are stipulations as to the loading or discharging cargo in a port is always to be construed as made with reference to the custom of that port; therefore words "cargo to be discharged with all despatch according to the custom of the port," do not affect the liability imposed on the charterer by the ordinary clause, "cargo to be taken from alongside at the merchant's risk and expense," as they mean no more than would be implied. "Custom" in such a case means a settled and established practice of the port. (H. of L. from Ct. of App.) *Postlethwaite* v. *Freeland* 302

4. *Demurrage—Detention—Discharge—Lighters—Limited number—Custom of port—Charterer—Liability of.*—Where in an action brought by a shipowner against the charterer for demurrage at the port of discharge, it is proved that from the natural conditions and rules of the port ships must necessarily be discharged into lighters, and that only a limited number of lighters are available, the insufficiency of the number of lighters available to discharge simultaneously all the ships lying off the port when the ship arrives there, cannot, in the absence of any express stipulation as to time of discharge, be considered as an impediment to the due discharge of the ship collateral to or separable from the custom of the port, and the charterer is not liable for demurrage. (H. of L. from Ct. of App.) *Postlethwaite* v. *Freeland*..... 302

5. *Demurrage—Detention—Discharge—Charterer—Duty of—Reasonable time—Circumstances at port of discharge.*—Where the time to be allowed for unloading is not named in a charter-party, the charterer is bound, on the arrival of the ship at the usual place of discharge within the port of discharge, to provide sufficient appliances of the kind ordinarily in use at the port for the purpose of unloading, and it is no answer to a claim for damage for delay in unloading to show that the delay was caused by the crowded state of the port. (Ct. of App. from Q. B. Div.) *Wright* v. *The New Zealand Shipping Company*..... 118

6. *Demurrage—Detention—Custom of port—Dock—Frost—Loading.*—Where it was agreed by charter-party that a ship should load in a certain dock in the customary manner, and the charterer undertook to load as fast as the ship could take on board, and if longer detained to pay demurrage, detention by frost not to be reckoned as lay days, this exception was held not to cover frost which was external to the dock, and which prevented the shipper from getting the goods to the dock, although it appeared that it was customary to bring the goods into the dock by means of lighters. (Ct. of App., reversing Q. B. Div.) *Kay* v. *Field and Co.* ..... *page* 526, 588

7. *Demurrage—Detention—Loading—Exception of frost—Charter-party—Construction.*—Where it was agreed by charter-party that the plaintiffs' ship should proceed to Cardiff, and there load in the customary manner a cargo of iron, the charter-party containing the following clauses: "Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage at 40*l.* per day. Except in case of hands striking work, or frost, or floods, or any other unavoidable accidents preventing the loading and unloading in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship" and the ship arrived at Cardiff, and the loading was commenced, but was afterwards interrupted by frost, it was held that the exception applied to delay occasioned by the excepted causes after the loading was commenced, and was not confined to the commencement of the loading being prevented. (Q. B. Div.) *Coverdale, Todd, and Co.* v. *Grant and Co.*..... 528

See *Carriage of Goods*, Nos. 4, 5, 6, 8, 10, 11, 12, 13, 14, 18, 19, 20, 22, 23, 24—*County Courts Admiralty Jurisdiction*, No. 2—*General Average*, No. 5—*Marine Insurance*, Nos. 13, 14—*Mortgage* Nos. 1, 2—*Ship's Husband*, Nos. 1, 2.

COLLISION.

1. *Appeal—Costs—Inevitable accident—Practice.*—In future the costs in Admiralty appeals, where a vessel is held not to blame on the ground of inevitable accidents, will follow the event, notwithstanding the former practice of the Judicial Committee of the Privy Council in certain Admiralty appeals. (Ct. of App. from Adm.) *The Condor*..... 115

2. *Appeal—Costs—Variation of decree—Both ships to blame—Practice.*—Where the Court of Appeal varies the decision of the court below by finding both vessels to blame for a collision, there will be no order as to costs, but each party must bear his own costs of the whole litigation. (Ct. of App. from Adm.) *The Milanese* 318

3. *Compulsory pilotage—Exemptions from Pilotage Act* 1825 (6 *Geo.* 4, *c.* 125)—*Merchant Shipping Act* 1854 (17 & 18 Vict. *c.* 154) *s.* 353.—The provisions of the Pilotage Act 1825 (6 Geo. 4, c. 125), as to compulsory pilotage and exemptions therefrom, are preserved by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 353. (Adm.) *The Hankow* 97

4. *Compulsory pilotage—Exemption—Foreign ships—British ships—Order in Council, Feb. 18th* 1854.—The Order in Council of the 18th Feb., 1854, extending the exemptions from compulsory pilotage, applies only to British vessels. (Adm.) *The Vesta* 515

5. *Compulsory pilotage—Differential dues—Harbours and Passing Tolls Act* 1861—*Foreign ship.*—A charge for compulsory pilotage on a foreign ship is

not a differential due within the meaning of the Harbours and Passing Tolls Act 1861, and is therefore not abolished by that Act. (Adm.) *The Vesta* ..... *page* 515

6. *Compulsory pilotage — Foreign ship — River Thames—Passengers*—Pilotage is compulsory in the Thames on a foreign ship carrying passengers and trading between London and ports between Boulogne and the Baltic. (Adm.) *The Vesta*... 515

7. *Compulsory pilotage—Passengers—Port of London —Pilotage Act* 1825, *sect.* 59.—A ship belonging to the port of London, and bound to London from Australia with passengers, is obliged to employ a pilot by compulsion of law, under the provisions of sect. 59 of the Pilotage Act 1825 (6 Geo. 4, c. 125), when within the limits of the port of London, by reason of there being at that time "particular provisions" for the appointment of pilots for the rivers Thames and Medway below bridge. *The Stettin* (Br. & Lush. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. C. O. S. 229) not followed. *The Killarney* (Lush. 427; 6 L.T. Rep. N. S. 908; 1 Mar. L. C. O. S. 238) approved. (Adm.) *The Hankow* 97

8. *Compulsory pilotage—Port to which ship belongs— Exemption—Pilotage Act* 1825.—A vessel within the limits of her own port at a place where, previous to the passing of the Pilotage Act 1825, there were provisions in force for the appointment of pilots, is not exempt from compulsory pilotage. (Adm.) *The Hankow* 97

9. *Compulsory pilotage—"Proceeding to Sea"— Mersey Docks Acts Consolidation Act* 1858 (21 & 22 *Vict. c. xcii.*) *ss.* 138, 139.—When a vessel leaves a dock in the Mersey on her voyage to sea and receives slight injuries to a yard-arm, necessitating repairs, and in consequence is anchored under the directions of the pilot in the river, intending to go to sea on the next day, the pilot remaining in charge, but on the next morning before resuming her voyage, and whilst still at anchor, she gets into collision and does damage to another vessel, she is not "proceeding to sea" within the meaning of the 139th section of the Mersey Docks Act Consolidation Act 1858 (21 & 22 Vict. c. xcii.), and the pilot is not in charge by compulsion of law. (Adm.) *The Cachapool* 502

10. *Compulsory pilotage—Rivers Thames and Medway—Trinity House charter—"Particular provisions"— Pilotage Act* 1825, *s.* 59.—The provisions of the Trinity House Charter granted by James II., and of the Acts of Parliament relating to the pilotage of the rivers Thames and Medway, and the approaches thereto, are "particular provisions" relating to the port of London, within the meaning of sect. 59 of the Pilotage Act, so far as that port is contained in the pilotage district. (Adm.) *The Hankow* 97

11. *Compulsory pilotage—Suez Canal—Negligence of pilot.*—The employment of a pilot in the Suez Canal, though compulsory, is not of such a nature as to exempt the owners of a ship from liability for damage done to another ship by the negligence or want of skill of such pilot. (Adm and Ct. of App.) *The Guy Mannering*..... 485, 553

12. *Compulsory pilotage—Suez Canal—Duties of pilot—Regulations.*—By the regulations of the Suez Canal the pilot is to advise the master of the ship; but the master remains responsible for the navigation of the ship. Such regulations are not *ultra vires*. (Adm. and Ct. of App.) *The Guy Mannering*..... 485, 553

13. *Contributory negligence—Damages recoverable— Admiralty rule—Practice.*—Where a plaintiff by his negligence causes a collision which would not have caused damage except for the negligence of the defendant, he is not disentitled to recover damages altogether, but is by the practice of the Admiralty Division only allowed to recover half the loss he has sustained. (C. A. from Adm.) *The Margaret*..... *page* 276, 375

14. *Launch—Reasonable notice—Necessary precautions.*—Where a launch was about to take place in the river Mersey at high water, and the usual general notice had been given, and the launch was dressed with flags and all usual precautions taken, and in due time before the launch a tug proceeded to a vessel lying at anchor off the place where the launch was about to take place and warned her thereof, and subsequently in sufficient time offered to tow her out of the way; but, owing to the conduct of those on board the vessel at anchor, whose pilot was aware before she anchored that the launch was about to take place, that vessel was still in the way, when the launch, which was delayed as long as it was prudent to do so, took place, and the launch struck the vessel and sank her: it was held that the owners of the launch had taken every possible precaution and were not to blame for the collision, and that the vessel at anchor was alone to blame. (Adm.) *The Cachapool* 502

15. *Launch—Reasonable notice.*—*Semble*, a vessel at anchor in the track of a vessel about to be launched is bound to get out of the way of the launch if she has had warning of the launch in due time and facilities for moving out of the way in time (such as a tug offering and being ready to tow her) are afforded by those in charge of the launch. (Adm.) *The Cachapool* 502

16. *Liability—Foreign ship—Damage on the high seas—General maritime law—Law of the flag.*—Collisions between ships when one or both are foreign, on the high seas, are questions *communis juris*, and liabilities created by them are to be decided by the general maritime law of liability as administered in the court where the cause is tried. (Adm.) *The Leon*..... 404

17. *Liability—Foreign ship—Damage on the high seas—General maritime law—Law of the flag.*—A collision took place on the high seas between a British and a Spanish vessel; both vessels sank. The English owners commenced a suit against the Spanish shipowners, who had an office in England. The Spanish shipowners appeared, and pleaded that by Spanish law there was no personal liability. Held, a bad defence, as the liability was governed by general maritime law and not by Spanish law. (Adm.) *The Leon* ... 404

18. *Liability—Ship and shipowner—General maritime law.*—By general maritime law the liabilities of the ship and of the owners are identical for damages arising from collision. (Adm.) *The Leon*..... 404

19. *Measure of damages—Loss of goods.*—The measure of damages for goods lost in a collision (as held in the United States) is the value of the cargo at the port of shipment, together with the expense of lading it on board, and transporting it to the place of collision, and interest at 6 per cent. per ann.; all beyond is expected earnings or profits; and the loss of them is not a proper measure of damages. (U.S. Circ. Ct. East Dist. of N.Y.) *Joseph W. Dyer and others* v. *The National Steamship Company* 26

20. *Measure of damages—Market value—Deductions.* —Where the value at the port of shipment cannot be ascertained, the measure is the market value at the port of destination, less expenses which would have attended the sale, and less the estimated mercantile profit but *plus* interest.

(U.S. Circ. Ct. East Dist. of N.Y.) *Joseph W. Dyer and others* v. *The National Steamship Company* .....*page* 26

21. *Mistake—Error of Judgment—Imminence of collision—Liability.*—Where a ship has, by improper navigation rendered a collision imminent, and executes wrong manœuvres when close to another vessel, such other vessel will not be held guilty of contributory negligence, or in any way to blame for the collision, if the master, under the pressure of circumstances, executes or orders a manœuvre which is not the right one under the circumstances. Ordinary skill and care are all that are expected of persons in charge of vessels, and not ability to see at once the best possible course to pursue under the pressure of extreme peril brought about by the wrongful act of another. (Ct. of App.) *The Bywell Castle* 207

22. *Practice—Actions by ship and cargo—Stay of proceedings—Limitation of liability.*—Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendant's ship at 8*l.* per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action. (Adm.) *The Alne Holme* (*first action*) 593

23. *Practice — Bail — Counter-claim—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 34.—Where, in a damage action, the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act 1861 (24 Vict. c. 10), s. 34, although they voluntarily give bail. (Adm.) *The Alne Holme* (*second action*) 591

24. *Practice—Bail—Lien — Necessaries — Sale of ship—Proceeds — Payment out of—Priority.*—Where, after judgment against a ship in a damage action, in which bail has been given and the ship released, judgment is given against the same ship in a necessaries action in which the ship is sold and the proceeds of the sale of the ship paid into court, the plaintiffs in the damage action cannot be paid out of the proceeds to the prejudice of other claimants still having maritime liens upon the proceeds. (Adm.) *The Falk* 592

25. *Practice—Consequential damage—Registrar and merchants—Admiralty division.*—It is not the invariable practice of the Admiralty Division in cases of damage to refer questions of consequential damages to the registrar and merchants. (Adm.) *The Maid of Kent* 476

26. *Practice—Consequential damage—Reference to registrar and merchants—Propriety of.*—The court will in each case consider whether the question of consequential damage is one which ought to be decided by the court itself, with the assistance of the Elder Brethren of the Trinity House, or one which ought to be referred to the registrar and merchants. (Adm.) *The Maid of Kent* 476

27. *Practice—Consequential damage—Reference—Question of cost and nautical skill—Admiralty Division.*—The court will be influenced in coming to its decision by economical considerations, and by the presence of questions requiring for their decision the nautical knowledge of the Elder Brethren. (Adm.) *The Maid of Kent* .....*page* 476

28. *Practice — Consolidation — Cross causes of damage—Service of writ.*—Consolidation of cross causes of damage will not be ordered where service of the writ in the principal action has not been effected. (Adm.) *The Helenslea*; *The Catalonia* 594

29. *Practice—Consolidation—Irish Admiralty Court—Interest of suitors.*—In case of collisions occurring between several ships on the same occasion and at the same time, the court will, in the exercise of its discretion, make such order for consolidation as it considers will meet the justice of the case, and protect the interest of the suitors. (Adm. Ir.) *The Vildosala*; *The Emerald*; *The Satellite*; *The Toiler* 228

30. *Practice— Costs—Cargo owners —Contributory negligence—Both ships to blame—Semble*, if the defendant in an action brought by the owner of cargo laden on board another ship, for damages arising from a collision, admits his liability, but pleads contributory negligence on the part of the ship on board which the cargo was laden, and both ships are found to blame, the plaintiffs may be condemned in costs; and where cargo owners suing alone admit contributory negligence on the part of the ship in which their cargo was, and only claim half their damages, and recover them, they will get costs. (Ct. of App.) *The City of Manchester* 261

31. *Practice—Costs—Cargo owners—Both ships to blame—Damages—Judicature Act* 1873, *sect.* 25, *sub-sect.* 9.—Where an action is brought by owners of cargo laden on board one ship against another ship, for damages sustained by the cargo through collision between the ship in which it is laden and the other ship, and both ships are found to blame for the collision, the plaintiffs will recover half their damages in accordance with the practice of the Court of Admiralty and sect. 25, sub-sect. 9 of The Judicature Act 1873, but no order will, as a rule, be made as to the costs. (Ct. of App. from Adm., overruling *The Milan*, 1 Mar. Law Cas. O. S. 185, as to costs.) *The City of Manchester* 106, 261

32. *Practice—Costs—Compulsory pilotage.*—When defendants rely solely on the defence of compulsory pilotage and are successful, they may not get costs if the court is of opinion that under the circumstances the plaintiffs were justified in bringing the action. (Adm.) *The Hankow* 97

33. *Practice — Costs— Compulsory pilotage— Defence on merits.*—Where a defendant in a collision action raises a defence on the merits, and also on the ground of legal exemption from liability by reason of the compulsory employment of a pilot and succeeds in the latter defence alone, he will not recover his costs. (Adm.) *The Matthew Cay* ... 224

34. *Practice—Costs—Inevitable accident—Compulsory pilotage—Judicature Acts.* Query, whether in cases of inevitable accident, where the practice of the Admiralty Court as to costs before the Judicature Acts was different from that of the courts of common law, the Admiralty Division will now follow the practice of the courts of common law. In cases of compulsory pilotage the Admiralty Division will adhere to the practice of the High Court of Admiralty prior to the Judicature Acts as to costs. (Adm.) *The Matthew Cay* 224

35. *Practice—Costs—Reference—Both ships to blame Owners of Cargo—Owners of ship*—Where an action is brought by owners of ship and owners of cargo laden on board it jointly against another ship for damages arising from collision, and both vessels are found to blame, and as a consequence

no order is made as to the costs of the action, and each ship pays a moiety of the damage of the other, those plaintiffs who are owners of the cargo are entitled to the costs against the defendants of proving their claim in a reference before the Registrar and Merchants. (Ct. of App. from Adm) *The Consett* ..... *page* 230

36. *Practice—Evidence—Ship's log—Decease of persons making the log.*—Entries made in the ship's log by the mate of a vessel relative to a collision, and signed by him and the captain nearly two days after the collision, cannot be used as evidence on behalf of the ship in which they were made after the decease of the persons making and signing them (Adm.) *The Henry Coxon* 18

37. *Practice — Evidence — Depositions—Receiver of wreck—Decease of deponent.*—Depositions made before the receiver of wreck by persons on board a ship relative to a collision cannot, even after the decease of the deponents, be used as evidence on behalf of that ship at the trial. (Adm.) *The Henry Coxon* 18

38. *Practice— Indemnity— Third party—Issues—Decree—Judicature Act.*—When in a collision cause the defendant claims indemnity from a third party, and such third party appears and defends, the court may find the original defendant solely to blame, notwithstanding he does not plead or appear at the trial, but unless issues are directed between the defendant and the third party the court cannot make a decree deciding questions of liability between them. (Ct. of App., reversing Adm.) *The Cartsburn* 202

39. *Practice— Indemnity — Third party—Trial—Issues—Plaintiff and defendant—Semble:* It is competent to the court to order such issue between the defendant and the third party to be tried either at the same time as those between plaintiff and defendant, or after they have been decided. (Ct. of App. *The Cartsburn* 202

40. *Practice—Indemnity—Third Party—Defendant —Position of.*—The position of the defendant in the original action is the same whether a third party is cited or not. (Ct. of App.) *The Cartsburn*... 202

41. *Practice—Preliminary Act—Amendment prior to trial—Clerical error.*—In a damage action the court will not allow a party to amend a mistake in his preliminary act, prior to trial, although he applies upon affidavit, alleging that the mistake was the result of a clerical error. (Adm.) *The Miranda* 595

42. *Regulations for preventing Collisions* 1863.—*Infringement—Departure from—Master—Discretion of*—To leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public, and they ought not to be required to exercise such discretion, except in cases of extreme necessity. (Priv. C.) *The Byfoged Christensen* v. *The William Frederick* 201

43. *Regulations for Preventing Collisions* 1863—*Infringement—Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85), *s.* 17.—If an infringement of the Regulations for Preventing Collisions at Sea may by possibility cause or contribute to a collision, the vessel infringing the regulations will be found to blame under the provisions of sect. 17 of Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), unless the actual infringement was necessary although justifiable. (Adm.) *The Tirzah*..... 55

44. *Regulations for Preventing Collisions* 1863, *Art.* 10—*Fog—Duty of vessel when near fog-bank.*—It is the duty of a vessel when in the vicinity of a fog-bank to make the signals prescribed by Art. 10 of the regulations for Preventing Collisions at sea to warn vessels within it of her presence. (Adm., Ct. of App., and H. of L.) *The Milanese*...*page* 318, 438

45. *Regulations for Preventing Collisions* 1879, *Art.* 12—*Fog—Foghorn—Sailing prior to rules coming into force.*—The neglect to use a mechanical fog-horn is not excused by the fact that the sailing ship left port before the regulations came into force, if the master at the time of sailing knew that the rules would come into force during the voyage. (Adm.) *The Love Bird*..... 427

46. *Regulations for Preventing Collisions* 1879, *Art.* 12 — *Fog*— "*Necessary departure*" — "Possible" *contribution to collision—Merchant Shipping Act* 1873, *s.* 17.—The neglect of a steamship to stop and reverse in a fog on hearing a mouth fog-horn ahead of her will render her to blame for a collision with the sailing ship sounding the fog-horn; but the sailing ship is also to blame if she does not use the mechanical fog-horn provided for by the Sailing Rules, Art. 12, as such a fog-horn might possibly have given the steamship earlier warning and the neglect to use it cannot be excused unless circumstances rendered a departure from the rule necessary: Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17. (Adm.) *The Love Bird* 427

47. *Regulations for Preventing Collisions* 1879, *Art.* 12—*Mechanical fog-horn—Accident to—Necessary departure—Merchant Shipping Act* 1873, *s.* 17,—Where the mechanical fog-horn of a sailing-ship breaks down without any default on the part of those in charge of the ship and a mouth-horn is made use of in its place, the departure from Art. 12 of the regulations is necessary, and the vessel is not to blame under the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). (Adm.) *The Chilian*..... 473

48. *Regulations for preventing Collisions* 1863—*Lights—Alteration of place—Infringement.*—A vessel moving her lights in bad weather from a place approved by the Board of Trade, and where they complied with the regulations as to visibility, to a place where they were obscured, to a certain extent, by sails, &c., on the ground that in the approved place they would be washed away, found to blame for a collision which might have been occasioned by their non-visibility, on the ground that, though it was justifiable to move them, they should have been moved to such a place, or such steps should have been taken, as to render them properly visible in the new place. (Adm.) *The Tirzah* 55

49. *Regulations for Preventing Collisions* 1863—*Lights—Infringement—Vessel in tow—Merchant Shipping Act*, 1873, *sect.* 17.—A sailing vessel, and *semble*, any other vessel, towing another vessel, is responsible for the lights carried by both vessels being in accordance with the regulations, and an infringement by the towed vessel brings the towing vessel within the scope of sect. 17 of the Merchant Shipping Act 1873. (Adm.) *The Mary Hounsell* 101

50. *Regulations for Preventing Collisions* 1863—*Lights— Masthead light— Side Lights—Fog.*—When at night a masthead light is seen, but no side lights, it is an indication to an approaching vessel that the lights are those of a steamer, whose side lights are obscured by fog. (Adm. Ct. of App. and H. of L.) *The Milanese*.....318, 438

51. *Regulations for Preventing Collisions* 1863, *Art.* 7—*Lights—Mersey Approaches Act—River Mersey —Merchant Shipping Act* 1873.—Vessels at anchor in the sea approaches to the river Mersey are required by sect. 1 of 37 & 38 Vict. c. 52, to exhibit a white light at the main or mizen mast

in addition to the white light prescribed by the Regulations for Preventing Collisions, Art. 7, and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to a collision, be held to blame under sect. 17 of 36 & 37 Vict. c. 85. (Adm.) *The Lady Downshire* ..... *page* 25

52. *Regulations for Preventing Collisions*, 1863—*Mersey Approaches Act* (37 & 38 *Vict. c.* 52)—*Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.—The Mersey Approaches Act (37 & 38 Vict. c. 52) prescribing regulations to be observed in the Mersey additional to those contained in the Regulations for Preventing Collisions at sea is, though passed subsequently, to be read as a part of those regulations, and a breach of it will be visited by the penalties prescribed by sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85.) (Adm.) *The Lady Downshire* 25

53. *Regulations for Preventing Collisions* 1879, *Art.* 11—*Light astern—Binnacle Light—Overtaking ship.*—The provisions of Art. 11 of the Regulations for preventing Collisions at Sea, that a ship being overtaken by another shall show from her stern a light, are not complied with where the only light astern is the binnacle light in the binnacle. (Adm.) *The Breadalbane* 505

54. *Regulations for Preventing Collisions* 1879, *Art.* 11—*Light astern—Overtaking vessel—Apprehension of danger.*—A vessel is not bound by Art. 11 of the Regulations to show from her stern a white light or a flare-up light to a vessel overtaking her, unless there is ground for the apprehension of danger from the overtaking vessel. (Adm.) *The Reiher* 478

55. *Regulations for Preventing Collisions* 1863—*Lights—Pilot vessel—Vessel in tow.*—A sailing vessel of any description when in tow is bound to carry at night the two coloured side lights prescribed by Articles 3 and 5. The white masthead light prescribed by Article 8 for sailing pilot vessels is only to be carried by those boats when independent, and not in tow of any other vessel. (Adm.) *The Mary Hounsell* 101

56. *Regulations for Preventing Collisions* 1879—*Art.* 5—*Lights—Ship adrift—Inevitable accident—Merchant Shipping Act* 1873, *s.* 17—*Necessary departure—Possible contribution.*—Where a sailing vessel broke adrift from her anchors in very bad weather, and about one hour and a half afterwards, during a large part of which time she had been bumping over sands, thereby injuring herself so as to be unmanageable, drove into another vessel at anchor, having in the meantime neither put up her side lights nor three red lights: it was held that the collision was an inevitable accident, and that under the circumstances of the case she was not to blame for not carrying her side lights or the three red lights prescribed by Art. 5 of the Regulations for Preventing Collisions at Sea, the circumstances being such as to render a departure from the rule necessary and their absence not possibly contributory to the collision. The action was dismissed without costs. (Adm. Div.) *The Buckhurst* 484

57. *Regulations for Preventing Collisions* 1863—*Arts.* 12 *&* 18—*Sailing Ships—Crossing Ships.*—Where one vessel close hauled on the port tack is approaching another on the starboard tack with the wind free, so that the former cannot at any particular time come to a distinct conclusion that the latter is not about to obey Article 12 of the Regulations for Preventing Collisions, the former is entitled to keep his course, under Article 18, till the last moment when, luffing is a proper manœuvre. *The Commerce* (3 W. Rob. 287) discussed. (Priv. Co.) *The Byfoged Christensen* v. *The William Frederick* ..... *page* 201

58. *Regulations for Preventing Collisions* 1863—*Arts.* 12, 19, 20—*Sailing Ships crossing—Vessel hove to—Vessel close hauled on starboard tack.*—Where a vessel hove to with her tiller lashed a-lee, and with the wind on the port side, fore-reaching one and a half knots an hour, is crossing another vessel close-hauled on the starboard tack and a collision occurs, the first vessel is to blame for not keeping out of the way under Art. 12 of the Regulations; but the second is also to blame if she sees, or ought to see, that the first vessel is not taking steps to keep out of the way, and fails to take any steps in her power to avoid the collision. (Adm.) *The Rosalie* 384

59. *Regulations for Preventing Collisions* 1879—*Arts.* 14, 20—*Sailing ships—Crossing ship—Overtaking ship.*—*Semble*, that where two ships are on converging courses, with the difference of a point and a half, the one having the other on her quarter four or five points abaft the beam, they are crossing ships, and not within the overtaking rules. (Adm.) *The Breadalbane* 505

60. *Regulations for Preventing Collisions* 1879 (*Art.* 13)—*Speed—Fog—Sailing ship.*—What is a "moderate speed" for a sailing ship in a fog, in accordance with Art 13 of the Regulations for Preventing Collisions at Sea 1879, depends on the place where the ship happens to be, and (*semble*, per Cotton, L.J.) her handiness, and is not necessarily proportioned to or less than the maximum speed she can make under the circumstances. (Ct. of App.) *The Elysia* 540

61. *Regulations for preventing Collisions* 1879 (*Art.* 13)—*Speed—Fog—Sailing ship—Atlantic Ocean.*—A speed of about five knots, in the case of a sailing ship, in a fog out in the Atlantic Ocean, is a "moderate speed," and in compliance with this rule, the sailing ship being at the time under all plain sail, and going as fast as she can with the wind on her quarter. (Ct. of App.) *The Elysia* 540

62. *Regulations for Preventing Collisions* 1863—*Art.* 16—*Speed—Steamship—Risk of Collision—Merchant Shipping Act* 1873, *sect.* 17.—A steamship approaching another ship, so as to involve risk of collision, and failing to stop and reverse as provided by the Regulations for preventing Collisions at sea, Art. 16, must, if departure from the rule be not shown to be necessary, be held to blame under the Merchant Shipping Act 1875 (36 & 37 Vict. c. 85), s. 17, although the neglect to stop and reverse would not have prevented the collision. (H. of L.) *The Stoomvaart Maatschappy Nederlands* v. *The Peninsular and Oriental Company; The Voorwarts. The Khedive* 360

63. *Right of action—Mere contract—Injuria sine damno.*—In cases of collision between ships a mere contact without damage gives no right of action; the cause of action is the damage sustained by one ship through the negligence of those on board another. (C. A. from Adm.) *The Margaret*...276, 375

64. *River Tees—Rules for Navigation of, Art.* 22—*Speed—Through the water—Over the ground.*—In rule 22 of the Rules for the Navigation of the River Tees, providing that "no steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum speed of six miles an hour," the speed mentioned is speed through the water, and not over the ground, and a vessel exceeding that speed through the water is to blame if a collision ensues to which such speed contributes. (Adm.) *The R. L. Aston*..... 509

65. *Thames Conservancy Rules*, 1872, *Arts.* 19, 20, 72 —*Anchor—Breach of—Negligence—Penalty.*—A breach of the Thames Conservancy Rules, such as carrying an anchor in a manner thereby forbidden, which causes damage to others navigating the river, is evidence of negligence on the part of those guilty of the breach, and is not merely an act rendering the guilty party liable to the penalty provided by the rules. (Ct. of App. from Adm.) *The Margaret*.....*page* 276, 375

66. *Thames Conservancy Rules* 1875—*Lights—Effect of breach—Onus of proof.*—Where there has been a breach of the Thames Conservancy Rules as to lights by a vessel seeking to recover damages for collision with another vessel, the latter vessel cannot be held to blame for doing an act which she probably would not have done if the light had been carried, and it is upon the plaintiffs to show that the absence of the light did not contribute to the collision. (Ct. of App., reversing Adm.) *The Condor*..... 115

67. *Thames Conservancy Rules* 1875, *Art.* 3—*Stern lights—Infringement of—Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85), *s.* 17.—*Quære*, whether an infringement of the Thames Conservancy Rules 1875 causes the vessel infringing them to be "deemed to be in fault," within the meaning of sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). (Ct. of App. from Adm.) *The Condor*..... 115

68. *Thames Conservancy Rules*, 1880, *Art.* 23—*Steamships approaching points—Waiting—Tide.*—A steamship navigating the Thames against the tide is always bound to obey Rule 23 of the Thames Conservancy Rules 1880, and on approaching one of the points there named to wait until vessels then approaching it with the tide have passed clear of her. (Ct. of App.) *The Libra*..... 439

69. *Thames Conservancy Rules* 1880, *Art.* 22—*Vessels approaching points—Passing Rule—Tide, with and against.* — Whether vessels approaching points in the Thames are also to observe Rule 22 and pass port side to port side, depends upon whether the vessel navigating against the tide is close to the shore when waiting for the one approaching with the tide to pass her, or so far out as to allow the latter to pass port side to port side. (Ct. of App,) *The Libra*..... 439

70. *Thames Conservancy Rules* 1880, *Art.* 23—"*Passed clear*"—*Waiting ship.*—The expression "passed clear" in Rule 23 of the Thames Conservancy Rules 1880 means "passed clear of the waiting ship." (Ct. of App.) *The Libra*..... 439

71. *Thames Conservancy Rules* 1880, *Arts.* 22 & 23—*North side of river—Flood tide—Lights—Starboard side to starboard side.—Semble*, where the point to be passed is on the north side of the river, with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, the 23rd rule alone applies, and the vessels will pass clear starboard side to starboard side; otherwise both rules 22 and 23 apply. (Court of App.) *The Libra*..... 439

72. *Thames Conservancy Rules* 1880, *Arts.* 14, 23—*Steamships rounding points—Stop and reverse—Curvilinear courses.*—Steamships rounding a point in the river Thames are not bound to stop or reverse because at one moment they are approaching a vessel coming in the opposite direction where there is no risk of collision if both vessels continue the curvilinear courses they are then on. (Ct. of App.) *The Libra*..... 439

73. *Thames Conservancy Rules* 1880. *Art.* 22.—*Steamships meeting—Risk of collision—Regulations for preventing collision.*—Whether "two steam-vessels proceeding in opposite directions, the one up and the other down the river Thames, are approaching one another so as to involve risk of collision," within rule 22 of the Thames Conservancy Rules, is in all cases a question of fact for the court, and is not subject to the same interpretation as that given by Art. 15 of the Regulations for Preventing Collisions at Sea for vessels meeting end on or nearly end on. (Ct. of App.) *The Odessa*.....*page* 493

74. *Thames Conservancy Rules* 1880, *Art.* 22—*Risk of collision—Port side to port side.*—When two steam-vessels are proceeding in the Thames in such directions that their respective courses, if continued, will bring them so near each other as to cause a risk of collision, rule 22 of the Thames Conservancy Rules is imperative, and both vessels must so manœuvre as to pass port side to port side. (Ct. of App.) *The Odessa*..... 493

75. *Thames Conservancy Rules*, 1880, *Art.* 22.—*Vessels meeting—Lights—Port side to port side—Semble*, when two steam-vessels are proceeding one up and the other down the river, and have their green lights only in sight each to each, and bearing one point on each other's starboard bows at a distance of a quarter of a mile they are approaching so as to involve risk of collision, and are both bound to port their helms to pass port side to port side. (Ct. of App.) *The Odessa*..... 493

76. *Thames Conservancy Rules*, 1880, *Art.* 22—*Lights —Risk of Collision.—Semble*, if each had the other's green light three points on the starboard bow they would not be approaching so as to involve risk of collision. (Ct. of App.) *The Odessa* 493

77. *Tug and Tow—Compulsory pilotage—Liability of tug—Merchant Shipping Act*, 1854, *s.* 338.—Where a tug is employed to tow a ship which is in charge of a pilot by compulsion of law, the exemption from liability given to the owners of the ship for damage arising in consequence of obedience to the pilot's orders by sect. 388 of the Merchant Shipping Act 1854 does not extend to the owners of the tug for damage done by the tug, whether from acting in obedience to the pilot's orders or in the absence of any orders. The *Ticonderoga* (Sw. 215) followed. (Adm.) *The Mary*... 183

78. *Tug and tow—Person in charge of tow—Orders—Discretion to tug.*—The person in charge of a ship in tow is not bound to direct every movement of the vessel towing, but may allow the towing vessel a discretion as to the way in which other vessels are to be passed. (Adm.) *The Sinquasi*..... 383

79. *Tug and tow—Wrong Manœuvre on part of tug—Compulsory pilotage—Liability.*—Where a collision is caused by a tug executing a wrong manœuvre, the fact that the person in charge of the ship was a pilot employed by compulsion of law, and gave no orders does not relieve the owners of the ship in tow from liability. (Adm.) *The Sinquasi* 383

80. *Wreck—Navigable river—Obstruction—Possession and control—Liability of owner—Duty to give warning.*—Where a vessel, through the negligence of those in charge of her becomes a wreck and a dangerous obstruction in a navigable river, it is the duty of those originally in charge of her, though not actually in possession at the time, to take steps to warn approaching vessels of her position, and *semble*, this duty attaches until the wreck is removed or taken possession of by competent authority. (Adm.) *The Douglas*..... 510

81. *Wreck—Obstruction—Liability of owner—Notice to Conservators of Thames.*—The D., in consequence of a collision caused by the negligence

of those in charge of her, sank in the river Thames. Some hours afterwards the M. N. ran into the wreck, which was not marked in any way. The owners of the D. were held to blame, and not to be excused by reason of the impossibility of any person remaining on board the wreck, or by having given notice of the wreck to the proper authority. (Adm.) *The Douglas*.....*page* 510

See *Carriage of Goods*, Nos. 1, 2.—*Limitation of Liability*, Nos. 1, 3, 4, 6—*Practice*, No. 23—*Marine Insurance*, No. 3. (As to the Thames pilotage and Trinity House Charters, see note, p. 97.)

COMITY OF NATIONS.

See *Jurisdiction*, Nos. 7, 10.

COMMISSION.

See *Sale of Ship*, Nos. 1, 2.

COMMUNICATION.

See *Bottomry*, No. 1.

COMPENSATION.

See *Unseaworthy Ships*, No. 1.

COMPULSORY PILOTAGE.

Master—Criminal proceedings against—Omission of proof.—In criminal proceedings against a master of a vessel who has a compulsory pilot on board, such master is not bound to prove that at the time of the act or omission, the subject of such proceedings, he was not interfering with the navigation of his vessel, and he cannot be convicted unless it is shown against him that he was so interfering. (Q. B. Div.) *Oakley* v. *Speedy*... 134

See *Collision*, Nos. 3 to 12, 32, 33, 34, 77, 79—*Damage*, Nos. 1, 2—*Pilotage—Tug and Tow*, No. 1. (As to the Thames Pilotage and Trinity House Charters, see note, p. 97.)

CONCEALMENT.

See *Marine Insurance*, Nos. 6, 7, 24.

CONFLICT.

See *Damage*, No. 3.

CONSEQUENTIAL DAMAGE.

See *Collision*, Nos. 25, 26, 27, 35.

CONSERVANCY RULES.

See *Collision*, Nos. 65 to 76, 80, 81—*Tug and Tow*, No. 4.

CONSIGNEE.

See *Carriage of Goods*, Nos. 14, 15—*Stoppage in Transitu*, No. 3.

CONSOLIDATION.

See *Collision*, Nos. 23, 29—*Salavge*, No. 13.

CONSTRUCTION.

See *Carriage of Goods*, Nos. 12, 22, 23—*Charter-party*, No. 1.—*Marine Insurance*, Nos. 2, 8, 23—*Tug and Tow*, No. 4.

CONSTRUCTIVE DELIVERY.

See *Stoppage in Transitu*, Nos. 3, 4.

CONSTRUCTIVE TOTAL LOSS.

See *Marine Insurance*, Nos. 9, 10, 11, 21.

CONTRACT.

See *Carriage of Goods*, No. 17—*Mortgage*, No. 4—*Sale of Goods—Salvage*, Nos. 8, 25, 26—*Tug and Tow*, Nos. 3, 5.

CONTRACT OF AFFREIGHTMENT.

See *Salvage*, No. 8.

CONTRIBUTION.

See *General Average*, Nos. 5, 6, 7, 8, 9, 12—*Salvage*, Nos. 12, 23.

CONTRIBUTORY NEGLIGENCE.

See *Carriage of Goods*, No. 2—*Collision*, Nos. 13, 30—*Tug and Tow*, No. 1.

CONVERSION.

See *Carriage of Goods*, No. 4.

CO-OWNERS.

See *Mortgage*, No. 2—*Shipowners*, No. 2 to 9—*Ships Husband*, Nos. 2, 4.

CO-OWNERSHIP ACTION.

Shipowners, Nos. 3 to 9.

COSTS.

See *Bottomry*, No. 5—*Carriage of Goods*, No. 6—*Collision*, Nos. 1, 2, 30, 31, 32, 33, 34, 35, 56—*Limitation of Liability*, No. 12—*Masters' Wages and Disbursements*, No. 1—*Mortgage*, No. 2—*Practice*, Nos. 2, 3, 4, 5, 6, 11, 13, 14, 15, 16—*Salvage*, Nos. 13, 14, 15, 16—*Slave Trade*, No. 3—*Wrecks and Casualties*, No. 2.

COUNSEL'S FEES.

See *Practice*, Nos. 13, 14.

COUNTER-CLAIMS.

See *Collision*, No. 23—*Marine Insurance*, No. 1—*Marine Insurance Association*, No. 1—*Masters' Wages and Disbursements*, No. 2.

COUNTY COURT ADMIRALTY APPEAL.

See *Practice*, No. 1.

COUNTY COURTS ADMIRALTY JURISDICTION.

1. *Admiralty Jurisdiction.*—The County Courts Admiralty Jurisdiction Amendment Act 1869 is not limited to cases in which the High Court of Admiralty had jurisdiction at the time of the passing of that Act. (Adm.) *The Rona*..... 520

2. *Charter-party—Breach—County Court Admiralty Jurisdiction Amendment Act* 1869.—A County Court has Admiralty jurisdiction in cases of breach of charter-party under sect. 7 of the County Court Admiralty Jurisdiction Amendment Act 1869, notwithstanding that the Admiralty Court has not original jurisdiction in such matters. (Ct. of App. reversing Ex. Div.) *Brown and Sons* v. *The Russian ship Alima*..... 257

3. *Damage to Cargo—Agreement for Carriage of Goods—Owner domiciled in England.*—The County Courts have jurisdiction in Admiralty to entertain cases up to the amount of 300*l.* where damage to cargo is caused by, and the claim arises out of, an agreement made in relation to the carriage of goods in a ship, notwithstanding that an owner or part owner of the ship is domiciled in England or Wales. (Adm.) *The Rona* 520

4. *Jurisdiction — Necessaries — Admiralty.* — A County Court having Admiralty jurisdiction has no jurisdiction to entertain an action for necessaries supplied to a ship whereof the owners are domiciled in England and Wales, there being no such jurisdiction in the Admiralty Court. (Q. B. Div.) *Allen* v. *Garbutt*.....520n

See *Master's Wages and Disbursements*, No. 1—*Material Men*, No. 2—*Practice*, Nos. 6, 9.

COURT OF PASSAGE.

See *Practice*, No. 6.

CREW.

See *Carriage of Goods*, No. 2.

CREW SPACE.

See *Limitation of Liability*, Nos. 9, 10.

CROSS ACTIONS.

See *Collision*, No. 28.

CROSSING SHIPS.

See *Collision*, Nos. 57, 58, 59.

CROWN.

See *Jurisdiction*, No. 4.

CUSTOM.

See *Carriage of Goods*, Nos. 11, 12—*Charter-party*, Nos. 3, 4, 6—*General Average*, Nos. 1, 2, 5—*Marine Insurance*, No. 22.

DAMAGE.

1. *Liability of owner—Compulsory pilotage—Negligence of pilot—Private Act.*—A private Act rendering the owner of a ship, &c., liable for any damage caused, permitted, or suffered to be done wilfully or carelessly by such ship, &c. (to a pier) by any person having the care of such ship, &c., does not render the owner liable where the damage has been done by the negligence of a pilot whose employment on board such ship was, at the time and place, compulsory by law. (Adm.) *The Clan Gordon*.....page 513
2. *Liability of owner—Compulsory pilotage—Private Act.—Semble*, for the purposes of such a private Act a pilot employed by compulsion of law is not a person having the care of the ship on board which he is so employed. (Adm.) *The Clan Gordon*... 513
3. *Public Act—Private Act—Repeal.*—A section in a private Act cannot by implication repeal a provision of the common law or of a public statute. (Adm.) *The Clan Gordon* 513

DAMAGE TO CARGO.

1. *Practice—Pleadings—Particulars—Defective condition—Reasonable fitness—Negligence.*—In an action for damage to cargo in the Admiralty division the defendants are entitled to particulars from the plaintiffs of an alleged "defective condition" of the ship by reason of which she is asserted to have been not "reasonably fit" to carry the cargo in question, and also of an alleged act of negligence or breach of duty or contract on the part of the defendants causing the said damage. (Ct. of App., reversing Adm.) *The Rory* 534

See *Carriage of Goods*, Nos. 7, 8, 9—*County Courts Admiralty Jurisdiction*, No 3—*General Average*, Nos. 6, 7, 8.

DAMAGES.

See *Bottomry*, No. 5—*Carriage of Goods*, No. 4—*Collision*, Nos. 13, 19, 20, 31—*Slave Trade*, No. 3.

DECK CARGO.

See *General Average*, No. 5.

DECLARATION.

See *Marine Insurance*, Nos. 7, 22—*Sale of Goods*.

DEDUCTIONS.

See *Limitation of Liability*, Nos. 8, 9, 10—*Marine Insurance*, No. 13—*Wages*.

DEFAULT.

See *Practice*, Nos. 17, 18, 19.

DELAY.

See *Carriage of Goods*, Nos. 22, 23—*Tug and Tow*, Nos. 3, 5.

DELIVERY.

See *Carriage of Goods*, Nos. 3, 4, 6, 10, 11, 12, 21—*Stoppage in Transitu* Nos. 1, 2, 3, 4.

DEMURRAGE.

See *Carriage of Goods*, Nos. 13, 14, 22, 23, 24—*Charter-party*, Nos. 2, 3, 4, 5, 6, 7—*Salvage*, No. 7—*Ship's Husband*, No. 1.

DEMURRER.

See *Marine Insurance*, No 15—*Master's Wages and Disbursements*, No. 2.

DEPOSITION.

See *Collision*, No. 37.

DERELICT.

See *Salvage*, Nos. 8, 9.

DETENTION.

See *Carriage of Goods*, No. 15—*Charter-party*, Nos 3. 4, 5, 6, 7—*Pilotage—Unseaworthy Ships*, Nos. 1, 2.

DEVIATION.

See *Carriage of Goods*, No. 16.—*Salvage*, Nos. 2, 3.

DIFFERENTIAL DUES.

See *Collision*, No. 5.

DISBURSEMENTS.

See *Master's Wages and Disbursements*.

DISCHARGE OF CARGO.

See *Carriage of Goods*, Nos. 10, 11—*Charter-party*, Nos. 3, 4, 5.

DISCOVERY.

See *Salvage*, No. 16—*Shipowner*, No. 3.

DISTRIBUTION.

See *Salvage*, Nos. 2, 4, 5, 6.

DISTRICT REGISTRIES.

See *Practice*, No. 16.

DOCK.

See *Charter-party*, Nos. 1, 2, 6.

DUES.

See *Collision*, No. 5.—*Pilotage*.

DURATION OF TRANSIT.

See *Stoppage in Transitu*.

ENGINE ROOM.

See *Limitation of Liability*, Nos. 8, 9.

EQUIPMENT AND REPAIR.

See *Material Men*, Nos. 1, 2.

EVIDENCE.

See *Collision*, Nos. 36, 37—*General Average*, Nos. 1, 2—*Practice*, Nos. 9, 20, 21—*Sale of Ship*, No. 1—*Salvage*, No. 17—*Slave Trade*, Nos. 1, 3—*Unseaworthy Ships*, No. 2.

EXCEPTED PERILS.

See *Carriage of Goods*, Nos. 2, 8, 16, 21—*General Average*, No. 8.

EXCEPTIONS.

See *Charter-party*, Nos. 1, 6, 7.

EXECUTORY CONTRACT.

See *Marine Insurance*, No. 17.

EXEMPTION.

See *Carriage of Goods*, No. 8—*Collision*, Nos. 3, 4, 5, 8—*General Average*, No. 8—*Jurisdiction*, Nos. 6, 8.

EXPENSES.

See *General Average*, Nos. 1, 9, 10.

EXPERTS.

See *Practice*, No. 21.

EXPRESS CONTRACT.

See *Salvage*, Nos. 25, 26.

FEES.

See *Practice*, Nos. 13, 14.

FIRE.

See *General Average*, Nos. 6, 7, 8—*Marine Insurance*, Nos. 8, 22.

FOG.

See *Collision*, Nos. 44, 45, 46, 47, 50, 60, 61.

FOG-HORN.

See *Collision*, Nos. 45, 47.

FOREIGN JUDGMENT.

See *Jurisdiction*, Nos. 2, 3.

FOREIGN RIVER.

See *Jurisdiction*, No. 1.

FOREIGN SHIP.

See *Bottomry*, Nos. 1, 2—*Carriage of Goods*, No 7—*Collision*, Nos. 4, 5, 6, 16, 17, 18—*Jurisdiction* Nos. 4, 5, 6, 7, 8, 9—*Limitation of Liability*, Nos. 5, 8—*Marine Insurance*, No. 12—*Practice*, No. 15—*Slave Trade*, No. 2. (As to Treaty-making power of the Crown, see note, p. 83.)

FOREIGN SHIP OF WAR.

See *Jurisdiction*, Nos. 5, 9.

FOREIGN SOVEREIGN.

See *Jurisdiction*, No. 7.

FOREIGN STATE.

See *Jurisdiction*, Nos. 2, 8.

FRAUD.

See *Marine Insurance*, No. 7—*Salvage*, No. 6.

FREIGHT.

See *Carriage of Goods*, Nos. 17, 18, 19, 20—*General Average*, Nos. 3, 7—*Limitation of Liability*, Nos. 1, 2—*Marine Insurance*, Nos. 3, 13, 14—*Mortgage*, No. 4—*Salvage*, Nos. 8, 21—*Ship's Husband*, Nos. 2, 3, 4—*Stoppage in Transitu*, No. 2.

FROST.

See *Charter-party*, Nos. 6, 7.

FUND IN COURT.

See *Limitation of Liability*, Nos. 1, 2, 4.

GENERAL AVERAGE.

1. *Adjusters—Custom of trade—Port of refuge—Expenses—Evidence—Practice.*—The defendants who were the owners of cargo in an action against them by the shipowner to recover a general average contribution in respect of expenses caused by the ship putting into a port of refuge, landing, storing, and reshipping the cargo, and leaving the port, alleged a custom of trade that in such a case the expenses incurred in and about warehousing the cargo were apportioned among the owners of the cargo alone, and the expenses of reshipping the cargo, port dues, &c., were borne by the owners of the ship and freight, and produced in support of such custom witnesses who proved that it had been the practice of average adjusters to adjust in accordance with the custom alleged by the defendants. Held, that this was not evidence of a custom of trade. (Q. B. Div.) *Svendson* v. *Wallace and others*.....*page* 550

2. *Adjusters — Practice of — Custom of trade—Evidence of.*—A long-continued practice of average adjusters who prepare their statements according to the law as laid down by the courts, is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner and an owner of cargo, and if their practice is to exclude expenses legally chargeable to general average, such practice is not binding as being contrary to law. Q. B. Div.) *Svendson* v. *Wallace and others* 550
Attwood v. *Sellar* 153, 283

3. *Adjustment — Place for making—Intermediate port—Termination of voyage—Pro ratâ freight.*—An average adjustment cannot be made at a port prior to the port of discharge, unless the original voyage was in fact terminated at such prior port through the occurrence of circumstances beyond the control of the shipowner, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view. (C.P. Div.) *Hill* v. *Wilson* 198

4. *Adjustment—Security for payment—Duty of shipowner—Lien.*—A shipowner having a lien on cargo for general average, not only can require security for payment of the cargo share, but it is his duty to take the neccssary steps for the adjustment of the general average and for securing its payment, and if by his neglect to take such steps anyone of the cargo owners is damnified, such cargo owner can recover his loss against the shipowner. (Q. B. Div.) *Crooks and Co.* v. *Allan and another* 216

5. *Deck cargo—Jettison—Custom—Charter-party—Liability.*—Where a general ship is carrying cargo both above and below deck, and there is no custom to carry goods on deck and the voyage is not a coasting voyage, the owner of the deck cargo that has been necessarily jettisoned in the course of a voyage can have no claim for contribution against the shipowner or the other cargo owners, although the contract between him and the shipowner specifies that the goods are to be carried on deck. (Ct. of App.) *Wright* v. *Marwood and others*; *Gordon* v. *Marwood and others* 451

6. *Fire—Damage to cargo by water—Liability of shipowner.*—Shipowners are liable to a claim for general average contribution by the owner of cargo in respect of damage to cargo caused by water being poured down the ship's hold to extinguish fire on board the ship while discharging. (Ct. of App.) *The Whitecross Wire and Iron Company Limited* v. *Savill and others*

7 *Fire—Damage by water—Spontaneous combustion of cargo — Right to contribution — Cargo owner—Shipowner—Loss of freight.*—Where a

cargo of coals is shipped to be carried to S., and there delivered on payment of freight, and a fire breaks out spontaneously in the coals, and portions are thrown overboard, and the remainder so wetted and damaged by water poured upon them to extinguish the fire, that they have to be discharged, and sold at a port of refuge, and the freight upon them is wholly lost; the shipowner is entitled to a contribution in general average for the lost freight, and there is no claim on account of the cargo; first because there is no loss on account of it; secondly, because the vice in it is the cause of the sacrifice. (Watkin Williams, J.) *Pirie and Co.* v. *Middle Dock Company* ..... *page* 388

8. *Fire—Damage by water—Exemptions in bill of lading—Insurance.*—Bills of lading exempting a shipowner from damage by fire or the consequences thereof, or any damage to any goods which is capable of being covered by insurance, does not exempt the shipowner from contributing in general average to damage sustained by goods carried under the bill of lading through water poured on them to extinguish a fire. (Q. B. Div.) *Crooks and Co.* v. *Allan and another; Schmidt* v. *Royal Mail Steamship Company* 216

9. *Limitation of liability—Salvage—Wrecks Removals Act* 1877 (40 & 41 *Vict. c.* 16)—*Thames Conservancy Acts* (20 & 21 *Vict. c. cxlvii., s.* 86, *and* 33 & 34 *Vict. c. cxlix., s.* 27)—*Contribution by cargo owners—Lien.*—Where a ship carrying cargo is sunk in the Thames in consequence of a collision caused by her own negligence, and her owner limits his liability under the Merchant Shipping Act 1862, s. 54, and the Thames Conservancy raise the ship and cargo under their special Acts and the Wrecks Removal Acts, and deliver them to the shipowner on payment of the expenses of raising, the shipowner has no lien on the cargo for general average or salvage, and no claim against the cargo owner for the cargo's proportion of the cost of raising. (Ct. of App. from Adm.) *Prehn* v. *Baily and others* 465

10. *Port of refuge, expenses—General average act—Expenses of warehousing and reloading—Pilotage charges—Repairs.*—Where a vessel has put into port to repair an injury occasioned by a general average sacrifice, the expenses of warehousing and reloading goods, necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average. (Ct. of App. from Q. B. Div.) *Attwood* v. *Sellar* 153, 283

11. *Right to general average—Foundation.*—The right to general average is not founded upon contract, or the relations created by contract, but upon a rule of the common law and upon the principle of the ancient maritime law. (Watkin Williams, J.) *Pirie & Co.* v. *Middle Dock Company* 388

12. *Salvage—Pilot—Contribution of cargo owner.*—Where a payment is rightly made to pilot by a shipowner as salvage reward for saving ship and cargo, the shipowner is entitled to recover from the cargo owner general average contribution in respect of such sum. (Ct. of App.) *Akerblom v. Price* 441

See *Salvage*, No. 12.

GENERAL SHIP.

See Carriage of Goods, No. 19—*General Average* No. 5—*Marine Insurance*, No. 25.

GENEVA AWARD.

See *Marine Insurance*, No. 26.

GOVERNING LAW.

See *Bottomry*, Nos. 1, 2.

GOVERNMENT PROPERTY.

See *Jurisdiction*, Nos. 4, 5, 6, 7, 8, 9.

GROSS TONNAGE.

See *Limitation of Liability*, Nos. 9, 10.

HARBOURS AND PASSING TOLLS ACT, 1861.

See *Collision*, No. 5.

HIGH SEAS.

See *Collision*, No. 16—*Slave Trade*, Nos. 1, 4.

HOUSE OF LORDS.

See *Practice*, No. 10.

ICE.

See *Charter-party*, No. 7.

IMPLIED CONTRACT.

See *Carriage of Goods*, No. 17.

INCEPTION OF RISK.

See *Marine Insurance*, No. 15.

INDEMNITIES.

See *Collision*, Nos. 38, 39, 40—*Marine Insurance*, No. 23—*Practice*, No. 5.

INDORSEES.

See *Carriage of Goods*, Nos. 3, 7, 13.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 1, 34, 56—*Salvage*, No. 28.

INJURIA SINE DAMNO.

See *Collision*, No. 63.

INSPECTION OF DOCUMENTS.

See *Practice*, No. 22—*Salvage*, No. 16.

INSURABLE INTEREST.

See *Marine Insurance*, Nos. 16, 17.

INTEREST.

See *Bottomry*, No, 3—*Collision*, Nos. 19, 20 *Marine Insurance*, Nos. 16, 17 *Mortgage*, No. 3.

INTEREST IN PROFITS.

See *Marine Insurance*, Nos. 16, 17.

INTERLOCUTORY ORDER.

See *Practice*, No. 3.

INTERNATIONAL LAW.

See *Jurisdiction*, Nos. 7, 10.

INTERPLEADER.

See *Carriage of Goods*, No. 3.

INTERROGATORIES.

See *Carriage of Goods*, No. 21—*Practice*, Nos. 23, 24.

IRISH ADMIRALTY COURT.

See *Collision*, No. 29—*Material Men*, No. 3.

JETTISON.

See *General Average*, No. 5.

JUDGMENT.

See *Jurisdiction*, No. 2—*Limitation of Liability* Nos. 3, 4—*Practice*, No. 12—*Salvage*, No. 11.

JUDICATURE ACTS.

See *Carriage of Goods*, No. 1—*Collision*, Nos. 31, 34, 38—*Limitation of Liability*, No 11—*Mortgage* No. 4—*Practice*, Nos. 2, 3, 4, 18, 19, 20, 23. 27, 29.

JURISDICTION.

1. *Admiralty—Foreign river — Central Criminal Court.*—A British ship, lying moored to the shore in a foreign river at a place where great ships do lie is within the jurisdiction of the Admiral, so as to make offences committed on board of the ship triable in England under the Admiralty Jurisdiction of the Central Criminal Court. (C. C. R.) *Reg.* v. *Carr and Wilson* ..... *page* 604

2. *Foreign judgment* in rem—*Maritime Lien—Enforcement by Court of Admiralty—Practice.*—The Admiralty Division of the High Court of Justice has jurisdiction to entertain a suit *in rem* to enforce a judgment of a foreign court exercising Admiralty jurisdiction in a case where the original suit was to enforce a maritime lien. (Adm.) *The City of Mecca* 187

3. *Foreign judgment—Action* in rem—*Action* in personam—*Enforcement of, by Court of Admiralty—Practice.*—The Admiralty Division of the High Court of Justice cannot entertain an action *in rem* on a foreign judgment *in personam* for damages arising out of a collision. (Ct. of App.) *The City of Mecca* 412

4. *Foreign ship—National service—Arrest—Appearance of Crown—Right of reply—Practice.*—Where the Crown appears to protest against the jurisdiction of the court being exercised against a vessel belonging to a foreign power, it has the same right of reply as in cases where it appears on its own behalf. (Adm,) *The Parlement Belge* 83

5. *Foreign ship—National service—Ship of war—Privilege of—Suit* in rem—*Practice.*—An unarmed vessel belonging to a foreign sovereign State, and employed in what is considered by that State to be a national service, is entitled to the privilege of a vessel of war as to freedom from arrest in a suit *in rem*. (Ct. of App. reversing Adm.) *The Parlement Belge* 83, 234

6. *Foreign ship—Mail packet—Arrest—Exemption from—Practice.*—Such iummnity is not forfeited by the partial employment of the vessel in carrying merchandise and passengers where her substantial employment is of a national character; *e.g.*, the carriage of mails. (Ct. of App. reversing Adm.) *The Parlement Belge* 83, 234

7. *Foreign ship—Foreign sovereign—Action* in rem *—Compelling appearance—International law—Comity.*—A suit *in rem*, though primarily a proceeding against the ship or *res* is indirectly a process compelling the appearance of the owner to defend his property, and therefore is not applicable where the ship or *res* is the property of a foreign sovereign or sovereign State against whom an action will not lie by reason of international law or the comity of nations. (Ct. of App. reversing Adm.) *The Parlement Belge* 83, 234

8. *Foreign ship—Foreign state—Property of—Exemption.—Semble*, any property of a foreign sovereign or State used for public purposes is exempt from the jurisdiction of any tribunal in this country, (Ct. of App., reversing Adm.) *The Parlement Belge* 83, 234

9. *Foreign ship of war—Government property—Arrest —Salvors—Practice.*—The High Court of Justice, Admiralty Division, will not allow a warrant to issue for the arrest of a foreign vessel of war, or of private property on board of her and of which the government to which she belongs have the care, at the suit of salvors. (Adm.) *The Constitution* ..... *page* 79

10. *High Court of Admiralty—Admiralty Division —Comity of nations—International law.*—The jurisdiction of the Admiralty Division of the High Court of Justice is the same as that formerly exercised by the High Court of Admiralty in matters in which it had jurisdiction by the comity of nations as a court administering civil law. (Adm.) *The City of Mecca* 187

See *County Courts Admiralty Jurisdiction*, No. 4—*Master's Wages and Disbursements*, No. 1—*Mortgage*, No. 4—*Practice*, Nos. 27, 29—*Salvage*, Nos. 20, 22, 27—*Shipowner*, No. 7—*Wrecks and Casualties*, No. 1.

JURY.

See *Marine Insurance*, No. 11—*Sale of Ship*, No. 1 —*Unseaworthy Ships*, Nos. 1, 2.

JUSTICES.

Salvage, Nos. 20, 22, 27.

LAUNCH.

See *Collision*, Nos. 14, 15—*Limitation of Liability*, Nos. 6, 7.

LAW OF FLAG.

See *Bottomry*, Nos. 1, 2—*Collision*, Nos. 16, 17.

LEX LOCI.

See *Marine Insurance*, No. 12.

LICITATION.

See *Sale of Ship*, No. 4.

LIEN.

See *Carriage of Goods*, Nos. 19, 20—*Collision*, No. 24—*General Average*, Nos. 4, 9—*Jurisdiction*, No. 2—*Marine Insurance*, Nos. 4, 5—*Material Men*, Nos. 2, 3, 5—*Ship's Husband*, No. 3.

LIFE SALVAGE.

See *Carriage of Goods*, No. 16.

LIGHT ASTERN.

See *Collision*, Nos. 53, 54.

LIGHTERAGE.

See *Carriage of Goods*, No. 24—*Charter-party*, Nos. 4, 6—*Marine Insurance*, No. 15.

LIGHTS.

See *Collision*, Nos. 48 to 56, 66, 67, 71, 75, 76.

LIMITATION OF LIABILITY.

1. *Bottomry bond—Freight—Fund in Court—Right of assignee.*—Where freight is pledged by an instrument in the nature of a bottomry bond and the ship is totally lost, whilst the freight is at risk, by a collision with another ship which admits and limits her liability under the Merchant Shipping Acts, paying the amount of her liability into court, the holders of the instrument are entitled to rank against the fund paid into court for the freight pledged to them: (Adm.) *Ths Empusa* ...*page* 185

2. *Bottomry Bond—Freight—Loss of fund in court —Proportion.—Semble*, that the bondholders are entitled to recover out of the fund in court applicable to the payment of damages for loss of freight the same proportion of the sum secured by the bond as the total sum apportioned in respect of loss of freight bears to the whole freight of the ship lost. (Adm.) *The Empusa* 18

3. *Collision — Both ships to blame — Merchant Shipping Act* 1862, *s.* 514—*Judgment—Amount recoverable—Set-off*—Where two vessels have been found to blame in an action of collision, and one limits her liability, the other cannot claim to have the half damages set off one against the other, and then to prove in the limitation suit for the balance, but the party proving in the limitation suit must prove for his full half damage against the assessed amount of which the other party will be entitled to set off his half. (Ct. of App., reversing M.R.) *Chapman* v. *Royal Netherlands Steam Navigation Company* ..... *page* 107

4. *Collision—Both ships to blame—Merchant Shipping Act* 1862, *s.* 54—*Judgment—Amount recoverable—Set-off.*—Where two ships have been injured by a collision for which both have been found to be in fault, and each has been condemned to pay the moiety of the other's damage, if either party applies to have his liability limited under the Merchant Shipping Act 1862, s. 54, a set-off is allowed between the two amounts, and the other party is entitled to prove against the fund paid into court for a moiety of the loss sustained by him less a moiety of the loss sustained by the party making such application. H. of L.) *The Stoomvaart Maatschappy* v. *The Peninsular and Oriental Steam Navigation Company* 567

5. *Foreign ship—English court—Merchant Shipping Act* 1867, *sect.* 9.—Sect. 9 of the Merchant Shipping Act 1867 applies to foreign ships seeking to limit the extent of their liability in an English court. (Ct. of App. from Adm.) *The Franconia* 1

6. *Launch — Registration — "Recognised British ship"—Collision—Merchant Shipping Act* 1867 *sect.* 54.—A vessel at the time of her launch, and before registration, is not a "recognised British ship," and cannot avail herself of the limitation of liability granted by sect. 54 of the Merchant Shipping Act 1862, for damage done by her to another vessel. (Adm.) *The Andalusian* 22

7. *Launch—Shipbuilder—Merchant Shipping Acts.* —*Quære*, whether the limitation of liability clauses of the Merchant Shipping Act apply to the case of a shipbuilder under contract to build and launch safely before delivery. (Adm.) *The Andalusian* 22

8. *Measurement of steamships—Foreign ship—Order in Council—Allowance for engine-room—Merchant Shipping Act* 1862, *sect.* 60.—An Order in Council purporting to be made in pursuance of sect. 60 of the Merchant Shipping Act 1862 is valid notwithstanding that it recites that the British rules as to measurement have been adopted. . . . "with the exception of a slight difference in the mode of estimating the allowance of engine-room." (Ct. of App. from Adm.) *The Franconia* 1

9. *Measurement of steamships—Gross tonnage — Deductions—Crew space—Merchant Shipping Act* 1869, *sect.* 9.—The "gross tonnage without deduction on account of engine-room" on which the limited liability of owners of steamships is calculated, is the total capacity of the ship obtained by the rules of measurement given in the Merchant Shipping Act 1854, and including the space or spaces occupied by the crew, unless the provisions of sect. 9 of the Merchant Shipping Act 1867 with regard to such spaces are complied with. (Ct. of App. from Adm.) *The Franconia* 1

10. *Measurement of steamships—Gross tonnage—Spar deck—Merchant Shipping Act* 1854, *sect.* 21.—*Semble*, it is immaterial, if the provisions of sect. 9 of the Merchant Shipping Act 1867 are complied with, whether the crew space in question is in "a break or poop, or any other permanent closed-in space on the upper deck solely appropriated to the berthing of the crew" (sect. 21 (4) Merchant Shipping Act 1854), or is a portion of the space between a "spar deck" (sect. 21 (5) Merchant Shipping Act 1854). (Ct. of App. from Adm.) *The Franconia* ..... *page* 1

11. *Practice—Pleading—Defence—Judicature Acts—Merchant Shipping Act.*—Where a defendant in an action for damages to a ship, seeks to limit his liability under the Merchant Shipping Acts, he must, since the Judicature Acts, claim such limitation in his defence, as otherwise he will not be entitled thereto. (C. P. Div.) *Wahlberg and another* v. *Young and others* ..... 27n.

12. *Practice—Rival claims—Costs.*—In a limitation suit the costs of deciding a point of law arising on the claims of two rival claimants to the same fund not allowed as against the plaintiff; each claimant ordered to pay his own costs. (Adm.) *The Empusa* 185

13. *Tug and tow—Pilot—Improper navigation—Right of tug to limitation.*—A tug towing another vessel, and, by disobedience to the orders of the pilot and mismanagement, running her aground or damaging her, caused the damage by improper navigation and is entitled to limitation of liability under the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 83), sect. 54. C. P. Div.) *Wahlberg and another* v. *Young and others* ..... 27n.

14. *United States law—Act of Congress* 1851—*Transfer of property in ship doing damage.*—In the United States a defendant is not intitled to claim limitation of his liability under the Act of Congress 1851, in an action brought against him, unless he has taken the steps prescribed by the Act to transfer his property in the ship doing the damage. (U. S. Circ. Ct. East Distr. of N. Y.). *Joseph W. Dyer and others* v. *The National Steamship Company* 26

See *Collision*, No. 22—*General Average*, No. 9.

LIMITED COMPANY.

See *Marine Insurance Associations.*

LOADING.

See *Charter-party*, Nos. 2, 3, 5. 6, 7—*Marine Insurance*, No. 15.

LOG.

See *Collision*, No. 36.

LOSS OF CARGO.

See *Carriage of Goods*, No. 16—*Collision*, Nos. 19, 20—*Marine Insurance*, Nos. 15, 16.

MAIL PACKET.

See *Jurisdiction*, No. 6.

MANAGING OWNER.

See *Mortgage*, No. 2—*Shipowner*, Nos. 2, 3, 5, 9.

MARINE INSURANCE.

1. *Assignee of policy—Action by—Counter-claim by underwriters*—31 & 32 *Vict. c.* 86, *s.* 1.—In an action by an assignee of a marine policy against the underwriters, the defendants are not entitled, under 31 and 32 Vict. 86, s. 1, to set up a counter-claim for money owing to them by the assignor at the time of the assignment, but in respect of matters not arising out of the policy. (Ct. of App., reversing C. P. Div.) *E. Pallas and Co.* v. *The Neptune Marine Insurance Company* 136, 213

2. *Barratry—Smuggling—Seizure by revenue officers —Warranty "free from seizure"—Causa proxima.* —Where a policy of marine insurance for a named time enumerates, among the perils insured against,

"men-of-war, enemies, pirates, rovers, thieves, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners," there being also a warranty "free from capture and seizure and the consequences of any attempts thereat," and the officers of the ship insured by the policy, are arrested by Spanish revenue officers for smuggling tobacco on board, and proceedings are taken to procure sentence of condemnation and confiscation of the ship at a Spanish port, an underwriter of the policy is not liable for expenses incurred in resisting the proceedings of the Spanish revenue officers upon the ground that the *causa proxima* of the loss was seizure and not barratry. (Ct. of App. from Q. B. Div.) *Cory and others* v. *Burr* .....*page* 480, 559

3. *Bottomry bond — Freight — Insufficiency—Cargo owners—Perils of sea—Liability of insurers.*—Where a bottomry bond has been given on ship, cargo, and freight to discharge the cost of repairs of a ship damaged in collision at sea, and the ship's freight proves insufficient to pay the amount of the bond, and the owner of cargo has to pay the deficiency, he cannot recover the amount so paid under the bond under his policy of insurance, as the loss upon the cargo is not proximately caused by perils of the sea. (Q.B.Div.) *Greer* v. *Poole and others* 300

4. *Broker—Lien for premiums—Policy.*—Where a shipowner employs a broker to effect insurances, and, there being no underwriters at the place of employment, the broker engages another broker elsewhere to effect the insurances, and such latter broker pays the premiums, he has a lien on the policies for such premiums as against the shipowner. (H. of L.) *Fisher* v. *Smith* 60

5. *Broker — Lien for premiums — Settlement of accounts—Sub-agent—Monthly payments*—Settlement of accounts between the two brokers once a month, the sub-agent meanwhile retaining the policies, is not inconsistent with such a lien, even though the first broker has been paid by the shipowner. *Crawshay* v. *Homfray* (4 Barn. & Ald. 50) distinguished. (H. of L.) *Fisher* v. *Smith*... 60

6. *Concealment of material facts—Duty of assured——Facts to be disclosed.*—In marine insurance it is not sufficient to disclose the facts material to the risks considered in their own nature, but all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act. (Ct. of App. from Q. B. Div.) *Rivaz* v. *Gerussi and others* 377

7. *Concealment of material facts—Fraud—Open policies—Goods to arrive—Declaration at less than true value—Action to set aside policies—Premiums.*—Where open policies are effected on goods to arrive, and the assured declare goods after arrival at less than their true value, and effect other policies upon such goods without disclosing the fact that the declaration was for less than the actual value, the underwriters are entitled to have the latter policies set aside on the ground of concealment of material facts, and the assured are not entitled to a return of the premiums paid. (Ct. of App. from Q.B. Div.) *Rivaz* v. *Gerussi and others* 377

8. *Construction of policy—"Perils of the sea, fire, and all other perils, &c.—Explosion of boiler.* Damage to a steamer occasioned by the bursting of a boiler, the plates of which had become too thin to resist the pressure of the steam, through the negligence of those in charge in not regularly inspecting and cleaning the boiler, is covered by a policy of marine insurance against "perils of the sea, fire, and all other perils, &c." (Ct. of App.) *The West India and Panama Telegraph Company Limited* v. *The Home and Colonial Marine Insurance Company Limited*.....*page* 341

9. *Constructive total loss—Abandonment—Mutual Marine Insurance Association—Bye-law.*—A bye-law of a Mutual Marine Insurance Association providing that, in the event of any ship being stranded or damaged, and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents, under or in pursuance of the power thereby reserved to the company, should be deemed or taken to be an acceptance or recognition of any abandonment of which the assured might have given notice to such company; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which in no case was to exceed the sum insured, is no answer to an action by a member for a constructive total loss proved or admitted, the right to recover for such a loss being a right which can only be taken away by express words. (Ct. of App., affirming Lush, J.) *Forwood* v. *The North Wales Mutual Marine Insurance Company* 219, 293

10. *Constructive total loss—Notice of abandonment—Sale of ship.*—Notice of abandonment is a condition precedent to a claim for a constructive total loss, except in the one case where by reason of a justifiable sale of the ship coming to the knowledge of the assured at the same time as the news of the damage, such notice could not possibly be of any benefit to the underwriters. (Ct. of App., reversing C. P. Div.) *Kaltenbach* v. *Mackenzie* 15, 39

11. *Constructive total loss—Stranding—Sale of ship—Stringent necessity for—Question for jury.*—Where a ship is stranded, with her cargo on board, and the master *bona fide* believing that he is unable to save her, sells her, the question to be tried in an action on a policy for a constructive total loss is (per Coleridge, C.J.) whether the ship was a constructive total loss at the time of sale, so as to render the sale a stringent necessity, and if there is no evidence of this the case should be withdrawn from the jury, but (per Grove, J.) the question is not whether the circumstances justified the sale, but whether the circumstances detailed in the evidence was sufficient to be laid before a jury that the sale was justifiable, and that such a case should not be withdrawn from the jury. (C. P. Div.) *Hall* v. *Jupe* 328

12. *English policy—French ship—Lex loci.*—Where an English policy is made on goods on board a French ship, the policy, in the absence of stipulation to the contrary must be construed by English law. (Q. B. Div.) *Greer* v. *Poole and others* ... 300

13. *Freight — Loss of—Charter-party—Deductions for sea damage—Underwriter's liability.*—Where a charter-party provides for specific freight, and that "if any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate," the charterers, under a policy purporting "to cover only the one-third loss of freight in consequence of sea-damage, as per charter-party," can receive from the underwriters the one-third lost under the charter by sea-damage, or the amount insured in respect thereof, the policy sufficiently describing the subject-matter which is such one-third, and the whole freight. (Ct. of App.) *Griffiths and others* v. *Bramley Moore and others*..... 66

14. *Freight—Loss of—Perils of the sea—Admiralty charter—Discharge by Admiralty.*—Where a ship is chartered by the Admiralty Commissioners for three months certain, and thenceforward until notice given, the charter-party containing a clause entitling the charterers on the ship becoming incapable to perform efficiently the service contracted for, to put her out of pay, and before the expiration of three months the ship strikes on a rock, and is thereupon put out of pay and discharged from the service, and the ship is insured for three months on "freight outstanding," the underwriters knowing of the existence of the charter-party, but not knowing its terms, the loss of freight is not a loss by perils of the sea, and the shipowners are not entitled to recover it under the policy. (Ct. of App.) *The Inman Steamship Company Limited* v. *Bischoff and others* ..... *page* 419

15. *Inception of risk—"From the loading thereof on board"—Loss of cargo in lighters.*—Where shipowners by a policy insurance caused "themselves to be insured, lost or not lost, at and from Libau to Bordeaux, upon freight (valued at interest), of and in the vessel *Hawthorn*, beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau, and to continue and endure during the said vessel's abode there, and until the said vessel shall have arrived at Bordeaux, and the said goods shall be safely delivered from the said ship," and during the loading at Libau a portion of the cargo, which was in the lighters alongside and about to be transferred to the vessel, was by reason of the perils of the sea wholly lost and the shipowners prevented from earning the freight insured, it was held, upon demurrer, that the shipowners could not recover. (Q.B.Div.) *Hopper and another* v. *Wear Marine Insurance Company* 482

16. *Insurable interest—Floating policy on goods—Specific appropriation to contract—Passing of property—Interest in profits.*—Where A. contracted to sell goods to B. and C., and B. was buying to complete a contract made with C. for the sale of such goods, and this was unknown to A. and C., and all the goods were shipped together by A., without being specifically appropriated to either B. or C., and were lost, it was held that, although after the loss C. paid for the goods and obtained the necessary documents entitling him to their possession if they had existed, there was no such appropriation as gave him an insurable interest. (Q.B. Div.) *Stock* v. *Inglis* 596

17. *Insurable interest—Floating policy on goods—Appropriation to contract—Passing of property—Interest in profits*—There is no insurable interest in a purchaser of goods sold under an executory contract to answer a specific description. until the property in the goods has been transferred to the buyer by an appropriation of the goods to him; and if the goods are lost before such appropriation takes place, the buyer cannot recover for them under an open policy, although after the loss he pays for them and declares them under the policy. (Q.B. Div.) *Stock* v. *Inglis*..... 596

18. *Measure of insurers' liability—Constructive total loss — Abandonment — Partial loss—Partial repairs—Sale of damaged ship.*—Where a vessel insured under a time policy and valued is stranded and got off, and the owners, on the underwriters refusing to accept abandonment, finding that the cost of restoring her to her condition before stranding would exceed her value when repaired, do some slight necessary repairs and sell her for over her estimated value, the measure of the insurers liability is the difference between the value of the vessel when undamaged, and the balance which remains after deducting from the proceeds of the sale the cost of the repairs executed. (Ct of App., from Q. B. Div.) *Pitman and another* v. *The Universal Marine Insurance Company* ..... *page* 444, 544

19. *Measure of insurers' liability—Abandonment—Rights of insured — Repairs — Total loss.*—The assured is never bound to abandon; he can always repair if he chooses, and refrain from insisting on a total loss. (Q.B. Div. *Pitman and another* v. *The Universal Marine Insurance Company*..... 444

20. *Measure of insurer's liability—Repairs.*—If the assured does repair the ship, *bonâ fide* and with reasonable discretion, the cost of the repairs is the measure of the loss. (Q. B. Div.) *Pitman and another* v. *The Universal Marine Insurance Company*..... 444

21. *Measure of underwriter's liability—Repairs—Constructive total loss—Right of assured to repair.*—An assured whose ship is damaged, is not bound to claim for a total loss where repair is practicable, but may repair her; and even where her value when repaired is less than the cost of repair, may recover from the assurers their proportion of the reasonable cost of the repairs less one-third new for old, although such proportion exceed the amount the assurers would be liable for if they paid for a total loss. (Ct. of App. and H. of L.) *Aitchison* v. *Lohre* 11, 168

22. *Open policy—Reinsurance against fire—Usage—Declaration of risks.*—The usage that in case of any open marine policy in goods in ships to be declared, such policy attaches to the goods as soon as, and in the order in which they are shipped and in which order the assured is bound to declare them, and that in case of mistake the assured is bound to rectify the declaration, and that such rectification may take place after a loss, extends to a reinsurance effected by insurers with a fire reinsurance company against losses by fire only on coal-laden ships insured by the former, such risk being a contract of fire insurance in respect of a marine risk. (Lopes, J.) *Maritime Marine Insurance Company Limited* v. *Fire Re-Insurance Corporation Limited*..... 71

23. *Policy—Construction of—Indemnity—Qualifications.*—A policy of marine insurance is not a perfect contract of indemnity, but must be taken with certain well-established qualifications, which must be applied even if the assured thereby receives more than a perfect indemnity. (H. of L.) *Aitchison and another* v. *Lohre* 168

24. *Reinsurance after ship's arrival—Lost or not lost—Concealment—No knowledge.* — A voyage policy effected by way of re-insurance on the cargo of a vessel, lost or not lost, which has, unknown to both parties, arrived at the port of destination, and landed her cargo undamaged before the making of the policy, is a good contract of insurance, and the underwriter is entitled to the premium which the assured has agreed to pay. (Ct. of App.) *Bradford* v. *Symondson*..... 455

25. *Sale of cargo—Authority of master to sell—Agency—Necessity—Duty to carry to destination.*—The master of a general ship becomes agent for the sale of the cargo—that is, has an authority to sell, so as to bind the owners of the goods entrusted to him for carriage to their port of destination—only where there is a necessity for that course; and it lies on those who claim title to the cargo as purchasers from the master to prove that he, before selling, used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means

available to him carry the goods, or procure the goods to be carried, to their destination, as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival. (Ct. of App. from M. R.) *Atlantic Mutual Insurance Company* v. *Huth*.....*page* 369

26. *Salvage—Geneva award—Compensation under—War risks—Valued policy.*—Under a valued policy covering war risks underwriters who have paid for losses sustained by the assured through the destruction of the subject matter insured by the *Alabama*, are not entitled to recover as salvage from the assured sums paid by the United States Government under the Geneva Award as compensation for loss over and above the amount recovered by the assured. (H. of L., affirming Ct. of App.) *Burnand and others* v. *Rodocanachi, Son, and Co*.....400, 576

27. *Salvage—Peril insured against—Liability of underwriters.*—A claim for salvage is recoverable directly as a loss by the peril insured against, and the underwriters are not liable, in respect thereof beyond the amount insured. (H. of L.) *Aitchison and another* v. *Lohre*..... 168

28. *Salvage—Sue and labour clauses—Salvors not employed by assured or agents—Liability of underwriters.*—Under the sue and labour clause in a policy of insurance, the assured may recover expenses incurred by themselves or their agents for the hire of persons expressly engaged by them to avert loss to the insurers, but cannot recover money paid to salvors giving assistance to the ship to save her from perils of the sea, such salvors not being agents of the assured, and having no contract with the assured, but acquiring a lien on the ship by the law maritime. (Ct. of App., and H. of L.) *Aitchison and another* v. *Lohre*..... 11, 168

29. *Salvage—Sue and labour clause—Salvors not employed by assured or agents—Liability of underwriters.*—A sum paid for salvage services rendered to a ship where there has been no employment of the salvors by the assured or his agents is not recoverable under the sue and labour clause in a policy of marine insurance. (Ct. of App. reversing Lindley J.) *Dixon* v. *Whitworth*; *Dixon* v. *Sea Insurance Company* 138, 327

30. *Seaworthiness—Onus of proof—Presumption—Damage or loss immediately upon leaving port.*—Under a plea of unseaworthiness in an action on a policy of insurance, the onus of proof lies upon the defendants throughout, and is never, as a matter of law, shifted to the plaintiffs; but where it is shown by the defendants that the vessel shortly after leaving port is compelled to return disabled, or is totally lost, the shortness of time between the leaving port and the damage or loss may raise a presumption that she was lost or damaged, not by reason of perils insured against, but by reason of unseaworthiness before sailing, which presumption requires to be rebutted by the plaintiff's evidence, and whether such presumption is to prevail or is rebutted, is a question for the jury only. (Ct. of App.) *Pickup* v. *The Thames and Mersey Marine Insurance Company Limited*..... 43

31. *Valued Policy—Effect of valuation—Collateral purposes.* The valuation in a valued policy of insurance, while conclusive as between the parties for all purposes of the contract is not conclusive for other purposes collateral to the contract. (H. of L.) *Burnand* v. *Rodocanachi and others*..... 576

See *Carriage of goods*, No. 21—*General Average*, No. 7—*Master's Wages and Disbursements*, No. 2.

(See note as to Sue and Labour Clause and Salvage, p. 171.)

MARINE INSURANCE ASSOCIATION.

1. *Contributions—Default in payment—Counterclaim by member—Regulations.*——Where the rules of a mutual insurance company provide that a member making default in payment of contributions shall forfeit all claims for losses or average under his policies, but shall remain liable for his contributions, a member making default cannot in an action for contributions counterclaim for the losses and averages sustained by him. (Pollock, B.) *The Marine Mutual Insurance Association* v. *Young and another*.....*page* 357

2. *Stamp Act* 1867 (30 & 31 *Vict. c.* 23) *s* 7—*Mutual policy—Limited company — Common Seal—Signature by Manager.*—Where a mutual policy is issued duly stamped by a limited company, it is sufficiently stamped under the Stamp Act (30 & 31 Vict. c. 23), s. 7, if it is sealed with the seal of the company and authenticated by the manager. (Pollock, B.) *The Marine Mutual Insurance Association* v. *Young and another*..... 357

See *Marine Insurance*, No. 9.

MARITIME LAW.

See *Bottomry*, No. 1—*Collision*, Nos. 16, 17, 18—*Marine Insurance*, No. 28.

MARITIME LIEN.

See *Collision*, No. 24—*Jurisdiction*, No. 2.

MARITIME RISK.

See *Bottomry*, No. 4.

MASTER.

See *Bottomry*, No. 3—*Carriage of Goods*, Nos. 5, 25—*Collision*, No. 42—*Compulsory Pilotage*—*Marine Insurance*, No. 25—*Master's Wages and Disbursements*—*Salvage*, Nos. 4, 17—*Tug and Tow*, No. 5.

MASTER'S AUTHORITY.

See *Bottomry*, No. 3—*Marine Insurance*, No. 25.

MASTER'S WAGES AND DISBURSEMENTS.

1. *Practice — Costs — Jurisdiction — Certificate — County Courts Admiralty Jurisdiction Act* 1868 (31 & 32, *Vict. c.* 71).—A County Court has no jurisdiction in Admiralty over a claim for a master's disbursements, and hence in an action for master's wages and disbursements in the High Court, a certificate under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) is not necessary to entitle a successful plaintiff to his costs, although he recover less than 150*l.*, the limit of the County Court jurisdiction over wages under sect. 3 of the said Act. (Adm.) *The Dictator*..... 19

2. *Pleadings—Claim—Counter-claim — Negligence—Reply—Payment by indemnities—Demurrer.*—Where in an action a master claims his wages, and the shipowners counter-claim for loss of the ship by his negligence, a reply that the ship was insured, and that the underwriters are liable to pay the shipowner, and that the defendants can not consequently claim in respect of the loss, is no answer to the counter-claim, and is bad on demurrer. *Quære*: Would such a reply be good if it alleged that the money had been paid by the underwriters, and that the counter-claim was made without their authority. (Ct. of App.) *The Sir Charles Napier*..... 231

MATERIAL FACTS.

See *Marine Insurance*, Nos. 6, 7.

MATERIAL MEN.

1. *Mortgage—Intervention of—Release of Ship—Bail—Priority.*—A mortgagee, although entitled to intervene in a cause *in rem* for equipment and repair, is not entitled to claim a release of the vessel upon giving bail conditional to pay the claim of the material men, in the event of its being held to have priority over the mortgage. (Adm. Ir.) *The Acacia*.....page 226

Possessory lien—Mortgagor—Mortgagee—Priority—Arrest.—A material man into whose hands a vessel has been put for repairs by a mortgagor, left in possession by the mortgagee, has, so long as he retains his possession, a possessory lien for the repairs done, giving him priority over the mortgagee, and such possessory lien is not determined by the arrest of the vessel by warrant of the High Court of Admiralty in a suit by him for equipment and repair. (Adm. Ir.) *Hamilton* v. *Harland and Wolff*; *The Acacia*..... 254

3. *Practice—Lien—Irish Admiralty Court.*—The powers of material men to enforce their lien differ under the English and Irish Admiralty Court Acts. (Adm. Ir.) *Hamilton* v. *Harland and Wolff*; *The Acacia*..... 254

4. *Sale of ship—Mortgagees—Priority—Petition and answer.*—Sale of vessel by decree of the High Court of Admiralty restrained in order to ascertain the respective priorities of material men and mortgagees before appraisement and sale, such priorities to be ascertained by petition and answer in the High Court of Admiralty. (Ct. of App. in Ir.) *Hamilton* (app.) v. *Harland and Wolff* (resps.) *The Acacia*..... 229

5. *Transfer—Necessaries action—Sale of ship—County Courts Admiralty Jurisdiction—Action in High Court—Possessory lien.*—When a necessaries action against a ship in the City of London Court has proceeded to judgment, by which a sale of the ship is ordered, and subsequently another action is commenced in the High Court by material men having a possessory lien upon the ship, and an appearance has been entered to the action in the City of London Court by the plaintiffs in the High Court, the sale will be stayed, and the City of London Court action transferred to the High Court upon the application of the plaintiffs in the High Court. (Adm.) *The Immacolata Concezzione*..... 593

MAURITIUS.

See *Sale of Ship*, No. 4.

MEASURE OF DAMAGES.

See *Collision*, Nos. 19, 20.

MEASUREMENT GOODS.

See *Carriage of Goods*, No. 18.

MEASUREMENT OF STEAMSHIPS.

See *Limitation of Liability*, Nos. 8, 9, 10.

MERCHANT SHIPPING ACTS.

See *Carriage of Goods*, No. 25—*Collision*, Nos. 3, 43, 46, 49, 51, 52, 56, 62, 67, 77—*General Average*, No. 9—*Limitation of Liability*, Nos. 3 to 11—*Pilotage—Sale of Ship*, Nos. 3, 4—*Salvage*, Nos. 5, 20, 22, 27—*Shipowner*, No. 1—*Unseaworthy Ships*, No. 1—*Wages*.

MERSEY APPROACHES ACT

See *Collision*, Nos. 51, 52.

MERSEY DOCKS ACTS CONSOLIDATION ACT.

See *Collision*, No. 9.

MISTAKE.

See *Collison*, No. 21.

MORTGAGE.

1. *Charter-party—Mortgagor—Charterer's rights—Arrest—Release.*—Where the owner of a ship, which is mortgaged, charters her before the mortgagee takes possession, the mortgagee cannot interfere to prevent the execution of the charter-party unless it will materially injure or impair the value of his security, and if the vessel be arrested in an action of mortgage by the mortgagee, the court will release on the application of the charterer, unless such injury is shown by the mortgagee. (Adm.) *The Fanchon*...page 272

2. *Charter-party — Mortgagors—Co-owners—Arrest—Bail—Release.*—Where shares in a ship are mortgaged, possession being retained by the mortgagors, and the managing owner, duly appointed by all the co-owners, including the mortgagors, charters the ship for a foreign voyage, and she loads and is about to proceed on the voyage, the mortgagee, even though he takes possession of his shares before the sailing of the ship but after the making of the charter-party, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mortgage debt, provided the performance of the charter-party is not prejudicial to the security; and the court will, upon the application of the co-owners, release a ship so arrested, and will condemn the mortgagee arresting in costs. (Adm.) *The Maxima*..... 21

3. *Interest on mortgage—Payable in advance—Notice—Sale by mortgagee.*—Where interest on the mortgage of a ship is payable in advance, and the mortgage provides for six months interest in lieu of notice, and the mortgagee sells and receives the proceeds two days after the six months' interest falls due, he is not entitled to the six months' interest in lieu of notice. (Ch. Div.) *Banner* v. *Berridge*..... 420

4. *Practice—Action by mortgagee—Account—Second mortgagee—Freight—Defendants out of jurisdiction—Service on—Order XI., r. 1.*—In an action by a first mortgagee of a ship against a second mortgagee for an account, persons resident abroad and retaining the freight as against a debt due to them from the second mortgagee, may be added as defendants, and served with notice of the writ out of the jurisdiction under Order XI., r. 1, provided the contract under which the freight is due is an English contract. (V.C.B.) *McStephen and Co.* v. *Carnegie*..... 215

5. *Statute of Limitations—Sale by first mortgagee—Trust, express or constructive—Acknowledgement.*—Where a ship is mortgaged in the ordinary form provided under the Merchant Shipping Act 1854, and the mortgagee sells under the powers of sale in sect. 71 of that Act, there is no express trust in favour of the mortgagor of the purchase moneys received by the mortgagee, but only a constructive trust of the surplus remaining after paying off the mortgage, and the court will not, after the expiration of six years, allow evidence to be gone into to show the existence of a surplus for the purpose of raising such trust except

where there has been such an acknowledgment as will take the case out of the Statute of Limitations. (Ch. Div.) *Banner* v. *Berridge* ...*page* 420

See *Material Men*, Nos. 1, 2, 4—*Ship's Husband*, No. 4.

MUTUAL POLICY.

See *Marine Insurance Association*, No. 1.

NATIONAL SERVICE.

See *Jurisdiction*, Nos. 4, 5.

NAUTICAL ASSESSORS.

See *Practice*, Nos. 21, 25, 28.

NAVIGABLE RIVER.

See *Collision*, Nos. 80, 81.

NECESSARIES.

See *Collision*, No. 24—*County Court Admiralty Jurisdiction*, No. 4—*Material Men*, No. 5.

NEGLIGENCE.

See *Carriage of Goods*, Nos. 1, 2—*Collision*, No. 65—*Damage*, No. 1—*Damage to cargo—Master's Wages and Disbursements*, No. 2—*Salvage*—Nos. 7, 28—*Tug and Tow*, Nos. 1, 2.

NEW TRIAL.

See *Practice*, No. 20—*Salvage*, No. 11.

NON-DELIVERY OF CARGO.

See *Carriage of Goods*, Nos. 4, 6, 21.

NOTICE.

See *Collision*, Nos. 14, 15, *Mortgage*, No. 3—*Stoppage in Transitu*, No. 2.

NOTICE OF ABANDONMENT.

See *Marine Insurance*, No. 10.

OBSTRUCTION.

See *Collision*, Nos. 80, 81.

ONUS OF PROOF.

See *Collision*, No. 66—*Compulsory Pilotage*—*Marine Insurance*, No. 30.

OPEN POLICY.

See *Marine Insurance*, Nos. 7, 17, 22.

ORDER IN COUNCIL.

See *Collision*, No. 4—*Limitation of Liability*—No. 8—*Practice*. No. 7.

OVERTAKING SHIPS.

See *Collision*, Nos. 53, 54, 59.

OWNER.

See *Shipowner*.

PACIFIC ISLANDERS PROTECTION ACTS.

Seizure—Voyage commenced before Act passed—Reasonable ground of suspicion—Liability of officer seizing.—An officer of one of H.M.'s ships seizing and detaining a ship under the *bonâ fide* belief that there is reasonable cause for suspecting that an offence under the Pacific Islanders Protection Act (38 & 39 Vict. c. 51) has been committed by that ship, is not liable in damages even where the ship is not in fact employed in the commission of any such offence, as where she has taken labourers on board before the Act came into operation. (Ct. of App. from Q.B. Div.) *Burns* v. *Nowell*..... *page* 323

PARTIAL LOSS.

See *Marine Insurance*, No. 18.

PARTICULARS.

See *Damage to cargo—Practice*, No. 26.

PASSENGER.

See *Collision*, No. 6.

PASSING OF PROPERTY.

See *Marine Insurance*, Nos. 16, 17.

PAYMENT INTO COURT.

See *Salvage*, No. 15.

PENALTY.

See *Carriage of Goods*, No. 4—*Collision*, No. 65—*Shipowner*, No. 1.

PEREMPTION.

See *Practice*, No. 8.

PERILS OF THE SEA.

See *Carriage of goods*, Nos. 2, 16, 21—*Marine Insurance*, Nos. 3, 8, 14.

PETITION AND ANSWER.

See *Material Men*, No. 4.

PIER.

See *Damage*, No. 1.

PILOT VESSEL.

See *Collision*, No. 55.

PILOTAGE.

Dues—Pilot carried to sea—Compensation of detention—Ships broker—Liability of—Merchant Shipping Act 1854, *ss.* 357, 363,—The money payable to a pilot, who is carried out to sea, for detention under the Merchant Shipping Act 1854, sect. 357, is not a pilotage due within sect. 363 so as to make the same recoverable by the pilot from the ship's broker under that section. (C.P. Div.) *Morteo and another* (apps.) v. *Julian* (resp.)..... 166

See *Collision*, Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 32, 33, 34, 55, 77, 79—*Compulsory Pilotage—Damage*, Nos. 1, 2—*General Average*, Nos. 10, 12—*Salvage*, Nos. 10, 11, 12, 25, 26. (As to the Thames Pilotage and Trinity House Charters, see note page 97.)

PLEADINGS.

See *Damage to cargo—Limitation of Liability*, No. 11—*Master's Wages and Disbursements*, No. 2—*Practice*, No. 26.

POLICY.

See *Marine Insurance*, Nos. 1, 4, 7, 8, 12, 16, 17, 22, 23, 24, 26, 31—*Marine Insurance Associations*.

PORT.

See *Carriage of Goods*, Nos. 10, 11, 12—*Charter-party*, Nos. 3, 4, 5—*Collision*, Nos. 7, 8—*Slave trade*, Nos. 1, 2, 4.

PORT OF DISCHARGE.

See *Carriage of Goods*, Nos. 11, 12—*Charter-party* Nos. 3, 4, 5.

PORT OF REFUGE.

See *General Average*, Nos. 1, 10.

PORTUGAL.

See *Slave Trade*, Nos. 2, 4.

POSSESSORY LIEN.

See *Material Men*, Nos. 2, 5.

PRACTICE.

1. *Appeals—County Courts—Leave to appeal to Court of Appeal.*—In cases from County Courts raising important points of law, the court will give leave to appeal to the Court of Appeal, where, on a proper construction of the Acts governing appeals, such leave is necessary. (Adm.) *The Rona*..............................*page* 520
2. *Appeal—Costs—Both vessels to blame—Motion by way of cross-appeal—Order LVIII., r.* 6.—The fact that respondents in an appeal from the Admiralty Division, where both have been held to blame, have given notice under Order LVIII., r. 6, of their intention to ask for a variation of the decree below makes no difference in the practice of dismissing the appeal with costs if the judgment below be confirmed, provided only that such costs as are occasioned by the respondent's notice will be deducted. (Ct. of App. from Adm.) *The Lauretta* 118
3. *Appeal—Costs — Interlocutory order — Order LVIII., r.* 15.—An addition made to a decree upon motion, giving directions as to costs as to which the decree itself was silent, is a portion of the decree, and therefore can be examined in an appeal from the decree, and is not an interlocutory order within the meaning of Order LVIII., r. 15. (Ct. of App.) *The City of Manchester* 261
4. *Appeal—Costs—Judicature Act* 1873, *s.* 49.—A question of the principle on which costs are awarded is subject to appeal, notwithstanding sect. 49 of the Judicature Act 1873. (Ct. of App.) *The City of Manchester*............................ 261
5. *Appeal—Indemnity for costs—Salvage—Apportionment.*—On appeal against apportionment of salvage reward the owners of the salved vessel were cited, and asked for an indemnity for their costs, which the appellants refused, and gave notice that no relief would be applied for against the owners. The owners were held to be entitled to their costs up to the time of such notice. (P.C.) *The Castlewood*.............................. 278
6. *Appeal—Security for costs—Court of Passage—County Courts Admiralty Jnrisdiction Act* 1868 (31 & 32 *Vict. c.* 21) *s.* 26.—The appeal from the Court of Passage at Liverpool exercising Admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71, s. 26), and security for costs must be given before the instrument of appeal is lodged. (Ct. of App. from Adm.) *The Ganges* 317
7. *Appeals—Vice-Admiralty Courts—Time—Order in Council, June,* 27, 1832—26 *Vict. c.* 24, *s.* 23, 24—30 *&* 31 *Vict. c.* 45, *s.* 18. The time for appealing from the judgment of a Vice-Admiralty Court is governed strictly by the rules and regulations made by Order in Council, June 27, 1832, no rules having been made as yet under 26 Vict. c. 24, ss. 23, 24, and 30 & 31 Vict. c. 45, s. 18, and is limited to fifteen days. (P.C.) *The Brinhilda* 461
8. *Appeal—Vice-Admiralty Court—Peremption—Reference.*—In any Admiralty or Vice-Admiralty cause the right of appeal to the Privy Council is perempted by any proceedings (such as proceeding to a reference to assess damages) being taken by the appellant under the decree to be appealed from. (P.C.) *The Brinhilda*.................*page* 461
9. *Appeal from County Court—Notes of Evidence—Mode of hearing—Witnesses on appeal—County Courts—Admiralty Jurisdiction Act,*1868.—In an Admiralty appeal from a County Court, under the County Courts Admiralty Jurisdiction Act 1868, where there are no shorthand writer's notes of the evidence, and no notes taken by the judge of the County Court available for the purpose of appeal, the High Court (Admiralty Division) will order the appeal to be heard on *viva voce* evidence. (Adm.) *The Confidence—The Susan Elizabeth* 79
10. *Appeal to House of Lords—Stay of proceedings—Application to Court of Appeal.*—Where an appeal is carried to the House of Lords from the decision of the Court of Appeal in an Admiralty action, an application for a stay of proceedings pending such appeal must be made to the Court of Appeal, and not to the court below. (Ct. of App.) *The Khedive* 182
11. *Bail—Action in rem—Sureties—Cross-examination—Delay of ship—Costs.*—A plaintiff has a right to require the attendance of sureties, who have justified as bail for a ship in a suit *in rem*, for cross-examination; but he does so at his peril as to costs and damages occasioned by the delay of the ship under arrest pending such cross-examination. (Adm.) *The Don Ricardo* 225
12. *Bail — Appearance under protest — Writ—Change in indorsement.*—Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail. (Ct. of App.) *The City of Mecca*..................... 412
13. *Costs—Fees—Retainers—Admiralty Division.* It is the practice in the Admiralty Division to allow retaining fees to both leading and junior counsel. (Adm.) *The Neera* 277
14. *Costs—Refreshers—Taxing officer—Discretion of.*—It is a reasonable exercise of the discretion of the taxing officer, with which the court will not interfere, to disallow refresher fees to counsel for the second day when a case has taken part of two days; but the parts together do not amount to a full day. (Adm.) *The Neera*................. 277
15. *Costs—Security for—Foreign mate—Wages.*—Security for costs of suit will not, as a rule, be required from a foreign mate suing a foreign ship *in rem* for wages. (Adm.) *The Don Ricardo* ... 225
16. *Costs—Taxation—District Registry—Principal Registry.*—The practice in district registries in taxing costs should be the same as that in the principal registry. (Adm.) *The Neera*........... 277
17. *Default proceedings—Sale of ship — Action against proceeds—Service of writ on registrar.*—After a vessel has been sold under an order of the judge of the Admiralty Division, and the proceeds are in the registry, no owner having appeared, the writ in an action against those proceeds, whether original or amended subsequent to the sale, must be personally served on the registrar, (Ct. of App. from Adm.) *The Cassiopeia* 148
18. *Default proceedings— Sale of ship—Action against proceeds—Service of amended writ on registrar.*—An amended writ must in all cases be served in the same way as an original writ would be under similar circumstances. Where a writ is served on the registrar, to render the service

good, the provisions of Order IX.., r. 13, must be strictly adhered to. (Ct. of App. from Adm.) *The Cassiopiea* ....page 148

19. *Default proceedings—Time of commencement—Date of writ.*—In ordinary default causes *in rem*, the time at which the steps in the action may be taken dates from the service of the writ of summons, and not, as before the Judicature Acts came into operation, from the service of the warrant of arrest. (Adm.) *The Maria* 57

20. *Evidence—Exclusion of—Admiralty—New trial—Application to Court of Appeal.*—*Semble*, where an objection is taken to the exclusion of evidence by the judge of the Admiralty Court, the proper course is to apply to the Court of Appeal for a new trial on that ground, and not to tender the evidence afresh in the Court of Appeal. (Ct. of App. from Adm.) *The Sir Robert Peel*........... 321

21. *Evidence—Nautical assessors—Experts.*—Where the court is assisted by nautical assessors evidence of experts on questions of nautical science and skill may properly be rejected. (Ct. of App. from Adm.) *The Sir Robert Peel*.................... 321

22. *Inspection of documents—Privilege—Reports of survey.*—Reports of survey of a ship made before the commencement of an action are privileged from inspection if made solely for the purpose of proceeding in the action. *Southwark and Vauxhall Water Company* v. *Quick* (3 Q. B. Div. 315; 38 L. T. Rep. N. S. 28), followed. (Adm.) *The Theodor Korner* 17

23. *Interrogatories—Preliminary Acts—Order XXXI., r. 5 (Nov. 5, 1878, r. 3)—Order XIX., r. 30.*—Interrogatories may be administered under Order XXXI., r. 5 (Nov. 1878, r. 3) concerning matters on which information is obtained by preliminary acts, Order XIX., r. 30. (Adm.) *The Radnorshire* 338

24. *Interrogatory—Vexatious*—A general interrogatory will be struck out as vexatious if too vague in its character to admit of a precise answer. (Adm.) *The Radnorshire*.................... 338

25. *Nautical assessors—Judge—Respective duties.*—Where a judge differs from the opinion of the Nautical Assessors, who assists him in a question of fact, he is bound to give judgment in accordance with his own opinion. The function of the Nautical Assessors is only to advise the judge on questions of nautical science and practice, not to give a verdict on the facts of the case. (Adm.) *The Aid* 432

26. *Particulars—Pleading—Damage to cargo.*—The rule as to giving particulars of general allegations in pleadings is the same in the Admiralty as in the other divisions of the High Court of Justice. (Ct. of App.) *The Rory* 534

27. *Transfer of action—Admiralty Division—Jurisdiction of Admiralty—Judicature Acts.*—An action assigned to the Admiralty Division, but which would not have been within the cognizance of the High Court of Admiralty before the Judicature Acts, transferred to another division on that ground. (Adm.) *The Seaham* 58

28. *Trinity Masters—Inspection and report by—Duties of.*—Where Trinity Masters are desired to inspect and report to the court, their report is not necessarily confined to those matters on which evidence has been given, but may include any circumstance in their opinion affecting the merits of the case. (Adm.) *The Marathon*...... 75

29. *Writ in personam—Incorrect address—Setting aside—Judicature Act, Order II., rr. 3, 4.*—The misdescription of the residence of a defendant, whereby he is alleged to be resident within the jurisdiction, whilst he is in fact resident out of the jurisdiction, is not a sufficient ground for setting aside a writ *in personam* intended for service as soon as the defendant shall come within the jurisdiction. (Adm.) *The Helenslea—The Catalonia*....................page 594

See *Bottomry*, No. 5—*Carriage of Goods*, No. 21—*Collision*, Nos. 1, 2, 13, 22 to 41—*Damage to Cargo — General Average*, No. 1—*Jurisdiction*, Nos. 2, 3, 4, 5, 6, 9—*Limitation of Liability*, Nos. 11, 12—*Master's Wages and Disbursements*, Nos. 1, 2—*Material men*, Nos. 3, 5—*Mortgage*, Nos. 4, 5—*Salvage*, Nos. 10, 11, 13 to 19—*Shipowners*, Nos. 4, 8, 9—*Wrecks and Casualties.*

PRELIMINARY ACT.

See *Collision*, No. 41—*Practice*, No. 23.

PREMIUM.

See *Bottomry*, No. 3—*Marine Insurance*, Nos. 4, 6, 7.

PRINCIPAL REGISTRY.

See *Practice*, No. 16.

PRIORITY.

See *Collision*, No. 24—*Material men*, Nos. 1, 2, 4.

PRIVILEGE.

See *Practice*, No. 22.

PRIVY COUNCIL.

See *Practice*, Nos. 7, 8.

PRO RATA FREIGHT.

See *General Average*, No. 3.

PROTEST.

See *Practice*, No. 12.

PURCHASER.

See *Sale of Goods—Sale of Ship—Vendor and Purchaser.*

RECEIVER OF WRECK.

See *Collision*, No. 37.

REFERENCE.

See *Collision*, Nos. 25, 26, 27, 35—*Practice*, No. 8.

REFRESHERS.

See *Practice*, No. 14.

REGISTRAR.

See *Practice*, Nos. 17, 18.

REGISTRAR AND MERCHANTS.

See *Collision*, Nos. 25, 26, 27.

REGISTRATION.

See *Limitation of Liability*, No. 6—*Sale of Ship*, Nos. 3, 4.

REGULATIONS FOR PREVENTING COLLISIONS

See *Collision*, Nos. 42 to 62, 73.

RE-INSURANCE.

See *Marine Insurance*, Nos. 22, 24.

RELEASE OF SHIP.

See *Collision*, No. 24—*Material Men*, No. 1—*Mortgage*—Nos. 1, 2.

RELOADING.

See *General Average*, No. 10.

REPAIRS.

See *General Average*, No. 10—*Marine Insurance*, Nos. 3, 18, 19, 20, 21—*Material Men*, Nos. 1, 2.

REPLY.

See *Jurisdiction*, No. 4—*Master's Wages and Disbursements*, No. 2—*Salvage*, No. 18.

RESCISSION.

See *Sale of Goods*.

RETAINERS.

See *Practice*, No. 13.

REVENUE OFFICERS.

See *Marine Insurance* No. 2.

RIGHT OF ACTION.

See *Collision*, No. 63.

RISK.

See *Bottomry*, Nos. 3, 4—*Marine Insurance*, Nos. 22, 26—*Salvage*, Nos. 17, 24.

RISK OF COLLISION.

See *Collision*, Nos. 21, 62, 73, 74, 75, 76.

RIVER MERSEY.

See *Collision*, Nos. 9, 51, 52.

RIVER TEES.

See *Collision*, No. 64.

RIVER THAMES.

See *Collision*, Nos. 6, 10, 65 to 76, 81—*General Average*, No. 9—*Tug and Tow*, No. 4. (As to the Thames Pilotage and Trinity House Charters, see note, p. 97.)

RUNNING DAYS.

See *Charter-party*, No. 2.

SAFE PORT.

See *Carriage of Goods*, No. 10.

SAFE RETURN.

See *Shipowner*, Nos. 8, 9.

SAILING SHIP.

See *Collision*, Nos. 49, 55, 56, 57, 58, 59, 60, 61.

SALE OF CARGO.

See *Carriage of Goods*, Nos. 5, 7. 15, 17—*Marine Insurance*, No. 25—*Stoppage in Transitu*, No. 2.

SALE OF GOODS.

Time contract—Rescission—Declaration by vendor after time expired.—Where vendors sell a certain quantity of goods (say 25 tons), October or November shipment, from a foreign port, per sailing vessels, name to be declared by the buyer in writing within sixty days from date of bill of lading, and the vendors declare 25 tons, 20 of which are duly shipped in October or November, but 5 tons in December, and the buyers refuse to accept, the vendors cannot, by declaring after sixty days from the bill of lading 5 tons shipped in November, alter the right of the buyer to refuse acceptance, the contract time for declaration being an essential condition, and the contract not being divisible. (Ct. of Ap.) *Reuter, Hufeland, and Co.* v. *Sala and Co.*.....*page* 121

SALE OF SHIP.

1. *Commission agent—Evidence for jury.*—Where an agent is engaged to sell a ship, and it is agreed that, if a sale is made to any person "led to make such offer in consequence of" the agent's "mention or publication for auction purposes" of the sale, the agent shall have a commission, the fact that a purchaser has been told in conversation by a person who had been in communication with the agent that the ship had been put up to auction and not sold, is evidence to go to a jury that the purchaser has been led to the purchase by the publication of the sale. (H. of L., reversing Ct. of App.) *Bayley and others* v. *Chadwick.*) 59

2. *Commission—Broker—Introduction of purchaser.*—Where a shipowner agrees with a broker that if the latter is the means of introducing a purchaser of a ship of the shipowner, the shipowner will pay the broker a commission on the purchase money, the commission is payable when the purchaser is introduced through an agent employed by the broker, and the person introduced purchases as agent for some one else. (Ct. of App., reversing Lush, J.) *Wilkinson and Alston* 191

3. *Transfer of ship—Agreement not bill of sale—Registration—Action for specific performance—Merchant Shipping Act*, 1854, *s.* 55.—An agreement to transfer a ship, not being the actual instrument of transfer or bill of sale within the meaning of the Merchant Shipping Act 1854, s. 55, need not be registered, and may be enforced as against a purchaser in a suit for specific performance. (Grove, J.) *Batthyany* v. *Bouch* ... 380

4. *Transfer—Sale by licitation in Mauritius—Registration—Mortgage—Merchant Shipping Act*, 1854, *ss.* 55-60.—A sale of a ship under an order of the Supreme Court of Mauritius (by licitation, in accordance with the practice there) is not a transmission of the ship "by any lawful means other than by a transfer according to the provisions of this Act," within the meaning of the Merchant Shipping Act 1854, sect. 58, and the Registrar of Shipping is not bound, in a case where the register shows the ship to be mortgaged, upon the production of a declaration and statement under that section, without a bill of sale or release for the mortgage, to register the purchasers as owners without incumbrances or at all. (P. C.) *Chasteauneuf* v. *Capeyron and another*..... 489

See *Collision*, No. 24—*Marine Insurance*, Nos. 10, 11, 18—*Material Men*, Nos. 4, 5—*Mortgage*, Nos. 3, 5—*Practice*, Nos. 17, 18.

SALVAGE.

1. *Agreement—Exorbitancy — Setting aside.*—The court will set aside an agreement for salvage which is obviously unreasonable and exorbitant, even if made *bonâ fide*, and not under compulsion. (Adm.) *The Silesia* 338

2 *Appeal—Amount—Apportionment.*—In a service mainly rendered by the steam power of the salving ship, and which had occasioned a deviation in point of law, and in rendering which the crew are exposed to some peril, an apportionment of two-thirds to the shipowners and one-third to the master and crew was altered to five-ninths to the shipowners and four-ninths to the master and crew, and the total award increased from 660*l.* to

900*l.*; owners' share increased from 400*l.* to 500*l.*, master's share increased from 80*l.* to 100*l.*, crew's share increased from 120*l.* to 300*l.* (Ct. of App.) *The Farnley Hall* ..... *page* 499

3. *Appeal—Amount—Discretion of judge—Circumstances under which Court of Appeal will interfere—Deviation.*—The Court of Appeal will alter an award of salvage made by the court below, where there is reason to believe that the court below has not taken into consideration the circumstance that rendering a salvage service to property alone constitutes a deviation in point of law, however small the deviation may be in point of fact. (Ct. of App.) *The Farnley Hall*..... 499

4. *Apportionment—Master's share—Skilful navigation.*—Where 3500*l.* had been awarded for salvage services rendered by a steamship, 2000*l.* was awarded to the owners, and 700*l.* to the master for his skilful navigation in dangerous circumstances. (Jud. Com. P. C., varying Vice-Adm. Ct. of Bermuda.) *The Castlewood* 278

5. *Apportionment—Seamen—Settlement by solicitors—Merchant Shipping Act* 1854, *sect.* 182.—Where solicitors are duly authorised by seamen to settle a claim against their employers for their share of salvage, after the whole reward to be paid is ascertained, and to make an agreement for that purpose, and the solicitors accept a sum in full satisfaction, such agreement is not void under the Merchant Shipping Act 1854, s. 182, even if the amount accepted is less than the seamen would be entitled to recover in an action for distribution. (Adm.) *The Afrika* 266

6. *Apportionment—Settlement by solicitors.—Semble*, that fraud or concealment or an extravagant disproportion between the amount actually received and the amount strictly due, is necessary to induce the court to re-open such an agreement. (Adm.) *The Afrika* 266

7. *Damage to salvor—Demurrage—Negligence.*—Where a vessel in rendering salvage service sustains damage without negligence on her part, she is entitled to be repaid for such damage, and for demurrage during repairs, by the owners of the vessel salved. (Adm.) *Mud Hopper*, No. 4 103

8. *Derelict—Contract of affreightment—Abandonment—Owner of cargo—Bail—Freight.*—Where a vessel is abandoned and becomes a derelict, the owners of cargo on board are entitled to treat the contract of affreightment as abandoned, and are entitled, until the shipowner again gets possession of his ship, to have the cargo delivered to them at any port into which it may be brought by salvors, on giving bail to cover an award of salvage, without payment of any freight to the shipowner. (Ct. of App.) *The Cito*..... 468

9. *Derelict—Volunteers—Ineffectual efforts—Right to award.*—Where volunteers navigate a derelict for a time, and on falling in with another vessel abandon her, they are not entitled to salvage award. (Adm.) *The Killeena* 472

10. *Pilot—Right to salvage award—Unusual services—Danger.*—To entitle a pilot to salvage award the ship he assists must be in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage award. (Ct. of App.) *Akerblom* v. *Price* 441

11. *Pilotage — Practice — Verdict — New trial — Judgment.*—Where in such a case a jury finds that the services are pilotage, and a divisional court directs a new trial, the Court of Appeal will, if it appears that all the materials are before it upon which to decide the case, go further than the divisional court, and set aside the verdict for the defendants the owners of the cargo, and enter judgment for the plaintiffs without another trial. (Ct. of App.) *Akerblom* v. *Price* ..... *page* 441

12. *Pilot—Salvage paid to cargo-owners—General average contribution.*—Where an uninjured vessel is off a coast unknown to the crew, in a gale, and cannot beat to windward, and is being driven towards dangerous sands, and pilots put to sea at considerable risk, and guide her to a safe anchorage, money paid to the pilots for their services is a payment for salvage, and the owners of the vessel are entitled to general average contribution from the owners of cargo. (Ct. of App.) *Akerblom* v. *Price* 441

13. *Practice — Consolidation — Rival salvors — Tender.*—The court has power to order the consolidation of salvage suits in all cases, but it will not usually exercise the power contrary to the wish of the various plaintiffs; but if the plaintiffs institute and prosecute several suits without necessity, they will be condemned in costs. (Adm.) *The Jacob Landstrom*..... 58

14. *Practice—Costs—Setting aside of agreement.*—Where an agreement is set aside, and an award of salvage made, each party will pay their own costs. (Adm.) *The Silesia* 338

15. *Practice—Costs—Tender.*—In a salvage suit, where the tender was held sufficient, but it was not liberal, the Court gave the salvors their costs up to the time of the payment of the tender into court. (Adm.) *The Lotus* 595

16. *Practice—Discovery—Inspection—Tender and admission of statement of claim—Costs.*—A plaintiff in a salvage action in the Admiralty Division, in which the defendants admit the allegations in the statement of claim, and tender a sum in satisfaction, is nevertheless entitled to discovery and inspection of documents, but at his own risk and cost if such discovery and inspection should be held at the hearing to have been unnecessary. (Adm.) *The Maria* 94

17. *Practice—Evidence—Risk—Instructions not to salve.*—Instructions from an owner or his agent to his ship's master not to salve property is evidence as affecting the risk run by the salvor. (Adm.) *The Silesia* 338

18. *Practice—Reply—Admission—Tender.—Quære*, is a reply necessary in a salvage action where the only defence is admission of the plaintiff's facts and tender of a sum in satisfaction which is rejected by the plaintiff? (Adm.) *The Maria* ... 94

19. *Practice — Tender — Separate salvors.*—When there are separate suits instituted in respect of services rendered to a vessel and her crew by rival salvors, and the defendant is unable to estimate the respective value of two several services, he will be allowed to make a single tender in respect of the whole services rendered. (Adm.) *The Jacob Landstrom*..... 58

20. *Ship—Definition—Merchant Shipping Act* 1854—*Stranding — Jurisdiction of justices — Mud-hopper.*—A mudhopper barge used for carrying mud out from a river, and having no internal means of propulsion, is a "description of vessel used in navigation," and not being "propelled by oars," is a ship within the meaning of the word as defined by the Merchant Shipping Act, 1854, s. 2, and as such the justices have jurisdiction to award salvage for services rendered to her when

"stranded or otherwise in distress on the shore of any sea or tidal water situated within the limits of the United Kingdom." (Ct. of App., reversing Adm.) *MacAdam* (app.) v. *The Master and Crew of the Saucy Polly* (resps.); *The Mac* ..... *page* 507, 555

21. *Ship—Freight—Cargo—Liability to pay salvage.*—Salvage is payable out of ship, freight, and cargo, at risk, without distinction as to the nature of the cargo. (Adm.) *The Longford*... 385

22. *Ship in distress on shore—Merchant Shipping Act—Jurisdiction of justices.*—A vessel may be "in distress on the shore" without being actually aground or in contact with the shore. *The Leda* (Swabey, 40) approved. (Ct. of App., reversing Adm.) *MacAdam* (app.) v. *The Master and Crew of the Saucy Polly* (resps.); *The Mac*.....507, 555

23. *Specie—Proportion of contribution.*—Specie contributes towards salvage in the same proportion as ship, freight, and other cargo. (Adm.) *The Longford* 385

24. *Steamship disabled — Towage — Absence of danger.*—Where a steamship, carrying fore and aft sails only, and not rigged for proceeding under sail alone, breaks the mainshaft of her propellor, and is compelled to take assistance from another ship, which tows her forty miles into a port, the service is of a salvage character, although the service is not attended with any danger to the salvors. (Adm.) *The Jubilee*..... 275

25. *Vessel in distress—Pilot or other person—Right to reward—Express contract.*—A person, whether a pilot or not, who takes charge of a vessel in distress, with the consent of her master, is entitled to salvage reward, in the absence of an express contract to the contrary. (Adm.) *The Anders Knape* 142

26. *Vessel in distress—Pilot or other person—Right to reward—Express contract.*—*Semble*, it is immaterial whether, under such circumstances as would entitle a person to salvage reward in any case, the person claiming salvage does or does not hold himself out rightly or wrongly as being a pilot, so long as he performs the service. *The Frederick* (1 W. Rob. 16) approved. (Adm.) *The Anders Knape*..... 142

27. *Vessel used in navigation—Merchant Shipping Act*, 1854—*Jurisdiction of justices—Mudhopper—Semble*, a vessel such as a mudhopper used to transport men and mud, and capable of being guided, though not of motion, by internal means, is a vessel actually used in navigation. (Ct. of App., reversing Adm.) *MacAdam* (app.) v. *The Master and Crew of the Saucy Polly* (resps.); *The Mac* 507, 555

28. *Tug and tow—Position of danger—Right of tug to salvage — Negligence — Inevitable accident.*—Where in the performance of towage services the tow gets into a position of danger, the tug is not entitled to salvage reward for extracting her from it, unless she can show (1) That there was no negligence on the part of the tug causing the tow to get into the position of danger, and (2) That her being in the position of danger was the result of an unforeseen and inevitable accident. (Ct. of App. from Adm.) *The Robert Dixon* 95, 246

See *Carriage of Goods*, No. 16—*General Average*, No. 12 — *Jurisdiction*, No. 9 — *Marine Insurance*, Nos. 26, 27, 28, 29—*Practice*, No. 5.

SALVORS.

See *Jurisdiction*, No. 3—*Salvage*, Nos. 7, 9, 10, 11, 12, 19.

SEA DAMAGE.

See *Carriage of Goods*, No. 9—*Marine Insurance*, No. 13.

SEAMAN.

See *Salvage*, No. 5—*Wages*.

SEAWORTHINESS.

See *Carriage of Goods*, No. 9—*Marine Insurance*, No. 30—*Unseaworthy Ships*.

SECURITY.

See *General Average*, No. 4—*Practice*, Nos. 6, 15.

SEIZURE.

See *Marine Insurance*, No. 2—*Pacific Islanders Protection Acts—Slave Trade*, Nos. 1, 2, 3, 4.

SERVICE.

See *Collision*, No. 28—*Mortgage*, No. 4—*Practice*, Nos. 17, 18, 19, 29.

SET-OFF.

See *Limitation of Liability*, Nos. 3, 4.

SHIP.

See *Salvage*, Nos. 20, 21, 27.

SHIPBROKER.

See *Pilotage—Sale of Ship*, No. 2.

SHIPBUILDER.

See *Limitation of Liability*, Nos. 6, 7.

SHIPMENT OF GOODS.

See *Bottomry*, No. 1—*Sale of Goods*.

SHIPOWNER.

1. *Apprentice—Owner—Penalty—Exemption*—17 & 18 *Vict. c.* 104, *ss.* 55, 100, 146, 147—25 & 26 *Vict. c.* 63, *s.* 3.—Where a person has *bonâ fide* purchased one sixty-fourth share of a British ship, but the share has not been transferred to him by bill of sale, nor has he been registered as owner, and he has engaged and supplied an apprentice to be entered on board the said ship, being within the meaning of the Merchant Shipping Amendment Act 1862, s. 3, an owner of the ship, he is not liable to be convicted under the Merchant Shipping Act 1854, s. 147, sub-sect. 1. The word "owner" must be construed with reference to the subject-matter and context of each provision of the Merchant Shipping Act. (Q. B. Div.) *Hughes* (app.) v. *Sutherland* (resp.) 459

2. *Co-owners—Managing owner—Settlement with—Liability for goods supplied.*—A shipowner, by settling accounts with his managing owner, does not relieve himself from liability in respect of goods supplied on the order of the managing owner for the use of the ship, even though his share of the cost of such goods is debited to him in such accounts, and thereby paid for by him. (Ct. of App.) *Davidson* v. *Donaldson* 601

3. *Co-ownership—Action against managing owner—Discovery of documents—Partnership.*—In an action against a managing owner of ships for an account, he cannot protect himself against settling out books and documents relating to the ship accounts in his affidavit of documents, or in answer to interrogatories, by alleging that the accounts and books are kept by a firm of which he is a member, and that the action is brought

against him in his individual capacity only, but he must discover all documents, whether in his possession or in that of the firm. (Ct. of App.) *Swanston* v. *Lishman* .....*page* 450

4. *Co-ownership action—Accounts—Settlement of—Date of writ—Practice—Admiralty Court Act* 1861, *s.* 8.—In an action by one co-owner of a ship against the other co-owners under the Admiralty Court Act 1861 for a settlement of accounts between the co-owners, the plaintiff is entitled to a settlement of such accounts only as are or ought to be rendered to the co-owners prior to the date of the writ in the action and cannot recover any sum due upon accounts, which in the due course of the ship's business could not be rendered to the co-owners until after such date. (Adm.) *The Eider*..... 104

5. *Co-ownership action—Accounts—Agent.*—When a co-owner acts as a ship's agent (not managing owner) for a coasting steamer at one of her ports of call, he cannot in a co-ownership action for the settlement of ship's account recover amounts due to him as agent. (Adm.) *The Eider*..... 104

6. *Co-ownership action — Half-yearly accounts — Settlement.*—Where a ship's accounts are rendered half-yearly, a co-owner is not entitled to recover upon accounts rendered for and at the end of the half-year in which the writ is issued. (Adm.) *The Eider* 104

7. *Co-ownership action—Sale of ship on application of minority—Jurisdiction—Admiralty Court Act* 1861, *s.* 8.—The High Court of Justice (Admiralty Division) has power, under the Admiralty Court Act 1861, s. 3, in a co-ownership action to order the sale of a ship on the application of a minority of owners, and will exercise such power where it appears that a sale is to the interest of the owners, but such power will always be exercised with great caution. (Adm.) *The Nelly Schneider*..... 54

8. *Co-ownership action—Practice—Bail for safe return.*—The minority in interest of co-owners are entitled to bail for safe return of the ship as far as the value of their shares extends, if they object to the proposed employment of the ship. (Adm.) *The Talca* 226

9. *Co-ownership action—Practice—Bail for safe return—Managing owner.*—It is not a bar to the claim for bail for safe return that the manager or ship's husband who arranged the employment of the ship was appointed with their acquiescence if they give reasonable notice of their objection to the employment of the ship. (Adm.) *The Talca* 226

See *Collision*, No. 35—*County Courts Admiralty Jurisdiction*, No. 3—*Damage*, No. 1—*General average*, Nos. 4, 5, 6, 7—*Marine insurance*, Nos. 4, 5—*Stoppage in transitu*, No. 2. (As to bail for safe return when ship chartered, see note, p. 226).

SHIP'S HUSBAND.

1. *Charter-party — Cancellation — Authority.* — A ship's husband, who, with the authority of the ship-owners, has entered into a charter-party under which a commission on freight, primage, and demurrage is payable to the charterers on execution of the charter-party, cannot, by virtue of his office as ship's husband, enter into an agreement with the charterers to cancel the charter-party and pay them a sum of money in lieu of commission, that shall be binding on the ship-owners, without their express authority so to do, notwithstanding that such agreement may be for the benefit of the shipowners. (Ex. Div.) *Thomas and another* v. *Lewis* 51

2. *Freight—Co-owners—Assignments—Advances*—A ship's husband has no implied power as against his co-owners to assign or pledge the entire freight to become due on a charter, although money be owing to him from the co-owners or advances made on the ship's account. (Ct. of App.) *Benyon and Co.* v. *Godden and Son*; *H. R. Evans*, third party .....*page* 10

3. *Freight—Lien—Advances—Assignments*—Where a ship's husband has made advances on account of the ship, he has a right or lien or retainer, and not a charge, on the freight in respect of the repayment of those advances, so that, if his appointment of ship's husband ceases before the freight has been earned, an assignee of his interest in the freight is not entitled to it as against the owners. (Ct. of App.) *Benyon and Co.* v. *Godden and Son*; *H. R. Evans*, third party 10

4. *Freight — Right to—Co-owners — Mortgagees.* — Where a ship's husband, who is also part owner, has mortgaged his shares, he will be deprived of all right to receive his share of freight, either as ship's husband or owner, if the mortgagees before the end of the voyage unite with the co-owners in the appointment of another ship's husband to receive the freight; the action of the mortgagees being a sufficient taking possession or intervention to displace the title of the mortgagor to the freight. (Ct. of App.) *Benyon and Co.* v. *Godden and Son*; *H. R. Evans*, third party 10

SHIPPER.

See *Carriage of Goods*, Nos. 19, 20.

SHIPPING CASUALTIES ACT 1879.

See *Wrecks and Casualties.*

SHORTHAND WRITER.

See *Practice* No. 9.

SLAVE TRADE.

1. *Seizure — Place — Justification — Evidence — Examination of papers.*—Evidence which may justify a seizure on the high seas is not sufficient when the vessel is in harbour and there is an opportunity of examining her papers. (P. C.) *The Ovarense; Reg. and Loggie* v. *Casaca and others* 308

2. *Seizure—Portuguese ship—British port—Slave Trade Act*, 1873, *s.* 4.—Sect. 4 of the Slave Trade Act 1873 does not apply to Portuguese vessels seized in a British port. (P. C.) *The Ovarense; Reg. and Loggie* v. *Casaca and others*..... 308

3 *Seizure—Primâ facie evidence—Treaty—Slave Trade Act*, 1873.—*Costs and Damages.*—The presence of the articles enumerated in the treaty, and the Slave Trade Act 1873, as *primâ facie* evidence of slave trading, do not prevent a seizor of a vessel in port being condemned in costs and damages, if with reasonable care he could have satisfied himself that the vessel's employment was lawful. (P. C.) *The Ovarense; Reg. and Loggie* v. *Casaca and others* 308

4. *Seizure—Treaty with Portugal—Port or territorial waters.*—The treaty with Portugal concerning the slave trade relates to seizures on the high seas and not in port or territorial waters. (Priv. Co.) *The Ovarense; Reg. and Loggie* v. *Casaca and others* 308

SLAVE TRADE ACT 1873.

See *Slave Trade*, Nos. 2, 3.

SMUGGLING.

See *Marine Insurance*, No. 2.

SOLICITOR.

See *Salvage*, Nos. 5, 6.

SPAR DECK.

See *Limitation of Liability*, No. 10.

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1. *Duration of transit—Actual Delivery—Destination.*—Till the goods are actually delivered to the purchaser or his agent the *transitus* is not at an end, and it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor. (Ct. of App. from Bank.) *Ex parte Rosevear China Clay Company; Re Cock*..... 144

2. *Duration of transit—Cargo held for freight—Notice to shipowner—Delivery orders—Sub-sale—Unpaid vendor.*—Where the master of a ship has still the character of carrier and retains a lien for freight upon the cargo, the fact of a subsale and handing over of a delivery order for the cargo to the sub-purchaser, and actual receipt by him of part, does not put an end to the *transitus*, and the unpaid vendor has, upon giving the due notice, the right to stop the purchase money payable and still unpaid by the sub-purchaser, after discharging intermediate equities. (Ct. of App from Bank.) *Ex parte Falk; Re Kiell*..... 280

3. *Duration of transit—Constructive delivery—Agreement between carrier and consignee—Warehouseman.*—Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier, and it is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold for the consignee not as a carrier but as his agent. The same principle applies to goods placed in possession of a warehouseman or wharfinger. (Ct. of App.) *Ex parte Cooper; Re M'Laren*.....*page* 63

4. *Duration of transit—Constructive delivery—Free on board—Ship chartered by purchaser.*—Delivery of goods by a vendor on board a ship chartered by the purchaser is only constructive, and not actual, delivery to the purchaser, inasmuch as the contract with the master of the ship to carry the goods does not make him the agent of the purchaser, and so long as the goods remain in the hands of the master of the ship as carrier, the vendor's right of stoppage *in transitu* continues. Ct. of App. from Bank.) *Ex parte Rosevear China Clay Company; Re Cock* 144

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TUG AND TOW.

1. *Negligence of tug—Contributory negligence of tow—Orders of person in charge of tow.*—Where a tug was engaged to tow a ship in charge of a compulsory pilot into harbour, and the tug attempted to tow the ship across a bank instead of round it, and the ship struck and was damaged, and it appeared that although the pilot signalled the tug to alter her course he did not, on seeing the signals disregarded, cast off the tow rope: Held, that as the casting off would have had to be done at the last moment there was no such contributory negligence on the part of the ship as prevented her from recovering from the tug owners, although the nautical assessors considered the pilot's conduct negligent. (H. L.) *Spaight* v. *Tedcastle*..... page 406

2. *Negligence of tug—Orders as to navigation—Person in charge of tow—Course—Discretion of tug—Semble*, the person in charge of the tow may give express orders as to the course, and the tug is bound to obey them, but in the absence of such orders the tug has the general direction of the course, and is bound to tow the vessel in a safe and prudent course. (Ct. of App.) *The Robert Dixon*..... page 246

3. *Specific agreement—Delay—Extra remuneration.*—Where a tug contracts to perform a specified towage for a specific sum, and from causes beyond the control of tug or tow, the completion of the contract is delayed, the tug is not entitled to extra remuneration for such delay, provided it was reasonable under the circumstances. (Adm.) *The Hjemmett*..... 274

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5. *Warranty—Power of tug—Delay—Master—Agreement.*—Where a master mariner agreed with certain owners of barges to take charge thereof, for a voyage across the Atlantic, the owners to provide a specified tug for towing, and the tug, by reason of defects unknown at the time of contracting, prolonged the voyage longer than was anticipated: Held, that there was no implied warranty that the tug should be reasonably efficient for the purposes of the voyage, and the master mariner was not entitled to recover the loss incurred by the prolongation. (Ct. of App., reversing Q. B. Div.) *Robertson* v. *Amazon Tug and Lighterage Company Limited*.....448, 496

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WAGES.

1. *Deductions—Illness of seaman—Bad provisions—Board of Trade—Hospital expenses—Merchant Shipping Act* 1854, *ss.* 236 *and* 228.—A seaman, who from the effects of bad food supplied on board ship becomes seriously ill and is landed at a port abroad, and is there tended in hospital, the expenses for such attendance and for his passage home being paid by the Board of Trade or on their behalf, has received an injury in the service of the ship, within the meaning of the Merchant Shipping Act 1854, s. 228, sub-sect. 1, and the Board of Trade are not entitled on receiving his wages to deduct therefrom such expenses. (Q. B. Div.) *The Secretary of the Board of Trade* (app.) v. *Sundholm* (resp.) .....*page* 196

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1. *Shipping Casualties Act* 1879—*Certificate of officer—Suspension—Default not contributory to casualty—Jurisdiction.*—Where the report of those who hold an investigation into a shipping casualty under the Shipping Casualties Act 1879 does not show that a default on the part of an officer directly or by necessary inference causes or contributes to the casualty itself, his certificate cannot be taken away or suspended. An officer's certificate cannot be suspended for a default appearing in the investigation which does not cause or contribute to the casualty. (Adm.) *The Arizona* .....*page* 269
2. *Shipping Casualties Act* 1879—*Appeal—Costs.*—In appeals under the Shipping Casualties Act 1879 costs of such appeals will, as a rule, follow the event. (P. D. & Adm. Div.) *The Arizona* 269

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REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by J. P. Aspinall, F. W. Raikes, and W. Appleton, Esqrs., Barristers-at-Law.

Friday, July 19, 1878.

(Before James, Brett, and Cotton, L.JJ.)

THE FRANCONIA.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY.)

Limitation of liability—Steamships—Gross tonnage—Deductions—Crew space—Spar deck—Foreign ships—British measurements—17 & 18 *Vict. c.* 104, *ss.* 20, 21, 23, 26, 29, 504, 505; 25 & 26 *Vict. c.* 63, *ss.* 2, 3, 54, 60, 61; 30 & 31 *Vict. c.* 124, *ss.* 1, 9; 35 & 36 *Vict. c.* 73, *s.* 3—*Order in Council 26th June* 1873.

The "gross tonnage without deduction on account of engine-room" on which the limited liability of owners of steamships is calculated is the total capacity of the ship obtained by the rules of measurement given in the Merchant Shipping Act 1854, *and including the space or spaces occupied by the crew, unless the provisions of sect.* 9 *of the Merchant Shipping Act* 1867 *with regard to such spaces are complied with.*

Semble, it is immaterial, if the provisions of sect. 6 *of the Merchant Shipping Act* 1867 *are complied with, whether the space in question is in "a break or poop, or any other permanent closed-in space on the upper deck solely appropriated to the berthing of the crew" (sect.* 21 (4) *Merchant Shipping Act* 1854), *or is a portion of the space beneath a "spar deck" (sect.* 21 (5) *Merchant Shipping Act* 1854).

Sect. 9 *of the Merchant Shipping Act* 1867 *applies to foreign ships seeking to limit the extent of their liability in an English court.*

An order in Council purporting to be made in pursuance of sect. 60 *of the Merchant Shipping Act* 1862 *is valid notwithstanding that it recites that the British rules as to measurement have been adopted. . . . "with the exception of a slight difference in the mode of estimating the allowance of engine-room."*

Burrell v. Simpson (*Cas. in Court of Ses. (Sc.) ser.* 4 *vol. p.* 177) *explained.*

THIS was a suit for the limitation of liability by the owners of the German steamship *Franconia*, which had been found to blame for a collision in the English Channel, which took place between her and the *Strathclyde*, and in consequence of which the *Strathclyde* sunk, and several of the passengers and crew on board were drowned. The facts of the collision will be found reported *The Franconia* (*ante*, vol. 3, p. 285; L. Rep. 2 P. Div. 8; 35 L. T. Rep. N.S. 360). The collision gave rise to criminal proceedings against the captain of the *Franconia* which are reported *Reg* v. *Keyn* (L. Rep. 2 Ex. Div. 63; 13 Cox C. C. 403), and also to proceedings under Lord Campbell's Act by the representatives of the deceased passengers and crew against the owners of the *Franconia*, reported *Mary Ann Harris, Administratrix of James Sullivan, deceased* v. *The Hamburg-Amerikanische Packetfahrt-Actien Giesellschaft* (L. Rep. 2 C. P. Div. 173), and subsequently to proceedings *in rem* against the ship by some persons similarly interested, which are reported *The Franconia* (*ante*, vol. 3, pp. 415, 435; L. Rep. 2 P. Div. 163; 36 L. T. Rep. N.S. 445, 640).

The *Franconia* was a spar-decked ship—that is, a ship having a deck above the tonnage deck: and her crew were berthed between the spar deck and the tonnage deck, occupying a space of $154\frac{33}{100}$ tons. The total capacity of the ship according to her German certificate was $3098\frac{45}{100}$ tons, made up as follows: Space under the measurement (tonnage) deck, $228\frac{3}{100}$; space between decks (spar deck and tonnage deck), $848\frac{1}{100}$; round house (above spar deck), $15\frac{99}{100}$ tons; one other erection (above spar deck), $6\frac{12}{100}$—total, $3098\frac{45}{100}$. Then follow as deductions: Berths of crew, which are between decks (spar and tonnage), $154\frac{33}{100}$; engines, boilers, and fixed coal bunkers, $844\frac{8}{100}$. No question arose as to this last deduction; but, deducting $154\frac{33}{100}$ from $3098\frac{45}{100}$ the remainder is $2944\frac{12}{100}$; and of this "remaining tonnage" $154\frac{33}{100}$ is more than $\frac{1}{20}$th by $7\frac{13}{100}$ tons.

The writ in the suit for limitation of liability was issued on 20th Nov. 1877, and a statement of claim delivered by the owners of the *Franconia* on 23rd Nov. 1877, in which they alleged that all claims for loss of life or personal injury were settled with the various claimants or otherwise disposed of, and praying a decree

limiting their liability to 8*l.* per ton on a gross tonnage of $3098\frac{45}{100}$ tons.

The cause was heard on 21st Dec. 1877, and a decree made limiting the liability of the owners of the *Franconia* to 24,788*l.*, being 8*l.* per ton on the gross tonnage of $3098\frac{45}{100}$. Subsequently the plaintiffs ascertained that a portion of the tonnage included in the $3099\frac{45}{100}$ was space occupied by the crew, below the upper or spar deck of the ship, and on the 26th Feb. 1878 an order was made allowing an amended statement of claim to be delivered to enable the court to decide at a rehearing whether a deduction could or could not be made for such "crew space" in estimating the liability of the vessel for damages. The amended claim stated the gross tonnage of the *Franconia* without deduction on account of engine room space to be $2944\frac{12}{100}$, and no more. The plaintiffs now moved the court to amend the former decree by inserting the figures 23,553*l.* for the figures 24,788*l.* wherever the same occurred in the former judgment.

The motion was heard on the 14th and 22nd May 1878. The sections of the Merchant Shipping Act 1854, and of the various Acts amending the same, on which the arguments turned and the judgment was based, are as follows:

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104):

Measurement of Tonnage.

Tonnage Deck; Feet, Decimals.

Sect. 20. Throughout the following rules the tonnage deck shall be taken to be the upper deck in ships which have less than three decks, and to be the second deck from below in all other ships; and in carrying such rules into effect all measurements shall be taken in feet and fractions of feet, and all fractions of feet shall be expressed in decimals.

Rule I.—*For Ships to be registered and other Ships of which the Hold is clear.*

Sect. 21. The tonnage of every ship to be registered, with the exceptions mentioned in the next section, shall previously to her being registered be ascertained by the following rule, hereinafter called Rule I.; and the tonnage of every ship to which such rule can be applied, whether she is about to be registered or not, shall be ascertained by the same rule.

Sub-sects. 1, 2, 3 give the measurements to be taken and calculations made for ascertaining the tonnage beneath the tonnage deck, and sub-sect. 3 concludes as follows:

And the quotient being the tonnage under the tonnage deck shall be deemed to be the register tonnage of the ship, subject to the additions and deductions hereinafter mentioned.

Poop and any other closed in space.

(4.) If there be a break, a poop, or any other permanent closed-in space on the upper deck, available for cargo or stores, or for the berthing or accomodation of passengers or crews, the tonnage of such space shall be ascertained as follows:

Then follow the measurements to be taken, and calculations made, to ascertain the tonnage of any such space or spaces, and the sub-section concludes as follows:

And the quotient shall be deemed to be the tonnage of such space, and shall be added to the tonnage under the tonnage deck, ascertained as aforesaid, subject to the following provisoes: First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; and, secondly, that nothing shall be added in respect of any building erected for the shelter of deck passengers, and approved by the Board of Trade.

In cases of Two or more Decks.

(5.) If the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained as follows:

Then follow the measurements to be taken, &c., as before, and the sub-section concludes:

And the quotient shall be deemed to be the tonnage of such space, and shall be added to the other tonnage of the ship ascertained as aforesaid; and if the ship has more than three decks, the tonnage of each space between decks above the tonnage deck shall be severally ascertained in the manner above described, and shall be added to the tonnage of the ship ascertained as aforesaid.

Rule III.—*Allowance for engine room in steamers.*

Sect. 23. In every ship propelled by steam or other power requiring engine room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder shall be deemed to be the register tonnage of such ship; and such deduction shall be estimated as follows—that is to say:

To be rateable in ordinary Steamers.

(*a*) As regards ships propelled by paddle wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above 20 per cent. and under 30 per cent. of the gross tonnage of the ship, such deductions shall be thirty-seven one-hundredths of such gross tonnage; and in ships propelled by screws in which the tonnage of such space is above 13 per cent. and under 20 per cent. of such gross tonnage, such deduction shall be thirty-two one-hundredths of such gross tonnage.

(*b*) Contains provisions for measuring and calculating the engine space in certain exceptional cases.

Tonnage when once ascertained to be ever after deemed the Tonnage.

Sect. 26. Whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of this act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be remeasured, and her tonnage determined and registered according to the rules hereinbefore contained in that behalf.

Sect. 29. The Commissioners of Customs may, with the sanction of the Treasurer, appoint such persons to superintend the survey and admeasurements of ships as they think fit; and may, with the approval of the Board of Trade, make such regulations for that purpose as may be necessary; and also with the like approval make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted.

The Merchant Shipping Act 1862 (25 & 26 Vict. c. 63):

Sect. 2. This Act may be cited as "The Merchant Shipping Act Amendment Act 1862," and shall be construed with and as part of "The Merchant Shipping Act 1854," hereinafter termed the Principal Act.

Sect. 3 repeals certain enactments contained in schedule A.; *inter alia*, sects. 504, 505, Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), which were as follows:

Limitation of Liability.

Measure of Owner's Liability.

Sect. 504. No owner of any sea going ship or share therein shall, in cases where all or any of the following events occur without his actual fault or privity (that is to say),

(1) Where any loss of life or personal injury is caused to any person being carried in such ship;
(2) Where any damages or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;
(3) Where any loss of life or personal injury is by reason of the improper navigation of such sea-going ship as aforesaid caused to any person carried in any other ship or boat;
(4) Where any loss or damage is by reason of any such improper navigation of such sea-going ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat,

Be answerable in damages to an extent beyond the value of his ship and the freight due or to grow due in respect of such ship during the voyage which at the time of the happening of any such events as aforesaid is in prosecution or contracted for, subject to the following proviso (that is to say), that in no case where any such liability as aforesaid is incurred in respect of loss of life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than 15*l.* per registered ton.

Value of Carriage of Goods and Passage Money to be considered as Freight.

Sect. 505. For the purpose of the ninth part of this Act the freight shall be deemed to include the value of the carriage of any goods or merchandise belonging to the owners of the ship, passage money, and also the hire due or to grow due under or by virtue of any contract, except only such hire, in the case of a ship hired for time, as may not begin to be earned until the expiration of six months after such loss or damage.

Sect. 54 (which supplied the place of sects. 504, 505, given above):

LIABILITY OF SHIPOWNERS.

The owners of any ships, whether British or oreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say:

Then follow sub-sects. (1) to (4) *verbatim*, the same as those of sect. 504 of the Act of 1854, and the section continues:

Be answerable in damages in respect of loss of life or personal injury, either alone or together, or the loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage, nor in respect or loss or damage to ship's goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggegate amount exceeding 8*l.* for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of the engine room.

In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall for the purpose of this section be deemed to be the tonnage of such ship.

In the case of any foreign ship which has not been and cannot be measured under British law, the Surveyor-General of Tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by the direction of the court hearing the case such evidence concerning the dimensions of the ship as may be found practicable to furnish give a certificate under his hand stating what would in his opinion have been the tonnage of such ship, if she had been duly measured according to British law, and the tonnage so stated in such certificate shall for the purposes of this section be deemed to be the tonnage of such ship.

Sect. 60. Whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the Government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty by an Order in Council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry, or other national papers, and thereupon it shall no longer be necessary for such ships to be re-measured in any port or place in Her Majesty's dominions, but such ship shall be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes, in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships.

ORDER IN COUNCIL.

At the Court at Windsor, the 26th day of June 1873, present: The Queen's most excellent Majesty in Council, Whereas by the Merchant Shipping Act Amendment Act 1862, it is enacted:

And then, after reciting sect. 60 of that Act, (*ubi sup.*) proceeds:

And whereas it has been made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships now in force under the Merchant Shipping Act 1854, have been adopted by the Government of His Majesty the German Emperor, with the exception of a slight difference in the mode of estimating the allowance for engine room, and such rules are now in force in that country, having come into operation on the 1st day of January 1873, Her Majesty is hereby pleased, by and with the advice of her Privy Council, to direct as follows:

(1) As regards sailing ships: That merchant sailing ships of the said German Empire, the measurement whereof, after the first day of January 1873, has been ascertained and denoted in the registers and other national papers of such sailing ships, testified by the date thereof, shall be deemed to be of the tonnage denoted in such registers and other national papers in the same manner and to the same extent and for the same purpose in, to, and for which the tonnage denoted in the certificate of registry of British sailing ships is deemed to be the tonnage of such ships.
(2) As regards steamships: That merchant ships belonging to the said German Empire which are propelled by steam, or any other power requiring engine room, the measurement whereof shall, after the said 1st day of January 1873, have been ascertained and denoted in the registers and other national papers of such steamships, testified by the dates thereof, shall be deemed to be of the tonnage denoted in such registers or other national papers in the same manner and to the same extent and for the same purpose in, to, and for which the tonnage denoted in the certificate of registry of British ships is deemed to be the tonnage of such ships, provided nevertheless that if the owner or master of any such German steamships desires the deduction for engine room in his ships to be estimated under the rules for engine room measurement and deduction applicable to British ships instead of under the German rule, the engine room shall be measured and the deduction calculated according to the British rules.

Merchant Shipping Act 1867 (30 & 31 Vict. c. 124):

Sect. 1. This Act may be cited as the Merchant Shipping Act 1867, and shall be construed with and as part of the Merchant Shipping Act 1854, hereinafter termed the principal Act.

Place appropriated to Seamen to have a certain space for each man, and to be properly constructed and kept clean.

Sect. 9. The following rules shall be observed with respect to accommodation on board British ships. That is to say:

1. Every place in any ship occupied by seamen or apprentices, and appropriated to their use, shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet and of not less than twelve superficial feet, measured on the deck or floor of such place.
2. Every such place shall be such as to make the space aforesaid available for the proper accommodation of the men who are to occupy it, shall be securely constructed, properly lighted and ventilated, properly protected from weather and sea, and as

far as practicable properly shut off and protected from effluvium which may be caused by cargo or bilge water.

3. No such place as aforesaid shall be deemed to be such as to authorise a deduction from registered tonnage, under the provisions hereinafter contained unless there is or are in the ship one or more properly constructed privy or privies for the use of the crew, such privy or privies to be of such number and of such construction as may be approved by the surveyor hereinafter mentioned.
4. Every such place shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors appointed by the Board of Trade under part iv. of the principal Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of customs a certificate to that effect, and thereupon such space shall be deducted from the registered tonnage.
5. No such deduction from tonnage as aforesaid shall be authorised unless there is permanently cut in a beam or cut in or painted on or over the doorway or hatchway of every such place the number of men which it is constructed to accommodate, with the words "certified to accommodate seamen."

Merchant Shipping Act 1872 (35 & 36 Vict. c. 73):

Transfer to Board of Trade of duties of Commissioners of Customs with respect to measurement of ships.

Sect. 3. The twenty-third, twenty-seventh, twenty-eight, and twenty-ninth sections of the Merchant Shipping Act 1854, the fourteenth section of the Merchant Shipping Act Amendment Act 1855, and the fourth section of the Merchant Shipping Act 1871, shall be read and construed as if the Board of Trade were therein named instead of the Commissioners of Customs.

May 14, 22, *and* 28, 1878.—*W. G. F. Phillimore* and *Stubbs* for the plaintiffs, owners of the *Franconia*. — The question as to whether, in estimating the tonnage to which the limitation of liability applies, "crew space" is to be deducted or not in the case of steamers, is one of considerable importance. In this case the "crew space" represents more than 154 tons, or an amount of over 1232*l*. The final clause of sect. 54 of the Act 1862 (25 & 26 Vict. c. 63) shows that the tonnage of the vessel is to be arrived at on the same principles as those which regulate the tonnage of British vessels and therefore, by the principles laid down in sects. 20-23 of the Act of 1854 (17 & 18 Vict. c. 104). The *Franconia* has three decks, and therefore, by sect. 20, her tonnage deck is the second deck from below. Sect. 21 (sub-sects. 1-3) show how to obtain the cubical contents, *i.e.*, the tonnage of the space below the tonnage deck, aad declares that that space shall be deemed to be the registered tonnage of the ship, subject to certain additions and deductions; what those additions and deductions are, in the case of all ships, are given by sect. 21, sub-sects. 4 and 5, and, in addition, for steamers, by sect. 23, Our contention is, first, that "gross tonnage, without deduction for engine room, is the tonnage ascertained by sect. 21 (1) with the proper deductions for crew space. This is shown by sect. 23 (3), which speaks of deductions to be made in the plural, and therefore cannot apply to engine room space alone, but to crew space and engine room space separately. A sailing ship in no case would pay on her crew space, because it is deducted in her register from the amount of her total tonnage, and the remainder is called her registered tonnage. Moreover, the Board of Trade, who now have the functions of the Commissioners of Customs vested in them by sect. 3 of the Merchant Shipping Act 1872 (35 & 36 Vict. c. 73), within certain limits can allow such deductions in the measurement (sect. 29 of the Merchant Shipping Act 1854, 17 & 18 Vict, c. 104), though such deductions must be, as to measurement, in accordance with the system of measurement prescribed by the Act itself: (*The City of Dublin Steam Packet Company* v. *Thompson*, 2 Mar. Law Cas. O. S. 247, 412; L. Rep. 1 C. P. 355; 12 L. T. Rep. N. S. 849; 15 L. T. Rep. N. S. 112.) That it was the intention of the Legislature that crew space should in all cases be deducted is apparent from the provisions contained in sect. 9 of the Act of 1867 (30 & 31 Vict. c. 124); and second, assuming that we are entitled to deduct the crew space at all, the fact that in this vessel the crew are not berthed in permanently closed-in spaces on the upper deck wholly appropriated to their use, but in a portion of the vessel above the tonnage deck but beneath the spar deck, we are still entitled to deduct from our total tonnage the space so occupied. Sect. 23 (4) speaks of a species of erections above the level of the tonnage deck, and says that those erections used for the crew are not to be added in estimating the tonnage of the ship. Sect. 23 (5) speaks of the particular case in which the erections, instead of being isolated, are continuous, but must be read subject to the general provisions of sect. 23 (4). It is true that sect. 9 of the Merchant Shipping Act 1867 (30 & 31 Vict. c. 124) applies only to British ships, and that therefore this vessel, the *Franconia*, is not bound by its provisions, but it is explanatory of the previous regulations so far as crew space is concerned, and shows that the intention of the Legislature was to encourage proper accommodation being given to the crew, by allowing for it whether under a spar deck or in a house on deck. What the tonnage of the vessel is appears from her certificate of register, which states what the crew space is. The court cannot go behind the certificate after it has been adopted by the Order in Council, as is here the case by the Order in Council of June 26, 1873 (*ubi sup.*) The only difference is as to engine rome space, and this, as no deduction is claimed for it, does not effect this case. The whole object of the system of measurement is to obtain the amount of tonnage on which light, harbour, and other dues are to be paid; the interest of the shipowner is to make this as small as possible, and at the same time to carry as much tonnage for freight as possible, therefore the interests of the crew would suffer by the space allotted to them being reduced so as to make as much as possible of the vessel available for cargo. The Legislature protects the seamen from this tendency by first of all saying in the Act of 1854, that crew space should not be included in the registered tonnage on which dues are payable, and then in the Act of 1862 that in British ships it shall only not be included provided the surveyors are satisfied with its sufficiency. The case has already been decided in accordance with our contention in the Court of Sessions in Scotland, which had to decide on these sections of the Act (*Burrell* v. *Simpson*, Cases in Court of Session, series 4, vol. 4, p. 177), and the parties concerned must have been satisfied that the judgment could not be impeached, as, although that case was carried on Appeal to the House of Lords (*sub nom. Simpson and others* v. *Thomson and others*, *ante*, vol. 3, p. 267; 3 App. Cas. 279; 38 L. T. Rep. N. S. 1), on another point there was no appeal

from the decision so far as the measurement was concerned.

E. C. Clarkson (with him *Butt*, Q.C.) for defendants.—There are two questions in the case. First, can any steamer, in estimating the tonnage in which her liability is limited, deduct for the space occupied by the crew? Secondly, supposing that under certain circumstances of build and equipment steamers may make such a deduction, can this steamer do so? The language of sect. 54 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63) is clear and precise. It says that "such tonnage"—that is, the tonnage on which the liability, limited to 8*l.* per ton, is to be calculated—is "to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage." So far as practice goes, it was, until the decision of the recent case in Scotland of *Burrell* v. *Simpson* (*ubi sup.*), universal that steamers paid on the whole of their gross tonnage in these suits for limitation of liability, both in this court and in the Court of Chancery. The Scotch case does not govern the decisions of this court; but, even if it did, it only goes so far as to say that spaces properly deducted, or rather in respect of which "nothing shall be added"—*i.e.*, spaces mentioned in sect. 21 (4) of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) and "solely appropriated to the berthing of the crew," &c.; but the crew space here can in no case be deducted—it is a portion of the space below the spar deck, the directions for the measurement of which are given in sect 21 (5) of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and which that section expressly says "shall be added to the other tonnage of the ship." It is not contrary to natural justice that a steamship should have to pay on her crew space while a sailing vessel has not. The liability of a shipowner, which originally was unlimited, was by sect. 504 of the Merchant Shipping Act 1854 limited to the value of the ship and freight; that is, it was not a function of the tonnage at all but of the value. Now, in consequence of her valuable machinery, a steamship is far more valuable per ton than a sailing ship of the same size. Therefore, assuming that the average value of a sailing ship is fairly estimated at 8*l.* per ton, the average value of a steamship would fairly be estimated at more than 8*l.* per ton; and it would not have been inequitable if the Legislature, when they repealed that section (sect. 504) and substituted for it sect. 54 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), had said that, whilst sailing vessels should have their liability limited to 8*l.* per ton, steamers should have theirs limited at some higher rate per ton. Instead of adopting that course, the Legislature has arrived at approximately the same result by enacting that steamers shall pay on their gross tonnage and sailing vessels on their registered tonnage only. In sect. 23 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) the amount of deduction for engine space is given, and this is to "be deducted from the gross tonnage ascertained as aforesaid," that is, by sect. 21, by not adding to the tonnage below the tonnage deck the spaces occupied solely by the crew if above that deck, sect. 21 (4), where such spaces are breaks, poops, or other permanent and separate closed-in spaces, but by adding the whole space under the spar deck if the vessel has a spar deck, s. 21 (5). But even if the crew space were to be deducted for the purposes of measurement on which tonnage dues are to be paid, it does not follow that they are to be deducted for the purpose of measuring the tonnage on which 8*l.* per ton has to be paid in part compensation of a tort; tonnage dues are naturally payable only on a vessel's actually available carrying capacity; liability for a tort should bear a relation to the value of the property, and so whereas sect. 23 of the Act of 1854 speaks of the "gross tonnage ascertained as aforesaid," sect. 54 of the Act of 1862 speaks simply of the "gross tonnage," that is, the whole contents of the ship without any deduction whatever. The forms at present in use by the Board of Trade show at a glance what this "gross tonnage" is, and the *par contra* the deductions for crew and engine space, leaving as a result the "register tonnage" on which dues are to be paid. As regards this particular ship, at all events, these deductions cannot be made. The Order in Council referred to as showing that the tonnage denoted by the German certificate of registry should be deemed to be the real tonnage of the vessel is altogether *ultra vires*; it purports to be made in pursuance of sect. 60 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), but the condition required by that section is that the rules of measurement contained in the principal Act should be adopted by the Government of the country to the ships of which the Order in Council is to apply. In this case the preamble of the Order in Council itself speaks of a "slight difference" in the method of measurement, showing, therefore, that the rules of measurement have not been adopted. [Sir R. PHILLIMORE.—The Order in Council goes on to say, "in the mode of estimating the allowance for engine room," that does not mean necessarily that the measurement of the spaces themselves are different.] On the face of the Order in Council it appears that there is a difference, that difference must be in some way a difference in the mode of measurement; but even assuming for the moment that the Order in Council is valid, that cannot avail the plaintiffs here, if in point of fact the measurement is not the same as it would be in all respects if this were a British ship, that is, if considered by the rules of measurement given in the Act "it is discovered that the tonnage of such ships has been erroneously computed." By the very words of the Order in Council such appears to be the case with regard to all German ships, and therefore, by sect. 20 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), the register is not conclusive, but the ship must be "re-measured, according to the rules" contained in sect. 21. The regulations of sect. 9 of the Merchant Shipping Act 1867 (30 & 31 Vict. c. 124), certainly so far as British ships are concerned, effect a modification of sect. 21 (5) by allowing to British ships a deduction for crew space wherever situated, but only to such ships as comply with the conditions contained in subsects. 4 and 5. This ship being a foreign vessel, cannot take advantage of these relaxations of sect. 21 (5); or, if it is alleged that the Order in Council brings her within the scope of the section, she has forfeited her right to claim the deduction, for it has never been contended that she has complied with the conditions subject to which they are

granted. In any event, the crew space occupying as it does more than one-twentieth of the vessel's capacity, there is a small excess to be added to the tonnage on which the plaintiffs seek to limit their liability. Sect. 21 (4).

Stubbs in reply.—The use of the words in sect. 54 Merchant Shipping Act 1862, "without deduction on account of engine room," shows that the Legislature must have contemplated some other deductions, as in the case of sailing ships, or else it would have been simpler and clearer to have said, "without any deduction whatever." The limitation of liability to 8*l.* per ton is not a question of abstract justice—that was perhaps better satisfied by the old law of satisfaction *in solido*—but an enactment passed to encourage trade, and it naturally is the tendency of that policy to foster especially the more valuable class of vessels, and therefore it is not surprising that the liability of all alike should be limited to 8*l.* per ton.

Sir R. Phillimore announced that he would take time to consider his judgment.

Clarkson applied that a decree might be made in general terms for the amount due under the Merchant Shipping Acts, so as to enable the necessary advertisements to issue, and the claims to be brought in.

The plaintiffs did not oppose the application.

Sir R. Phillimore.—I shall make a decree in he terms prayed, and give six weeks for the claims to be brought in.

May 28.—Sir R. Phillimore.—In this case the owners of the *Franconia* having admitted their liability for damage done to the defendants, bring a suit for the limitation of that liability under the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) sect. 54. They have stated, erroneously as they contend, the tonnage of the *Franconia* to be 3098 tons; and they now claim to have this error rectified by reducing the tonnage to 2944 tons, the effect of which is to lessen their liability by 154 tons, and a question of some difficulty and novelty is raised, whether for the purpose of estimating the tonnage for which the plaintiffs in this suit are liable, the space solely appropriated to the berthing of the crews is or is not wholly or in part to be deducted. The statute just referred to, after limiting the liability for personal injury to an aggregate amount of 15*l.*, and in the case of damage to goods to an aggregate amount of 8*l.* for each ton of the ship's tonnage, proceeds as follows: "Such tonnage to be registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage, without deduction on account of engine room. In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall for the purposes of this section be deemed to be the tonnage of such ship." The *Franconia* is a steamship. The question is, what is the meaning of the term "gross" applied to the tonnage? In order to ascertain the meaning of this term regard must be had to various sections of the Merchant Shipping Acts. The 20th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) enacts that, "Throughout the following rules the tonnage deck shall be taken to be the upper deck in ships which have less than three decks, and to be the second deck from below in all other ships."

Now, the *Franconia* has three decks, and therefore her tonnage deck will be the second deck from below. By the 21st section the tonnage is to be ascertained in a particular way by rule 1, sub-sect. 2; by sub-sect. 3 of this rule the register tonnage is to be ascertained by a computation of areas therein stated. But the tonnage so ascertained is to be subject to the additions and deductions thereinafter mentioned; to these I will presently refer. In sub-sect. 4 it is provided that, "If there be a break, a poop, or any other permanent closed-in space on the upper deck, available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained" in the manner there mentioned, "and shall be added to the tonnage under the tonnage deck ascertained as aforesaid, subject to the following provisoes: First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship; and, in case of such excess, the excess only shall be added;" and another provision in regard to deck passengers, which does not concern this case. These clauses apply to the register tonnage of all ships. The 23rd section introduces a new provision for steamships, and enacts that, "An allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, ascertained as aforesaid," and the remainder shall be deemed to be the register tonnage of such ship;" and then follow rules for estimating the deduction. Gross tonnage is, I think, to be ascertained under the provisions of sect. 21, and one of these provisions, under sub-sect. 4, is to deduct the space solely appropriated to the berthing of the crew, so far as it does not exceed one-twentieth of the remaining tonnage of the ship. Returning, then, to the 54th section of the Act of 1862, which enacts the "tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships, the gross tonnage without deduction on account of engine room," it is to be observed that the Act of 1862 (25 & 26 Vict. c. 63), provides, sect. 1, "That it shall be construed with, and as part of, the Act of 1854." The contention that according to this language the tonnage of the steamer is to be taken without deduction either for engine room or for berthage is, I think, erroneous, because the words "gross tonnage," as there stated, ought to have the same construction put upon them as clearly must be put upon them when used in sect. 23 of the Act of 1854.

I agree with the opinion expressed by the Lords of Session in the recent case (1876) of *Burrell Simpson and Co.* (Cases in Court of Session, Series 4, vol. 4, p. 177). The Lord President says (p. 184): "What is meant here, I apprehend, by gross tonnage, without deduction of engine room, means just the actual tonnage without deduction of engine room, or, in other words, the contrast between a sailing ship in this clause and a steamship is this, that in the case of a sailing ship the registered tonnage is to be taken — in the case of a steamship it is not to be the registered tonnage, but what is called the gross tonnage, without the deduction of engine room, which, if deducted, should make it the re-

gistered tonnage; in short, it is the want of the deduction of engine room that makes this gross tonnage instead of being registered tonnage."

It has been contended that, admitting the law to be as I have stated it in this case, inasmuch as the *Franconia* is a spar-decked ship, there is no closed-in place solely appropriated to the berthing of the crew according to the true meaning of the words in sub-sect. 4, sect. 21 of the Act of 1854 (17 & 18 Vict. c. 104); but I am unable to adopt this opinion, having regard to all the provisions in the 20th, 21st, and 23rd sections. I think that the deduction from the tonnage in cases of closed-in spaces are applicable to the berthing space provided in a spar-decked ship.

Lastly, with regard to the argument respecting the certificate of registry of this German vessel, the 60th section of the Act of 1862 (25 & 26 Vict. c. 63) provides that the Queen may by Order in Council direct that when the English rules for the measurement of tonnage of merchant ships have been adopted by a foreign government, "the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry" to all intents and purposes as if they were British ships. These measurement rules were extended to Germany by an Order in Council dated the 26th June 1873. It has been contended that the Order in Council referred to is on the face of it invalid, inasmuch as it contains the words "with the exception of a slight difference in the mode of estimating the allowance for engine room," thereby exceeding the authority conferred upon it by the statute. I am not inclined to put so rigid a construction upon the Order in Council, which in all substantial respects complies with the directions of the statute. Upon the whole I am of opinion that the plaintiffs are entititled to the reduction of the tonnage measurement for which they pray.

It only remains to observe that it was admitted that there would be a balance of about seven tons in favour of the defendants under the provisions of sub-sect. 4 of rule 1.

From this decision the owners of the *Strathclyde* appealed.

In addition to the sections above set out the following was referred to on the hearing of the appeal:

25 & 26 Vict. c. 63, sect. 61 (Merchant Shipping Act 1862):

Whenever an Order in Council has been issued under this Act, applying any provision of this Act, or any regulation made by or in pursuance of the Act to the ships of any foreign country, such ships shall in all cases arising in any British court be deemed to be subject to such provision or regulation, and shall for the purpose of such provision or regulation be treated as if they were British ships.

July 19, 1878.—*Butt*, Q.C. and *F. W. Raikes* (with them *E. C. Clarkson*), for the appellants, the owners of the *Strathclyde*.

Benjamin, Q.C., Dr. *W. G. F. Phillimore*, and *Stubbs* for respondents, owners of the *Franconia*.

The arguments used were substantially the same as those reported in the court below.

James, L.J.—I am of opinion that the judgment of the learned judge of the court below cannot be sustained.

First of all, with regard to the case *Burrell* v. *Simpson* (Cas. in Court of Ses., ser. 4, vol. 4, p. 177), which has been cited to us as decided by the Scotch Court—a court of co-ordinate jurisdiction—on the Act of Parliament in question, which Act applies to all parts of the United Kingdom, that case was also cited to the court below, and upon it, apparently, the learned judge proceeded. When that case, however, is considered it is really no authority because the point which has been raised in this case, as to the difference between a crew space between decks and one above the upper deck was never before the court at all. It was no matter of argument before them and was not referred to in any way in their judgment; and I should rather gather myself, from the absence of all reference to it, and from the nature of the ship, that in point of fact the crew space there was a crew space which was within, clearly within, the section of the original Act (sect. 21 (4), 17 & 18 Vict. c. 104, the Merchant Shipping Act 1854), and that the only point really in dispute as to the tonnage was, whether in a steamship the gross tonnage was to be taken, with or without the deduction for crew space in any event; that is, was it to be the total capacity of the ship, or the register tonnage with the addition of the amount of the deduction on account of engine-room. That seemed to me to be the only point there—that the gross tonnage on a steamer, whatever it is, would have been the same thing as the entire tonnage for registration had she been a sailing ship; that there was in reality no question before the court as to the construction of the Act of Parliament.

I have not heard anything in answer to the argument of Mr. Butt, who pointed out that there was a very distinct provision in the Act of Parliament providing for the deduction of crew space only under circumstances where the crew were lodged on the upper deck; the closed-in spaces in that case would be measured, but those of them which were solely appropriated to the convenience of the crew would not be included for the purposes of tonnage. The terms of the Act apply to that case first, and the whole measurement between docks below, it is quite clear, is to be taken without any deduction whatever, and therefore I myself have no doubt that upon the construction of the Merchant Shipping Act 1854 no deduction ought to be made for the berths of the crew when below the upper or spar deck.

There is a subsequent Act (30 & 31 Vict. c. 124, the Merchant Shipping Act 1867), which makes provision (sect. 9) for the better security and health of English seamen, and it contains very detailed provisions for requiring certain things to be done—certain measurements are to be made, certain inscriptions are to be put on the doors, a certain quantity of air is to be secured to each seaman, and so on; and it further requires that when the ship is measured the spaces should be certified, and when that was done, and all the provisions complied with, the allowance should be made for such spaces, but the allowance is to be made expressly subject to all those conditions. It is not pretended that those conditions have been or could have been complied with by the respondents' ship in this case. It does not appear that the ship ever was examined by a surveyor. It is proved that she had not got the announcement required to be cut or painted on the beam

or doorway that the space was certified to accommodate so many seamen. The provisions of the Act, in short, were not complied with, and the ship is therefore not brought within the Act. That being so, the court below allowed the deduction given by the Act.

Mr. Benjamin contends that, if an English certificate had shown that no deduction had been made, if the English register had shown so much gross tonnage, and so much to be deducted for the berths of the crews, that such a register would be conclusive evidence that all the provisions of the Act of Parliament had been complied with, and that it would not be competent to the court to rectify or go behind the register on the most conclusive evidence, that there had been a mistake somewhere, or some error committed by some of the parties, and that by the effect of the Order in Council the German register is put on the same footing as an English one. I cannot agree with that argument at all. There is a direction given which no doubt *primâ facie* makes provision for foreign ships similar to those for British ships, but all it authorises the Queen in Council to do, and all the Queen in Council has done—as was well put by Mr. Benjamin in the early part of his argument—is to authorise all her officers to accept the actual measurements, things ascertained by manual measurement made by the Germans, exactly the same as if they had been made in England. All we have got before us then is, that the gross tonnage is so much, that the space actually occupied by the crew is so much, that the actual measurement of the space occupied by the engines, boilers, and coal bunkers is so much—that is to say, that the actual measurements of the above-mentioned spaces as given in the German register are to be taken as the true measurements. But the legal results to be drawn from those measurements, that is the legal deduction from them, is a matter not within the function of the Queen in Council to declare. We have before us the statement that these are the actual measurements. We take it to be true. We take the German certificate to be perfectly accurate. On that finding the Queen in Council has directed us to consider that the actual crew space is $154\frac{33}{100}$ tons. That fact being so ascertained, is the space to be deducted, or is it not? And is the question of English law to be determined by the interpretation put by an English court of justice on an Act of Parliament, or to be determined for us by an Order in Council recognising, or giving a sort of recognition, to a German certificate? I think the contention that we are governed by the latter fails, and that we are bound by the Act of Parliament to hold that the berths between decks are not to be deducted for the purposes of this suit.

Brett, L.J.—I cannot agree with the judgment of the learned judge of the Admiralty Court.

I agree with him on one point, which is that the Order in Council here is not *ultra vires*. I cannot adopt the argument of Mr. Butt upon that, and I think that it is not *ultra vires*, for the same reason as that given by the learned judge of the Admiralty Court, namely, that the Order in Council is substantially in accordance with the statute.

That Order in Council is to have a certain effect. It is to have the effect which is stated in sects. 60 and 61 of the Act of 1862 (25 & 26 Vict. c. 63). From sect. 60 it results that the certificates of registry of a German ship are to be accepted in our courts, and the German ship shall thereupon "be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent, and for the same purposes, in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships." Mr. Benjamin argued that, if this were a British register, it would be conclusive. I cannot agree to that. I know of no law which says the register is to be conclusive for all purposes. I apprehend that you are entitled to look behind the register and see whether the provisions of the Act of Parliament on which and in virtue of which the register was made, were complied with. Therefore I think that a German certificate is no more conclusive than a German register would be. We are only to consider and determine the tonnage in the same manner and to the same extent as if the register was a British one. That entitles us to see whether the register was made in accordance with the Act of Parliament authorising it to be made. The question then is whether the register is made according to the provisions of the Act of Parliament, or in other words whether, if this had been a British ship, the register complied with the Act of Parliament.

Now, it is said, first that the berths of the crew ought to be deducted, that is what is called the crew space, by virtue of the statute of 1854 (Merchant Shipping Act 1854, 17 & 18 Vict. c. 104). It seems to me that the crew space in the case cannot be deducted under that Act. I agree that the sect. 21 applies to the measurement both of steam-vessels and sailing ships, and that therefore, where there is a crew space brought within sect. 21, that it is to be deducted before you show what the gross tonnage of the ship is. I take it that sect. 23 gives to a steam-vessel the deduction for engine-room space in addition to the deductions of sect. 21, and that therefore to arrive at the register tonnage of a steam-vessel both these deductions should be made. The question then is whether, to arrive at the gross tonnage, the crew space should be deducted. I think that cannot be done under sect. 21 of the Act of 1854, for the simple reason that the crew space is not on the upper deck.

It is argued that the Scotch case (*Burrell* v. *Simpson*, Cases in Court of Session, ser. 4, vol. 4, p. 177) decides that it does not signify under the Act of 1854 whether it is on the upper deck or between decks. As I understand the treatment of a Scotch decision by a court of this country, it should be treated with the greatest respect, but it is not a binding authority; and even supposing it to have decided the point in question, if we differed from it we should be entitled to decide differently from a Scotch court. But I cannot think that the Scotch court did decide the point; at all events it is not shown that it did. If in the case before the Scotch court the space was on the upper deck, it does not touch this case at all; certainly the point was never discussed. As it seems to me the point there was, whether, in the case of a steam-vessel, you should or should not deduct crew space, even on the upper deck; and on that question I should entirely agree with the Scotch court, and say you might.

But since the crew space here is not on the upper deck, it cannot, in my opinion, be deducted from

the total tonnage of this vessel to arrive at the gross tonnage under the provisions of the Act of 1854. Can it then be deducted under the provisions of the Act of 1867? It is argued that it is inequitable that the space could under the circumstances be deducted if this were a British ship, and that it cannot be deducted because this is a German vessel. The answer appears to be, that under the circumstances you could not have deducted it even if this had been a British ship, because it is allowed upon the facts of the case that it is not brought within the Act of 1867. There was no survey of the space. I care not about the cutting on the beam. But there is a more material matter behind, viz, that it is not shown to have been surveyed by the officer to whom the Legislature has intrusted this duty; that is to say, a surveyor of the Board of Trade. The British Legislature has not thought fit to intrust any surveyor with the power of giving these certificates, but only an authorised surveyor of the Board of Trade; and therefore, failing that certificate, the space is not brought within the Act of 1867.

It is argued that we may apply to this ship the rule in the Act of 1867, without her compliance with the provisions of that Act, because she is a foreign vessel. It seems to me that if we did so we should be legislating. If the Legislature, in passing the Act of 1867, overlooked the case of foreign ships we cannot help it. Those who think it has been overlooked by inadvertence and not intentionally, must go to the Legislature and get the Act of Parliament altered. We have only to construe the Act as it stands. This case is not brought within it, therefore this space cannot be deducted under it; and therefore we are driven to conclude that the tonnage on which the ship's limited liability is to be calculated—the gross tonnage without deduction on account of engine room—is the gross tonnage arrived at without deduction of engine room, and also without deduction on account of crew's space.

COTTON, L.J.—The question which we have to decide is this: Under the Merchant Shipping Act 1862, s. 54, what is to be considered the gross tonnage without any deduction on account of engine room? There is no difficulty with regard to the engine-room space. For that we are thrown back on the Act of 1854, of which sect. 23 for the first time mentions steamships, and provides for deduction being made in the tonnage, which of course is inapplicable to sailing vessels without propelling power. That does not decide whether the crew space is or is not to be deducted in steam-vessels, and I think the question may fairly be put, Does the previous section (sect. 21) allow for any ship a deduction for crew space except where the crew space is in some erection on the upper deck? In my opinion it does not. There are two sub-divisions of sect. 21 dealing with the point; sub-sect. 4 deals with the case of there being a poop or other closed-in space on the upper deck without reference to the question whether that deck is or is not a spar deck. It does not refer to the case of a closed-in space above the tonnage deck, but only to the case of a closed-in space above the upper deck, whatever that may be; and, after providing for the measurement of it, further provides that no addition is to be made for any such space solely appropriated to the berthing of the crew; that is, any house or erection on the upper deck separated and set apart for the crew; but the whole sub-section, in my opinion, only applies to cases where such a provision is made for the berthing of the crew. Then when you come to sub-sect. 5, which deals with the case we have now before us—that of spar-decked ships—there is no exception as to space set apart below it for the crew any more than when the crew are berthed below the tonnage deck.

A case was referred to as decided by the Court of Session; and of course we should regard the opinion expressed by a judge of that court with the highest respect; but the point is whether the crew space there was under the spar deck or on the upper deck, and until that is shown we cannot in any way consider the judges as expressing any opinion on the point which arises here. They were expressing their opinions on the words "gross tonnage" in sect. 23 of the Act of 1854, and sect. 54 of the Act of 1862.

We then come to the question whether or no, under the Order in Council referring to German ships and the Act of 1862 as to the certificates of foreign ships, these certificates are to be conclusive. I say they come in now, because the other question turned upon the Act of 1854. Without the Act of 1867 the *Franconia* could rely upon the certificate as being conclusive that if crew space should be deducted when under the spar deck in British ships, then that her crew space should be deducted, as it appeared on the face of the register certificate that the crew space was between decks. And of course that depends on the construction of an Act of Parliament, not upon the registered certificate of a German ship, assuming it to be put in the same position as a British ship, as to whether or no the crew space can properly be deducted. But, in my opinion, the true effect of the Act of 1862 and the Order in Council is this, that the measurement to be taken is sufficient when Her Majesty is satisfied that the principles of measurement in this country are adopted, and that the principles of measurement shall be defined when any question arises as to them in this country, but not that, when according to the true construction of the Act of Parliament, a certain deduction ought not to be made, and a foreign certificate treats it as a deduction which ought to be made. That certificate is to be binding upon the courts in this country when they have to decide the question.

It must not be supposed that I leave out of consideration whether or not the *Franconia* was entitled to the deduction allowed under certain circumstances by the Act of 1867. I need not go through that Act. It is perfectly true that the deductions to be allowed under that Act are subject to several stipulations and conditions. It may or may not be an oversight, that having regard to those conditions a foreigner cannot, except under very special circumstances, get the benefit of the Act of 1867; but a foreign ship coming here to get the benefit of the limitation of liability afforded by a British Act of Parliament, if it gets that benefit must of course take it with all its burdens, and one of these burdens is, that the crew space is to be reckoned if it is between decks, unless certain things are done as required by the Act of 1867. Those things have not been done in the present case, and we are unable to see that the *Franconia* is entitled, under

the Act of 1867, to deduct crew space when she has not complied with the requirements of the Act, has not got the necessary certificates of survey and the proper words put up to show that proper accommodation has been provided for the crew.

James, L.J.—The appeal will be allowed with costs. I should add, that we are unanimously of opinion that there is no foundation for the proposition that the Order in Council is *ultra vires*.

Solicitors for appellants, owners of the *Strathclyde*, *Gellatly* and *Warton*.

Solicitors for respondents, owners of the *Franconia*, *Stokes* and *Co*.

March 1, 4, 5, *and May* 18.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Beynon and Co. *v.* Godden and Son; H. R. Evans, Third Party.

Shipping — Mortgage — Assignment of freight — Charter-party — Ship's husband.

A ship's husband has no implied power as against his co-owners to assign or pledge the entire freight to become due on a charter, although money be owing to him from the co-owners for advances made on the ship's account.

Where a ship's husband has made advances on account of the ship, he has a right of lien or retainer, and not a charge, on the freight in respect of the repayment of those advances, so that, if his appointment of ship's husband ceases before the freight has been earned, an assignee of his interest in the freight is not entitled to it as against the owners.

Where a ship's husband, who is also part owner, has mortgaged his shares, he will be deprived of all right to receive his share of freight, either as ship's husband or owner, if the mortgagees before the end of the voyage unite with the co-owners in the appointment of another ship's husband to receive the freight; the action of the mortgagees being a sufficient taking possession or intervention to displace the title of the mortgagor to the freight.

R., being part owner of a ship, mortgaged his shares in her. Subsequently, in Aug. 1876, *he was acting as ship's husband and obtained a loan of* 200*l. from plaintiffs. The ship had been chartered by defendants, and by a letter of the* 30*th Aug. B. requested them to pay to plaintiffs the freight due on the charter. On the* 20*th Sept. R.'s co-owners and the mortgagees of his shares appointed E. ship's husband in R.'s place. Upon the* 11*th Oct. the ship completed her voyage, and upon the* 14*th began to discharge her cargo. Upon the* 16*th defendants sent plaintiffs a cheque for* 200*l., of which, having received notice that E. claimed the amount of the freight, they afterwards stopped payment.*

Held (affirming the decision of Huddleston, B.), that plaintiffs were not entitled to recover the amount of the cheque from defendants, as the mortgagees of R.'s shares in the ship, by appointing with the co-owners a ship's husband in place of R., had effectually interfered so as to entitle themselves to R.'s share of the freight as against him and the plaintiffs, his assignees.

Appeal from a decision of Huddleston, B., giving judgment for the defendants, at the trial before him without a jury.

The action was to recover the amount of a cheque for 200*l.* given by the defendants to the plaintiffs.

The proceedings at the trial, the facts and the arguments in the Court of Appeal, sufficiently appear in the judgment of the court (*post*).

J. J. Powell, Q.C., and *Watkin Williams*, Q.C. (*Rose* with them), for the plaintiffs, cited

Misa v. *Currie*, 35 L. T. Rep. N. S. 414; L. Rep. 1 App. Cas. 554; 45 L. J. 852, Ex.

Pollard and *Bosanquet*, for the defendants cited

Guion v. *Trask*, 1 De G. F. & J. 373; 29 L. J. 337, Ch.;
Lindsay v. *Gibbs*, 22 Beav. 552;
The Mary Ann, L. Rep. 1 A. & E. 8;
The Feronia, L. Rep. 2 A. & E. 65;
Brown v. *Tanner*, 18 L. T. Rep. N. S. 624; L. Rep. 3 Ch. 597;
Rusden v. *Pope*, 18 L. T. Rep. N. S. 651; L. Rep. 3 Ex. 269; 37 L. J. 137, Ex.;
Wilson v. *Wilson*, 26 L. T. Rep. N. S. 346; L. Rep. 14 Eq. 32; 41 L. J. 423, Ch.

H. Matthews, Q.C. and *A. T. Lawrence* appeared for the third party, H. R. Evans.

Cur. adv. vult.

May 18.—Bramwell, L.J. delivered the following judgment of the Court:—This is an action to recover the amount of a cheque given by the defendants Godden and Son to the plaintiffs. The judgment has been for the defendants, and against this the plaintiffs have appealed. The following are the transactions which gave rise to the plaintiffs' claim.

In Aug. 1876 T. R. Rees was part owner of a vessel, the *Eliza*, and he was also acting as a ship's husband. In August he was in want of money, but even assuming, as alleged by the plaintiffs, that he required it for the purposes of ships of which the ownership was the same as that of the *Eliza*, he did not require it for the purpose of earning the freight to be earned by the voyage on which the *Eliza* was then engaged. He applied to the plaintiffs for a loan, and it appears on the evidence of the plaintiff Thomas Beynon, that before he made any advance Rees stated to him that the ship was in debt to him, Rees, to the extent of 280*l.* The defendants had chartered the ship for the voyage in which she was at the time employed; and on the 30th Aug. 1876 the plaintiffs advanced to Rees 200*l.*, and he thereupon signed and gave to the plaintiffs a letter addressed to the defendants, which was dated the 30th Aug. 1876, and was as follows:

"Newport, Mon., Aug. 30, 1876.

"Messrs. William Godden and Son, London.

"Gentlemen, — I hereby give authority, and request that you will pay to Messrs. S. Beynon and Co., of Newport, Mon., the freight on charter of my vessel the *Eliza*, dated Aug. 2, 1876, bound from Little Curacoa (W.I.) to U. K. or continent, in consideration of value received from them."

On the 6th Sept. this letter was communicated to the defendants Godden and Son, and this letter constitutes a good equitable assignment to the plaintiffs of the freight payable by the defendants, if and so far as Rees was able to assign this freight. The *Eliza* on the 11th Oct. arrived at Hamburgh, and completed the voyage for which she was chartered by the defendants, and on the 14th began to unload her cargo. At the time when Rees gave the equitable assignment of the 30th Aug. his share of the *Eliza* was in mortgage, and on the 20th Sept. the mortgagees of his share

and the owners of the other shares, appointed Henry Russell Evans ship's husband in the place of Rees. There was some question whether this appointment was proved at the trial of the action, but, on the whole, we think that, if not proved, it was assumed to be the fact that Russell Evans had been so appointed. The *Eliza* began to discharge her cargo on the 14th Oct., and on the 16th of that month the defendants, who had previously had some communication with Moyle, their agent at Harburgh, where the vessel was unloading, on the subject of making a payment to the plaintiffs, gave to them a cheque for 200*l*. On the same 16th Oct. Evans sent a telegram to Harburgh, by which he claimed, as registered managing owner of the *Eliza*, to be entitled to the freight, and thereupon Moyle telegraphed to the defendants, who stopped payment of the cheque given to the plaintiffs, and the action is brought to recover the amount with interest. The defendants after the commencement of the action insisted that Russell Evans should be made a party to the action, on the ground that they, if liable to the plaintiffs, were entitled to relief over as against him.

The action was tried at Gloucester, before Baron Huddleston, without a jury. He decided in favour of the defendants, but he ordered them to pay the costs of Evans, and also gave the plaintiffs against the defendants any costs which they had incurred in consequence of Evans having been summoned as a third party. The plaintiffs have appealed, and ask that judgment may be given for them, or that a new trial may be directed; and the defendants have also appealed against the direction that they should pay the costs incurred by summoning Evans as a third party.

The right of the plaintiffs must depend on the question whether, at the time when the cheque was given, they were entitled to receive the freight of the *Eliza*, either absolutely or to the extent of 200*l*.

Under the charter-party one-third of the freight was payable on arrival at the port of discharge, and it was argued on behalf of the plaintiffs, that Messrs. Matthieson and Co., of Harburgh, had, by their directions, and on their account, paid sums of money exceeding 200*l*. for the expenses of the ship there, and that consequently the plaintiffs were entitled, to the extent of these payments, to receive a portion of the freight payable at Harburgh. But it appears that these payments were made on account of the defendants as charterers, and were repaid by them to Messrs. Matthieson.

Had, then, Rees power to assign the freight of the *Eliza*? At the time of obtaining the advance from the plaintiffs he was ship's husband; but as such, in our opinion he had no power as against his co-owners to assign or pledge the entire freight. Apparently the plaintiff made the advance to him on his representation that the money was owing to him as ship's husband by his co-owners; and if this was the fact, and he as ship's husband had received the freight, the co-owners must have allowed him in account the sums due to him before they could have claimed their shares of the freight, and he could have assigned to the plaintiffs this his interest therein. But this interest is a right of lien or retainer, and not in the nature of a charge on the freight; and as he was removed from being ship's husband by the act of the mortgagees and of the co-owners before he was in a position to receive any part of the freight, the plaintiffs cannot, even if there were a balance due to Rees, claim by virtue of his assignment to receive the freight. An attempt was made to show that the co-owners of the *Eliza* had given Rees at least implied authority to borrow money on security of the freight; but, in our opinion, the evidence does not support this contention.

The result, in our opinion, is that Rees had no power to assign the entire freight. But the question still remains whether Rees could assign his own share of the net freight, that is, of the freight remaining after paying all expenses connected with the voyage. At the trial there was no evidence that there was such a balance; but we might receive evidence now or direct an inquiry for the purpose of ascertaining whether there was any such balance of freight; but, in our opinion, the plaintiffs cannot under the circumstances sustain any claim even to Rees' share of the net freight. For Rees' share was in mortgage, and in our opinion the mortgagees effectually interfered, so as to entitle themselves to Rees' share of the freight, as against him and the plaintiffs as his assignees. If the entire ship had been in mortgage, to defeat the right of the mortgagor to receive the freight, it would have been necessary to establish that the mortgagee had taken possession of the ship before she completed her voyage. But the mortgage was of certain shares only in the ship, so that the mortgagees were not in a position to take possession of the ship, and in our opinion the mortgagees, by joining with the owners of the other shares in the ship in the appointment of the ship's husband in the place of Rees, which they did before the ship reached harbour, effectually intervened so as to entitle themselves to the freight to be earned, and to displace the title thereto of Rees and of his assigns. The plaintiffs' appeal entirely fails, and must be dismissed with costs.

There remains the appeal of the defendants. In our opinion this appeal fails. As far as appears, Russell Evans did not receive the freight or any part of it. All that he did, was as agent of other parties to give the defendants directions not to pay the freight to the plaintiffs. It was for them to decide whether they would act on their direction or not, and there was no sufficient reason for summoning Russell Evans as a third party.

Judgment affirmed.

Solicitors for plaintiff, *Thomas, White*, and *Sons*, for *J. D. Pain* and *Son*, Newport, Monmouthshire.

Solicitors for defendants, *Cowdell, Grundy*, and *Browne*.

Solicitors for H. R. Evans, *Stocken* and *Jupp*.

Jan. 14, 15, 16, *and May* 18, 1878.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

LOHRE *v.* ATCHINSON AND ANOTHER.

Marine insurance—Policy on ship—Partial loss—Repairs—Amount recoverable.

Plaintiff, a shipowner, effected a voyage policy with defendants, underwriters, for 1200*l. on a ship valued at* 2600*l. The policy was in ordinary form, and contained a suing and labouring clause. During the voyage the ship encountered severe weather, sustained sea damage, and was in danger of becoming a total loss. The ship was repaired, and was metalled, which she had not been before; and the cost of the repairs, exclusive of the metalling, came to* 4414*l. The repairs*

(except the metalling) were such as were reasonably necessary for making the ship staunch and seaworthy, and the effect of them was to make her of much greater value than she was before the damage occurred. Salvage expenses had been recovered in the Admiralty Court against the ship and cargo, amounting to 515l.

Held, first (affirming the decision of the Queen's Bench Division), that plaintiff was entitled to be paid by defendants, in respect of the repairs, 1200l., the full sum insured.

And secondly (reversing the decision of the Queen's Bench Division), that defendants were also liable to pay 12-26ths of the 515l., being their proportion of the amount of average charges incurred by the ship.

Appeal from a judgment of the Queen's Bench Division on a special case.

The case in the court below is fully reported 3 Asp. Mar. Law Cas. 445; 36 L. T. Rep. N. S. 794. The facts stated in the special case and the arguments sufficiently appear from the judgment of the Court of Appeal (*post*).

Benjamin, Q.C. and *J. C. Matthew*, for the defendants, cited

Potter v. *Rankin*, 22 L. T. Rep. N. S. 347; L. Rep. 5 C. P. 341; 3 Mar. Law Cas. O. S. 122;
Moss v. *Smith*, 14 L. T. Rep. O. S. 376; 9 C. B. 94;
North of England Iron Steamship Association v. *Armstrong*, 21 L. T. Rep. N. S. 822; L. Rep. 5 Q. B. 244; 3 Mar. Law Cas. O. S. 330;
Arnould on Marine Insurance, 5th edit. 311, 503, 946;
Phillips on Insurance, s. 1428;
Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616;

Cohen, Q.C. and *Hollams*, for plaintiff, cited

Arnould on Marine Insurance, 5th edit. 995, 996;
Stewart v. *Steele*, 5 Scott N. R. 927;
Peele v. *The Merchant Insurance Company*, 3 Mason U. S. Rep. 27, 72;
Phillips on Insurance, ss. 1548, 1742, 1743;
Irving v. *Manning*, 6 C. B. 391;
Kidstone v. *The Empire Marine Insurance Association*, 15 L. T. Rep. N. S. 12; L. Rep. 1 C. P. 535; 2 Mar. Law Cas. O. S. 400, 468;
Dent v. *Smith*, 20 L. T. Rep. N. S. 868; L. Rep. 4 Q. B. 414; 3 Mar. Law Cas. O. S. 251;

Cur. adv. vult.

May 18.—The judgment of the court was delivered by Brett, L.J.—This was a special case. The material facts were that the action was brought by the plaintiff, the owner of the ship *Alf*, on a voyage policy, effected with the defendants for 1200l., on ship valued at 2600l., the policy being in ordinary form, containing a suing and labouring clause. The ship, during the voyage insured, encountered severe weather. According to paragraph 5 of the case: "On the 30th Jan., the ship then being in great danger of being completely lost, and in a helpless condition, and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow without any agreement being come to as to remuneration for the service, and took her into Queenstown." For these services the ship, freight, and cargo were sued in the Admiralty Court, where salvage was awarded. The ship's proportion of salvage and general average charges was 515l. The ship was surveyed, estimates were made, a contract was entered into, and the ship was repaired, and she was metalled, which she had not been before. The amount expended on the ship, exclusive of metalling, was 4414l. Deducting one-third new for old in all matters to which such deduction is properly applicable, this was reduced to 3178l. The case then contained the following paragraph (14), from the full force of which we have no power to derogate. We are bound to accept it in its ordinary sense in full as correct. It is as follows: "All the works, except the metalling, &c., were undertaken for the purpose of making the ship staunch and strong and seaworthy, which she had ceased to be by reason of the sea damage she had sustained, and they were reasonably necessary for that purpose." The effect of these works was to make the ship a very much stronger and better ship, and of very much greater value than she had been before she sustained damage." The value of the ship after the repairs was 7000l. The case then stated the contentions of the parties, but it is unnecessary to refer to them, as they were not pressed in argument as correct. Before us, the substantial contention on behalf of the plaintiff was, that he was entitled to be paid, in respect of the loss arising from the expenses of repairs, 1200l., the full sum insured; and besides and beyond that sum a proportion of the salvage and general average charges of 515l., to be recovered by virtue of the suing and labouring clause. It was contended on behalf of the defendants, on several grounds, that they were only liable to pay, in respect of the loss, a proportionate part of 1200l.; and that they were not liable to pay any part of the 515l. under the suing and labouring clause.

The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of these rules, and the reason why they have a binding and exclusive force. They are rules which originated either in decisions of the courts upon the construction or on the mode of applying the policy, or in customs proved before the courts so clearly or so often as to have been long recognised by the courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are parts of the contract. And although a court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out.

It was urged on behalf of the defendants that there was in this case an actual total loss with benefit of salvage. The rules for determining whether or not there has been an actual total loss within the meaning of an ordinary policy are well established, and are of the nature of those above described. All the novel rules, therefore, proposed by Mr. Benjamin are inadmissible. According to the recognised rules, there cannot be a total loss of ship when it is safe in the hands of the owners, still bearing the character of a ship however greatly damaged. There is an actual total loss if by perils insured

against the ship has wholly disappeared, or is so damaged as to have lost the character of a ship, or, although still a ship, has by capture or a justifiable sale or otherwise become wholly lost to her owners. But in the present case the ship was saved, and restored to her owners as a ship, although greatly damaged; salvage, indeed, has been awarded to salvors for saving her as a ship; and there has been no sale. Moreover, if there had been a sale, it could not have been justified, or this loss made by it a total loss; because the rule as to that is, that a sale by the master cannot be justified as against his owners or as against the underwriters, nor a sale even by the owners constitute a total loss as against the underwriters, if the ship, being disabled, can be repaired, so as to be a seagoing ship, at an expense less than her value when repaired. The contrary is found in this case. It was further argued that the ship was, if not an actual, at least a constructive total loss. The rule for determining this question is also a settled rule. It would, in the circumstances of this case, be the same as that just enunciated with regard to a justifiable sale. In this case, therefore, no abandonment could have been supported, even if notice of abandonment had been given. But no such notice was given, and it is impossible to maintain that there was a constructive total loss. There was, therefore, no total, but only an average or partial loss in this case. And that being so, there can be no benefit of salvage. Upon a partial loss no such claim arises.

The questions, therefore, on the first part of this case are reduced to these: What is the proper mode of ascertaining the amount of a partial loss arising in respect of the expense of repairing a damaged wooden ship; and what is the proper mode of adjusting such a loss under a valued policy? Now, as to the first, there is an established mode of estimating the amount. The ship must be repaired, or estimates may be procured for repairing her, so as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, and in either case at such reasonable cost as the shipowner can by reasonable effort procure. "The underwriter is responsible for the repair or restoration of the damaged or destroyed part of the ship, or article belonging to it, with materials, workmanship, style, and finish, corresponding to its original character:" (Phillips on Insurance, s. 1428.) It has been found by experience that no carpentering can be so skilful as to replace exactly the damage which has occurred. If a ship be from age or construction a weak ship, it may, although she was seaworthy at the commencement of the risk, be impossible so to repair her as to make her equal to what she was before, or even a sea-borne ship, without, either by the superior strength of the materials used in the same manner as the old materials or by a necessary change of construction, making her a stronger, and therefore a more valuable ship than she was before. It has further been found by experience that it is almost impossible to ascertain with any exactness the difference between the value of the ship before the damage and the value added to her by repairs. "A general usage, which the law follows as founded in public convenience, has therefore applied a certain rule in all cases:" (Phillips on Insurance, s. 1431.) This rule is also one of those before described, and therefore is the only rule. The rule is that "where timbers or other materials are replaced by new (or are treated upon estimate as so replaced), the vessel when repaired (or when treated as repaired) is considered to be better than before; and accordingly the assured must himself bear one-third of the expense of the labour and materials for the repairs, and this deduction is said to be on account of new for old:" (Phillips on Insurance, s. 1431.) "Where the damage has been repaired, the established mode of estimating its amount is, in case of wooden ships, to deduct one-third from the whole expense both of labour and materials which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed deducting one-third new for old, &c. To avoid discussion in each particular case, the amount of deduction is fixed at one-third." (Arnould on Insurance, last edit. p. 901.) The amount, therefore, of the partial loss arising in respect of the expense of repairing a damaged wooden ship is the reasonable cost of so repairing her as to make her as nearly as possible equal to what she was before the damage caused to her by the perils insured against, less one-third new for old, that is to say, less one-third of the expense of the labour and materials used in making the repairs. And this mode is equally applicable, whether the ship is, by the repairs which are necessary to make her equal to what she was before the damage, made only a little or very largely of greater value than she was before the damage. The amount of the partial loss caused by the repairs in this case was therefore 4414*l.*, less one-third new for old; or, as found in paragraph 16 of the case, 3178*l.*

The next question is, how is this amount or loss to be adjusted? Here, again, it must be repeated that there is a recognised long-adopted rule, and that is therefore the only one. The relation between the amount of so much of the ascertained loss caused by expenses of repairing as is to be borne by the underwriters and the value of the ship at the commencement of the risk must first be established. In a valued policy that value of the ship is the valuation in the policy and no other. In an open policy that value must be ascertained by evidence. Then, in order to adjust the loss, the underwriters as a whole are, and each individual is, to pay an amount bearing the same relation to the sum insured by them or him as the amount of the ascertained loss bears to the value of the ship at the commencement of the risk. When the amount of the ascertained loss by repairs is less than the value of the ship at the commencement of the risk, or, which is equivalent, to the value of the ship stated in the policy, the relation is expressed in business by percentage expression, as that the loss is 20 per cent. or 50 per cent. or 90 per cent. Then the underwriter is said to be liable to pay the same percentage of the sum insured. According to the rule, therefore, if the percentage of the loss to the original value of the ship is 99 per cent, the underwriters must pay 99 per cent. of the sum insured. This by the argument addressed to us was admitted; but it was urged that the rule cannot be applied, because it is wholly unjust to apply it, if the relation of the amount of loss to the original value of the ship is 100 per cent., or greater than 100 per cent.; and in order to replace the rejected rule, many new ones were suggested. But if the rule were the only rule, the only logical conclusion

would be, that if the first relation is 100 per cent., or more than 100 per cent., so must the second relation be, and the underwriters must pay accordingly 100 per cent., or more than 100 per cent. of the sum insured. There is, however, another, and, to a certain extent, a controlling rule. "The liability of insurers on a single loss is, without question, limited to the amount insured (and the expense of suing &c.), and the payment of the whole amount for a single loss discharges them from further liability:" (Phillips on Insurance, s. 1742.) Where the relation of the ascertained loss to the value of the ship at the commencement of the risk or to the value stated in the policy is greater than 100 per cent., the underwriter, who by the rule for adjustment would have to pay more than 100 per cent., is by the rule of limitation of liability absolved from paying more than 100 per cent. But there is nothing to prevent his liability to the extent of 100 per cent. The defendants therefore were bound to pay, in respect of the loss arising from the ascertained expense of repairs, 1200*l*., the whole sum insured; although the loss was, according to the phraseology of insurance law, only a partial as distinguished from a total loss under the policy.

The next question is, whether the defendants are not bound also to pay further, an additional sum in respect of an alleged obligation to do so by reason of the suing and labouring clause. That depends, considering the subject generally, upon the construction of the suing and labouring clause, and, in the application of the clause to a particular case, upon whether the occasion upon which the alleged expenses were incurred was such as is within the clause, and whether the expenses were of such a character as are within the clause. Now the general construction of the clause has been held to be, and we think it is, that if by perils insured against the subject-matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters, and if the assured or his agent or servants exert unusual or extraordinary labour, or if the assured is made liable to unusual or extraordinary expense for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total or a partial loss, or no loss at all, not as part of the sum insured, but as a contribution independent of and even in addition to the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had incurred, or to the loss which, because the efforts have failed, has occurred bears to the sum insured. "There is a question," says Willes, J., in *Kidstone* v. *The Empire Marine Insurance Association* (*ubi sup.*), "whether the clause ought to be limited in construction to a case where the assured abandons, or perchance may abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs, or whether it extends to every case in which the subject of insurance is exposed to loss or damage, for the consequences of which the underwriters would be liable, and in warding off which labour is expended. The question manifestly depends upon the construction of the clause, and quite apart from the proved usage we think the latter is the construction." The proof given in that case by underwriters and others was that "there has been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriters to the term "particular average" as distinguished from the term "particular charges"; "particular average" denotes actual damage done to or loss of part of the subject-matter of insurance, but it does not include any expenses or charges incurred in recovering or preserving the subject matter of insurance." The decision in *Kidstone* v. *The Empire Marine Insurance Association*, was that a loss within the clause was not excluded by a clause exempting from average loss; the reason given being that a loss within the clause is different from and is in no case to be considered as part of the loss by reason of actual damage to the subject insured. "By this clause," says Arnould, summing up the authorities, "the insurers undertake an additional liability over and above the insurance properly so called, and quite of a different nature:" (Arnould, vol. 2, p. 780, last edit.) "The assured may recover, under a marine policy, the value at which the subject is insured; and also for the amount of expenditure in addition to a total loss. This liability is stipulated for by the provision that the assured may labour, travel, and sue for the safeguard and recovery of the insured property, to the expenses of which the insurers agree to contribute:" (Phillips on Insurance, s. 1742.) These authorities, and the decision in *Kidstone* v. *The Empire Marine Insurance Society*, seems to us to show that the clause in question is a wholly independent contract in the policy from the contract to pay a certain sum in respect of damage done to the subject-matter of insurance, and consequently that it applies whatever be the amount of such damage, and whether indeed any such damage occur or not. Nothing is said in any of the authorities, and there is nothing in the wording or nature of the clause, to show that an intention must be present in the mind of those who make the effort to benefit thereby the underwriters. The absence or presence of such an intention cannot diminish or add to the value or effect of the services. Such intention therefore is, upon reason and authority, an immaterial circumstance. The only conditions to give a valid claim under it are danger of damage to the subject insured by reason of perils insured against, unusual or extraordinary efforts made, or expenditure incurred in consequence of such efforts made to attempt to prevent such damage. Whether the present occasion was one to give rise to a valid claim under the suing and labouring clause depends upon whether there was probable danger of loss to the underwriters. Looking at paragraph 5 of the case, that cannot be doubted. Whether the expense in respect of which the claim is made is such as is within the suing and labouring clause depends upon whether the liability or obligation to pay for such salvage services as were here rendered is within the clause. Now services which can be rewarded as salvage services can only be such are rendered when danger exists, and when they are rendered in order to avert danger. They cannot, whilst the master or others in due charge are on board, be properly rendered without

the consent of the captain or those in charge. The only difference between them and similar services rendered without a claim for salvage is, that they are rendered without an agreement, express or implied, as to the price at which they are to be paid. They are rendered upon the terms that they are to be performed without payment if without success, and to be rewarded by a judgment of the Admiralty Court if successful. But the nature and object of them are precisely within the proposition above enunciated; they are unusual and extraordinary efforts made in a time of danger and made in an attempt to avert damage which, if the subject to which they are rendered is insured, would, if it ensued, cause loss to the underwriters. It is not necessary, as has been observed, that there should be a specific intention to benefit underwriters; therefore, although salvage services may be rendered without knowledge that the subject saved is insured and yet are of the same value to the underwriters, they fulfil the conditions just as much as similar services given on other terms of remuneration. "Salvage," says Arnould (p. 778, last edit.), "in so far as it is a claim to which the insurer is liable, designates an expenditure necessarily laid out in preserving the subject of an insurance from a loss for which the insurer would be liable under the policy, and is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause." With this we agree. Nothing is said about intention. It follows that in this case the defendants were bound to pay, in addition to the 1200*l*, the amount for which they were liable in respect of repairs done to the ship, their proportion of the 515*l*, the amount of "average charges" incurred on behalf of the ship. That seems to be, as urged on behalf of the plaintiff, the same proportion of 515*l*. as 1200*l*. bears to 2600*l*., or 12·26ths of 515*l*.

It follows that the appeal on behalf of the defendants must be dismissed, and the appeal on behalf of the plaintiff must be allowed.

Appeal dismissed.

Plaintiff's solicitors, *Hollams, Son,* and *Coward*
Defendant's solicitors, *Waltons, Bubb,* and *Walton.*

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by A. H. BITTLESTON Esq., Barrister-at-Law.

Monday, March 4, 1878.

(Before GROVE, DENMAN, and LOPES, JJ.)

KALTENBACH *v.* MACKENZIE. (*a*)

Marine insurance—Constructive total loss—No notice of abandonment—Question for jury.

A constructive total loss may, if the circumstances justify it, entitle the owners to recover as for an actual total loss, although no notice of abandonment has been given; and whether the circumstances justify the absence of such notice is a question for the jury in each particular case.

THIS was an action on a policy of marine insurance claiming as for a total loss. The defendant paid into court for a partial loss, and the question was whether the plaintiff could recover as for a total loss without notice of abandonment. At the trial before Lord Coleridge, C.J., judgment of nonsuit was given in favour of the defendant, on the ground that notice of abandonment was in the circumstances of the case essential, and that there was no evidence of any such notice having been given. The plaintiff is a partner in the mercantile firm of Kaltenbach, Engler, and Co., who carry on business at Paris, Singapore, and Saigon. In 1867 they became the owners of the *Admiral Protet*, the plaintiff being the only registered owner owing to the other parties being foreigners.

On Oct. 4, 1870, the *Admiral Protet* was insured for 4000*l*. for a voyage from Saigon to Hong Kong with rice, the policy being made in England in consequence of the French war.

On Jan. 14, 1871, she sailed from Saigon, and on the 22nd struck on a bank and was much damaged.

On the 24th she was towed to Saigon and discharged her cargo. She was then surveyed, and the surveyors recommended that she should be sold.

On Feb. 7, the owners (one of whom was at Singapore) made up their minds to sell, and communicated to the captain to that effect.

On Feb. 11 the ship was condemned, and on the 23rd was sold.

The owners on the 11th of March gave notice that they claimed for a total loss. The underwriters resisted the claim on the ground that notice of abandonment had not been given to them by the owner.

A rule *nisi* for a new trial having been obtained by the plaintiff.

Butt, Q. C., *Cohen*, Q.C., and *Hollams* showed cause.—In answer to interrogatories, the plaintiff says, "I was the sole registered owner of the ship, but it is in fact the property of my firm." One member of the firm was at Singapore at the time of abandonment. The captain, in a letter to the partner at Singapore, says, "It is more than probable that the ship will be condemned in dock." Then the ship is condemned and they do not telegraph to the underwriters. The sale of the ship was determined on by the plaintiffs themselves, not by the captain. The question is, whether, when the assured is on the spot, he can recover for a constructive total loss, without notice of abandonment. In *The Oriental* (7 Moore's P. C. C., O. S., 398, 411) it was held that the master has only authority to pledge the ship for necessaries, where there is no means of communication with the owner. In his judgment, Jervis, C.J. says: "We must, however, look at the circumstances of this case. There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication, not to send money as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand, and receive an answer on the other. There, there being the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no

(a) This case was originally argued June 19, 20, 1877, but was ordered to be re-argued before three judges.

authority in the master to raise money on bottomry." In *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. 65; L. Rep. 6 E. & Ir. App. 83, 121; 29 L. T. Rep. N. S. 142) Blackburn, J., after referring to Lord Abinger's judgment in *Roux* v. *Salvador* (3 Bing. N. C. 286), says: "But I think this is from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owner's election. This is a matter that is now of much greater practical importance than it was when Lord Abinger delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances a notice of abandonment was often a very idle ceremony, and in my opinion unnecessary, if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally on what steps the underwriters might take if they had notice. If there was nothing they could do, no notice I think is required." And Lord Chelmsford in the same case, says: "It was argued at the bar, on the authority of the case of *Knight* v. *Faith* (15 Q.B. 649), that in every case where the subject-matter insured exists in specie, though in a damaged state, a notice of abandonment is necessary to entitle the assured to make a claim as if it had been actually destroyed." This was the opinion expressed by Lord Campbell, in delivering the judgment of the court in that case. . . . Lord Campbell had before, in the case of *Fleming* v. *Smith* (1 H. of L. Cas. 535), stated the rule as to notice of abandonment in the same unqualified terms, saying, 'According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment.' . . . No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position. Upon this ground, therefore, I am of opinion that there was no necessity for the assured in this case to give notice of abandonment of the chartered freight to the underwriters." In *Roux* v. *Salvador* (*ubi sup.*), Lord Abinger says: "In all these or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for releasing and increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its port of destination, or, at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value of the thing insured, he is at liberty to do so, but he must also abide the risk of the arrival of the thing in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not less liable upon his contract because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before." And in Arnould's Marine Insurance, vol. ii. p. 919 (5th edit.), the author says: "It is obviously just that the assured, if he means to abandon and throw upon the underwriters the ownership of the thing insured, should give them notice of this intention within a reasonable time after receiving intelligence of the loss, in order that they may take immediate steps for turning the property thus cast upon their hands to the best account." The effect of the cases is that whenever there is a reasonable opportunity of communicating with the assured and the underwriters, the assured must give notice of abandonment to the underwriters, unless there is nothing to abandon. And the communication must now be by telegraph. See *The Oriental* (*ubi sup.*); *Proudfoot* v. *Montefiore* (L. Rep. 2 Q, B. 511; 3 Mar. Law Cas. O. S. 512); *The Onward* (L. Rep. 4 Adm. 38; 28 L.T. Rep. N.S. 204; 1 Asp. Mar. Law Cas. 540). If it should be held that the use of the telegraph is not necessary, still the notice of abandonment must be given within a reasonable time. "What is a reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the assured is not to delay his notice when a total loss occurs, in order to keep his chance of doing better for himself by keeping the subject insured, and then, when he finds it will be more to his advantage to do so, throwing the burden upon the underwriters; while, on the other, the underwriter cannot complain of a suspense of judgment fairly exercised on the part of the assured, to enable him to determine whether the circumstances are such as to entitle him to abandon." Per Lord Chelmsford, in *Currie and Co.* v. *The Bombay Native Insurance Company* (L. Rep. 3 P. C. 72, 79; 22 L. T. Rep. N. S. 317; 3 Mar. Law Cas. O.S. 369). Further there is in this case no evidence whatever of the necessity of the sale on the 23rd Feb. The following cases were also cited:

Martin v. *Crockatt*, 14 East, 465;
Knight v. *Faith*, 15 Q. B. 649;
Fleming v. *Smith*, 1 H. L. Cas. 535:
King v. *Walker*, 33 L. J. 325, Ex.; 2 H. & C. 384;
Farnworth v. *Hyde*, L. Rep. 2 C. P., 204; 34 L. J. 207, C.P.; 18 C.B.N.S. 835; 15 L.T.Rep. N.S. 395; 2 Mar. Law Cas. O.S. 187, 429.

Sir *Henry James*, Q.C., *Watkin Williams*, Q.C., and *J. C. Mathew*, for the defendant, in support of the rule.—The question is whether the state of the ship was such as to put on the assured the duty of giving notice of abandonment before

claiming as for a total loss. It is conceded that there was a partial loss, and money was paid into court in respect of that. It is also admitted that there was here no actual total loss. Here it must be taken that there was a constructive total loss. *Primâ facie* a constructive total loss is the same as an actual total loss. But though that is admitted it is said that for a constructive total loss notice of abandonment is necessary. At one time it seems to have been thought by some persons that notice of abandonment was necessary in all cases. But in *Roux* v. *Salvador* (3 Bing. N. C. 281) Lord Abinger laid down the rule that no notice of abandonment was necessary where "neither the assured nor the underwriters could, at the time when the intelligence arrived, exercise any control over the goods, or by any interference alter the consequences." This was dissented from by Lord Campbell in *Knight* v. *Faith* (15 Q. B. 649); but *Knight* v. *Faith* was disposed of in *Rankin* v. *Potter* (*ubi sup.*), in which case *Roux* v. *Salvador* was referred to with approval. What is the duty cast upon a person to give notice of abandonment? That is, I submit, a question of fact for the jury, depending on the circumstances of each case. The reasonableness as to time, expense, and probability of insurer receiving the notice must be considered in each case. In Arnould's Marine Insurance, ii.. 918 (4th edit.), it is laid down that "the notice of abandonment ought to contain, or be accompanied with, a short statement of the ground of abandonment, in order that the underwriters may determine whether to accept it or not." Then, as to the fact in this case, the ship was surveyed on Feb. 2nd and 3rd, by Waterson and Bailey, and they recommended that it should be sold. [GROVE, J.—All that you have to show is that there was evidence to go to the jury of a constructive total loss.] The log-book shows that on Feb. 7 the leakage was at the rate of two and a half inches per hour. The evidence of Lloyd's agent, who was on the spot, shows that there was no skilled labour to be had at Saigon, and no dock there. He says that he would not have sailed her; that she was broken all to pieces like a biscuit: and that there would have been risk to the lives of those on board to have towed her to Singapore with her back broken. The captain communicated the condemnation and sale of the ship at once to Kaltenbach at Singapore, and Kaltenbach immediately wrote to Im Thurn to let the insurers know. As soon as Im Thurn heard from Kaltenbach, he communicated with the underwriters. All that the court is asked to say is that each case is for the jury to decide, and that it was misdirection to rule that there was no evidence to go to the jury. In *Read* v. *Bonham* (3 Brod. & Bingh. 147) the court refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time; and Dallas, C.J. commences his judgment by saying: "The jury have found in this case that the captain had a justifiable cause for selling the ship." The following case was also cited:

King v. *Walker*, 33 L. J. Ex. 167, 325; 2 H. of L. Cas. 384.

GROVE, J.—We are all of opinion that there should be a new trial. I do not think it necessary or desirable to say more now than that the facts show more than a scintilla of evidence upon which the jury might have found for the plaintiff.

DENMAN, J.—I agree in the result. The single observation I will make is that on the new trial a question founded on *Rankin* v. *Potter* (*ubi sup.*) should be left to the jury.

LOPES, J.—I think that after the case of *Rankin* v. *Potter* (*ubi sup.*), it is impossible to hold that there was no evidence upon which the jury could have found for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Parker* and *Clarke*.

Solicitors for the defendants, *Hollams, Son*, and *Coward*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by JAMES P. ASPINALL and F. W. RAIKES, Esqrs Barristers-at-Law.

(Before Sir R. PHILLIMORE.)

Tuesday, July 2, 1878.

THE THEODOR KORNER.

Practice—Inspection of documents—Reports of survey—Privilege.

Reports of survey of a ship made before the commencement of an action are privileged for inspection if made solely for the purpose of proceeding in the action.

Southwark and Vauxhall Water Company *v.* Quick (3 *Q. B. Div.* 315; 38 *L. T. Rep. N.S.* 28, *followed*).

THIS was a motion on behalf of the defendants, owners of the *The dor Korner*, in the cause of damage to cargo, for (1) the issue of a commission for the examination of the defendant's witnesses at New York; (2) inspection of two reports of survey dated respectively the 26th and 27th March, and mentioned in the first schedule of the affidavit of Andrew Gibson Gibson, sworn on the 13th June. The third paragraph of the affidavit in question was as follows:

I object to the production of such documents as are set out in the first schedule hereto; on the ground that they are documents written and prepared solely for the purpose of proceeding in this action.

The first schedule contained only the names of the two documents following:—26th March 1878, reports of survey of Capt. T. H. Trapp; 27th March 1878, report of survey of Capt. H. Edwards. The writ in the action was issued on 4th April 1878.

E. C. Clarkson for defendants.—These documents are not privileged. There can be no privilege for *bonâ fide* reports of survey. [Sir R. PHILLIMORE.—The rule as to what documents are privileged has been laid down by the Court of Appeal: *Bustros* v. *White*, 1 Q. B. Div. 423; 34 L. T. Rep. N. S. 835.] That is so, and reports of survey are not such documents. Besides, it has been expressly held that reports of survey of a ship are liable to inspection:

Martin v. *Butchard*, 36 L. T. Rep. N. S. 732.

There both reports were made for the purposes of the action; one before and one after the action was actually brought, and both alike were held liable to inspection by the defendants. In this case both were before action brought, and therefore certainly liable. Besides, it has been the regular

practice of this division for years to allow inspection of such documents.

Myburgh for the plaintiffs.—These documents are privileged; they are information procured by the advice of solicitors for the purpose of being laid before them:

The Southwark and Vauxhall Water Company v. *Quick*, 3 Q. B. Div. 315; 38 L. T. Rep. N. S. 28.

The true test of privilege is, where they or were they not *bonâ fide* obtained for the purpose of being laid before the plaintiff's legal advisers, and for the purpose of seeing whether the action should be carried on or not. [Sir R. PHILLIMORE:—You say that *The Southwark and Vauxhall Water Company* v. *Quick* decides that any document is safe from inspection if actually prepared by the advice of the legal adviser of the party.] Yes, when in contemplation of legal proceedings.

Sir R. PHILLIMORE.—Taking paragraph 3 of the affidavit of Mr. Gibson and *The Southwark and Vauxhall Water Company* v. *Quick* (*ubi sup.*) together, I do not see how it is possible to say that these reports of survey are not privileged from inspection by the other side. I grant the first part of the motion, and a commission to examine witnesses at New York will issue: but I cannot grant the second part. I feel myself bound by the case cited.

Solicitors for plaintiffs, *Plews, Irvine,* and *Hodges.*

Solicitors for defendants, *Thomas Cooper* and *Co.*

July 6 and 8, 1878.

THE HENRY COXON.

Evidence—Admissibility—Ship's log—Deposition before receiver of wreck—Deponent deceased.

Entries made in the ship's log by the mate of a vessel relative to a collision and signed by him and the captain nearly two days after the collision, cannot be used as evidence on behalf of the ship in which they were made, after the decease of the persons making and signing them.

Depositions made before a receiver of wreck by persons on board a ship relative to a collision cannot, even after the decease of the deponents, be used as evidence on behalf of that ship at the trial.

THIS was a cause of damage instituted by the Compagnie des Messageries Maritimes de France, owners of the steamship *Gange*, against the British steamship *Henry Coxon*. There was also a counter-claim by the owners of the *Henry Coxon* against the *Gange* in respect of the same collision. The collision took place in Sea Reach of the River Thames about 2.30 p.m., on the 12th Jan. 1878. Both vessels were bound down the Thames—the *Gange* on a voyage to Marseilles, the *Henry Coxon* to the Tyne. In consequence of the collision the *Gange* had to run on shore, whilst the *Henry Coxon* proceeded on her voyage. At the hearing, after the evidence for the *Gange* was closed, the defendants called evidence to show that subsequent to the voyage in which the collision occurred the *Henry Coxon* had made a voyage to Riga, and had left that port on June 12, bound for Grimsby, with a cargo of sleepers; that she passed Copenhagen on June 15, and was due at Grimsby about June 19; that since leaving Copenhagen she had not been heard of, that on the 15th June there was very bad weather, that a lifeboat belonging to her had been picked up by another vessel and taken to Dantzic, and that some sleepers had been noticed floating near Copenhagen twenty-four hours after she passed. From this evidence the court was asked to conclude that she had foundered with all hands, and, under the circumstances, to admit as evidence for the defendants the log book kept on board by the mate on the voyage during which the collision happened, and who was on board also when she sailed from Riga. It was admitted that the log was in his handwriting; and the second engineer who was below in the engine room at the time of the collision on Saturday, 12th Jan., but was not in the vessel on the subsequent voyage, proved that he signed the entry in the log about 9 a.m. on Monday, and that the captain and mate had already signed it, and that when he went below, ten minutes before the collision, the captain and mate were both on deck, and that it was the practice for them both to be on deck whilst going down the river.

Butt, Q.C., with him *E. C. Clarkson*.—Under these circumstances the log is evidence. The entry in it is an entry by the mate in the course of his business:

Price v. *Earl of Torrington*, 1 Salk. 283, 2 Salk. 690, 6 Mod. Cas. 264, 2 Lord Raym. 873.

The entries are made on consecutive dates, and *recenti facto*. The collision only occurred on Saturday, and on Monday the entry had already been made before the second engineer was called on to sign it; it therefore falls within the rule of the cases cited in the notes to *Price* v. *Earl of Torrington* in Smith's Leading Cases, 7th edit. vol. I. p. 328, *et seq.*

Dr. *Deane*, Q.C. and *Webster*, Q.C. (with them Dr. *Phillimore*) in objection.—The rule is that where the handwriting is admitted or proved, an entry cannot be used as evidence after the decease of the writer unless some use could have been made of the entry in his lifetime, but no use can be made of a log. This is not the case of an admission against interest; and therefore it could only be evidence, if admitted, of a fact, *i.e.*, of the collision having happened, and also perhaps of the time and place at which it happened; but before it could be evidence even of that it must be "corroborated by other circumstances" (per Taunton, J., *Doe* v. *Turford*, 3 B. & Ald. 898. Here there is no evidence that the mate was on deck at the time, and therefore that he was making entries of matters within his personal knowledge. Besides, his duty as to entries in the log is only to enter facts, *i.e.*, in this case the fact of the collision, not that the other vessel was to blame for it. Therefore such entries are not entries within the scope of his ordinary duty, and cannot become evidence after his decease (*Smith and others* v. *Blakey*, L. Rep. 2 Q. B. 326); and, so far as the entries concern his own ship, he has an interest in making them favourable to her, and therefore are excluded by all rules of evidence:

Smith's Leading Cases, 7th edit. vol. ii., p. 333, *et passim*;

Taylor on Evidence, sect. 708. 7th edit. p. 599.

Butt, Q.C., in reply.—These entries are all in the course of the mate's duty. (*Doe* v. *Turford*) (*ubi sup.*). This duty is not confined to merely

entering facts, but the surrounding circumstances. [Sir R. PHILLIMORE.—Even assuming that what the writer himself did when recorded by himself is evidence, can you say that what he says he saw done by the other ship is so?] That is an objection to the weight of the evidence, but not to the fact of its being evidence. I don't put it as an entry against interest, but on the other ground of its being a practically contemporaneous entry in the course of business. [Sir R. PHILLIMORE.—Does it not create a fresh difficulty in that respect that it is a joint instrument signed by three different people?] Not if it is made contemporaneously. If not contemporaneous, I admit it is not to be relied upon.

Sir ROBERT PHILLIMORE.—I have fully considered the important question which has been raised in this case. The facts mentioned are these: The vessel which has been proceeded against has made a subsequent voyage and perished with all hands who were on board at the time of the collision, excepting one who has been called to-day, but who was not on deck at the time of the collision; and in these circumstances the log of the vessel which has perished is pressed upon the court as being evidence on the ground of a variety of cases beginning with that of *Price* v. *The Earl of Torrington* (*ubi sup.*), down to much later cases. In this case it is contended that the entry in the log was made in the course of his duty by the mate and contemporaneously; not against his interest but in the execution of his duty. Now I think upon the whole, though the question is not without difficulty, that the principle of the authorities is adverse to the admission of this document. I am not satisfied that it is a sufficiently contemporaneous instrument; the collision having taken place on the Saturday and the entry referred to having been made on the following Monday morning. There is another objection to it. I think that it was clearly to the interest of the parties to represent that the collision took place in consequence of the bad navigation of the other ship, and not of their own. There is another matter to consider. It seems to me that the authorities point to this, that when such evidence as this, where the party who furnished it is dead, is admitted, it must be evidence which relates to an act done by himself and not by others. We all know, as a matter of common knowledge in these proceedings, that it is the duty of the mate to enter not only what manœuvres are executed on board his ship and the navigation of his vessel, but to state what the cause of the collision was, and whether it was in consequence of the manœuvres and navigation of the other ship. Therefore it would be extremely difficult to disentangle the two portions of the evidence, that which relates to what was done by himself and that which was done by the other vessel. I think that this case does not come within the principle of those cases which have allowed evidence of this kind to be admitted. It is one of extreme difficulty, but I think that under all the circumstances I must reject the evidence.

Butt, Q.C. then tendered the deposition of the captain of the *Henry Coxon*, made before the receiver of wreck. The deposition is now the best evidence which can be produced of the facts; if the captain were still alive it could not be used, but as he is dead the case is otherwise. It was sworn at the Custom House in London, the 15th Jan., and therefore when the facts were fresh in his memory.

Dr. *Deane*, Q.C., in objection to the admission of the deposition, cited

Taylor on Evidence;
The Little Lizzie, L. Rep. 3 Ad. 56; 23 L. T. Rep. N. S. 84;
Northard v. *Pepper*, 17 C.B. N. S. 39; 10 L. T. Rep. N. S. 782.

Butt, Q.C. in reply.—The cases cited are not in point. The oral testimony of the deponents there could have been obtained; here, the deponent being dead, his deposition is the best evidence procurable. In this court matters could always be proved by affidavit.

Sir R. PHILLIMORE.—If the evidence is to be admissible, it must be because the common law has made it so or the words of a statute. There is no authority to show me that it is admissible by the common law; indeed, I hold it to be clearly inadmissible by common law. It is true that in the case of *Northard* v. *Pepper* (*ubi sup.*) (*a*) the deponent was still alive, but that does not seem to affect the case. I think it my duty to follow the decision in that case, and on the ground of that decision I must reject the evidence.

Some other evidence of independent witnesses was then heard for the defendants; and, after hearing counsel and consultation with the Trinity Masters, Sir Robert Phillimore found that the *Henry Coxon* was alone to blame, observing in the course of his judgment, "It is a misfortune that the *Henry Coxon* has lost the evidence of those on board her; but I must not on that account depart from the rules which govern the court in examining the testimony of the witnesses who are before it."

Solicitors for the plaintiffs, *Gallaty*, *Son*, and *Warton*.

Solicitors for defendants, *Thomas Cooper* and *Co.*

Tuesday, June 25, 1878.

THE DICTATOR.

Wages and disbursements—County Court Admiralty jurisdiction—Costs.

A County Court has no jurisdiction in Admiralty over a claim for a master's disbursements, and hence, in an action for master's wages and disbursements in the High Court, a certificate under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71) *is not necessary to entitle a successful plaintiff to his costs, although he recover less than* 150*l.*, *the limit of the County Court jurisdiction over wages under sect.* 3 *of the said Act.*

THIS was an action for master's wages and disbursements, and came before the court upon an application on behalf of the plaintiff for an order to the Liverpool District Registrar to tax the plaintiff's costs.

The claim had been referred to the district registrar, who had found and reported that the

(*a*) The cases of *Northard* v. *Pepper* and *The Little Lizzie*, cited in argument and in the judgment, were themselves argued on the supposition that these depositions were made evidence by sect. 449 Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). That section is, however, repealed by sect. 45 and Sched. Pt. 1 of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80).

sum of 137*l.* was due to the master for wages and disbursements, but had, upon the plaintiff's costs being brought in for taxation, refused to tax upon the ground that the amount recovered being below 150*l.*, the plaintiff was not entitled to his costs without a certificate under sect. 9 of the County Courts Admiralty Jurisdiction Act 1868, as the action might have been brought in a County Court.

Before action there had been considerable correspondence between the plaintiff and the owner of the ship as to the amount due to the plaintiff; but the plaintiff had not actually furnished his final accounts until Oct. 3, the action being begun on Oct. 6, 1877.

Clarkson in support of the application.—The district registrar was wrong in refusing to tax. This is a claim for wages and disbursements. The County Court Admiralty Jurisdiction Act 1868 gives jurisdiction to County Courts over wages only, and not over disbursements. Hence no certificate is necessary. The action could not have been brought in a County Court.

Sutton for the defendants.—The word "wages" in the County Courts Admiralty Jurisdiction Act 1868, sect. 3, sub-sect. 2, should be widely construed, and includes more than mere wages:

The Blessing, 38 L. T. Rep. N. S. 259; 3 Asp. Mar. Law Cas. 561.

and should include disbursements. Besides, the plaintiff is not entitled to his costs upon the ground that he did not deliver his accounts until too late for investigation before action:

The Fleur de Lis, L. Rep. 1 Adm. & Ecc. 49.

Clarkson in reply.

Sir R. PHILLIMORE.—The County Courts Admiralty Jurisdiction Act 1868 cannot be construed so as to give jurisdiction over disbursements to the County Courts. There is no such jurisdiction in the County Courts either by statute or by the general law. Hence I am clearly of opinion that the matter must be referred back to the registrar for taxation. On the other point, I am of opinion that the master had done all that was necessary to entitle him to bring his action. I grant the application.

Solicitors for the plaintiff, *Duncan, Hill,* and *Dickinson.*

Solicitors for the defendant, *Forshaw* and *Hawkins.*

Tuesday, June 25, 1878.

THE D. H. BILLS.

Bottomry — Interest after cessation of risk — Practice.

The rate of interest ordinarily payable upon a bottomry loan and the premium thereon after the safe arrival of the ship at the end of the risk is 4 per cent. per annum, and a provision in a bond entered into by the master of a ship providing for the payment of 10 per cent. per annum interest is not binding on the owners of ship or cargo, provided the provision was entered into without their knowledge. (a)

THIS was an action brought against the U. S. ship *D. H. Bills*, her cargo and freight, to recover the amount of a bottomry bond on ship, cargo, and freight, given by her master at Farsunden, Norway.

The court made a decree against ship and freight by default. The owners of cargo admitted liability.

The plaintiff, the holder of the bond, now applied for judgment pronouncing for the validity of the bond. The bond provided for the payment of the amount lent (1295*l.*), together with 161*l.* 17*s.* 6*d.* for bottomry premium three days after the arrival of the ship at Newport, Monmouth, and in default of such payment at the time aforesaid, it provided for the payment to the bondholders of "interest for the same sum at the rate of 10*l.* per cent. per annum, from the time aforesaid until payment of the said sum." The bond was entered into and signed by the master of the ship, and there appeared to have been no knowledge on the part of the shipowner or the owner of the cargo that there was any such stipulation as to interest in the bond.

Clarkson, for the plaintiffs, asked for judgment pronouncing for the validity of the bond against ship, cargo, and freight, for a sale of the ship, and payment of the bond, &c., out of the proceeds and freight, and for the condemnation of the cargo, or of the cargo owners, and their bail, in so much of the amount secured by the bond as the proceeds and freight should fail to satisfy.

J. P. Aspinall, for the owners of the cargo, admitted the validity of the bond, save in so far as the same provided for the payment of 10 per cent. interest, made payable by the bond in the event of the principal sum and premium not being paid within three days after arrival of the ship. The master had no authority in making the bond to bind the owners of cargo to pay anything for interest beyond the ordinary amount of interest allowed by the court. The court often reduces the amount of such interest stipulated for.

Sir R. PHILLIMORE.—The plaintiffs are not entitled to interest after arrival in this country in a greater amount than the usual amount allowed, viz., 4 per cent. In this respect the bond is not binding, as the owners had no knowledge of this stipulation; but in all other respects I pronounce for the validity of the bond as against ship, cargo, and freight.

Solicitors for the plaintiffs, *Clarkson, Son,* and *Greenwell.*

Solicitors for owners of cargo, *Waddilove* and *Nutt.*

(a) This same question arose in two cases: *Cargo ex Vineland*, an action on a respondentia bond, and *The Christiane*, in both of which the respective masters had signed bonds giving 6 per cent. interest on the advances in the event of nonpayment at the port of discharge. Both were undefended actions, but upon the cases coming before the court (July 23, 1878) the judge mentioned the above case and asked how the plaintiffs were entitled to more than the usual rate of interest. *Clarkson*, for the plaintiffs in both actions, pointed out that even if the defendants had not expressly sanctioned the rate of interest named in the bond, still, by their default of appearance, they had ratified it, and submitted that where the persons who had to pay did not object, the court would allow the interest. The Court allowed the rate of interest named in the bond upon the grounds submitted, expressly stating that if it were shown that a ship or cargo owner appeared and opposed the payment of more than the ordinary rate of interest, and showed that the master had no authority to allow more, no more than usual rate would be allowed.—ED.

Tuesday, June 18, 1878.

THE MAXIMA.

Mortgagee—Charter—Arrest—Possession—Release.

Where shares in a ship are mortgaged, possession being retained by the mortgagors, and the managing owner, duly appointed by all the co-owners, including the mortgagors, charters the ship for a foreign voyage, and she loads and is about to proceed on the voyage, the mortgagee, even though he takes possession of his shares before the sailing of the ship but after the making of the charter-party, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mortgage debt, provided the performance of the charter-party is not prejudicial to the security; and the court will, upon the application of the co-owners, release a ship so arrested, and will condemn the mortgagee arresting in costs.

THIS was an action brought by the mortgagee of 16-64th shares in the British barque *Maxima*, to recover the sum of 1000*l.* due to him on the security of the mortgage from the mortgagors, partners in the barque to the extent of those 16-64th shares. The action was commenced on the 7th June 1878, and the vessel was immediately afterwards arrested. An appearance was entered on behalf of the owners of the barque, and a motion was now made on their behalf for the immediate release without bail of the barque and the condemnation of the plaintiff in the damages and costs occasioned by the arrest of the barque and the costs of the motion.

The circumstances of the case were as follows: On June 14, 1877, J. H. Burgess and G. Shaddich, of Swansea, owners of the 16-64ths above mentioned, being indebted to G. C. Stewart, of Liverpool, in 1000*l.* on an account current, mortgaged their shares to Mr. Stewart to secure payment of the debt, which was by the mortgage made payable six months after the date thereof. In Nov. 1877, J. B. Meagher, of Swansea, was by the co-owners (including the mortgagors) of the barque appointed managing owner and continued to act in that capacity up to and after the arrest. The barque was employed under the managing owner's directions, and the plaintiff, in March 1878, applied to him as managing owner for information as to the barque's then and future employment, and was informed that she was at that time at New York, and was under charter to load grain from that port to the United Kingdom. The barque was, on the 11th May 1878, chartered by the managing owner to take a cargo of coals from Swansea to Coquimbo. On May 21, 1878, the plaintiff wrote to the managing owner asking where the barque then was, and whether he or the co-owners would purchase the 16-64th shares, of which the plaintiff was mortgagee, and also asking the date of her arrival in England, and what was going to be done with her then. To this the managing owner replied on the 23rd May 1878, that he had not been able to see the owners as to the purchase of the shares, but asking the plaintiff's price, and telling him that the vessel was then on her way from Newry to Swansea, to load a cargo of coals to Coquimbo. On the 28th May the plaintiff replied that he gave the managing owner notice that he held the mortgage above mentioned, and claimed to have paid to him at once the proportionate shares of her last freight, and offered in the alternative to transfer his mortgage to the managing owner for 1050*l.*; and saying that unless he heard satisfactorily by return he should be compelled to adopt legal proceedings against the vessel, as he would not permit her to go another voyage until he was settled with. On May 29, 1878, the managing owner replied that he would consider the plaintiff in future as mortgagee in possession, and wished to know how he was to deal with the unsettled accounts against the 16-64th shares, but refusing to give the price asked for the shares as being too high. The plaintiff thereupon wrote, saying he should commence proceedings at once. On the 4th June the plaintiff by means of an agent at Swansea took possession of the 16-64th shares in the ship, and on the 8th June the ship was arrested in the action. Thereupon, the barque being fully loaded, the charterers began to threaten to hold the owners liable for any damage resulting from delay. The plaintiff objected particularly to the proposed voyage, because he had not then insured the ship, and was informed that high rates of premium were charged for such a voyage.

W. G. F. Phillimore for the defendant in support of the motion.—The plaintiff has allowed the ship to remain in the hands of the managing owner, and the mortgagors to retain possession of their shares; he had full knowledge of the fact that the ship was being employed by the managing owner acting by the authority of his co-owners. So long as he is not in possession he must be taken to sanction the acts of the managing owner in the employment of the ship and he cannot in this respect be in a better position than the mortgagors. The mortgagors could not repudiate the acts of their authorised agent, the managing owner, nor do anything to prevent his contracts from being carried out, so long as they were within the scope of his authority; they could not derogate from their own grant of authority; and as the plaintiff has only their rights, neither can he. This charter-party was made before the mortgagee took possession, and he cannot now prevent its execution. If he had been in possession before it was made he might have taken steps to prevent the vessel leaving England, but now it is too late, and the court will not allow him to detain the ship, seeing that the charter-party is not in any way prejudicial to the sufficiency of the security:

Collins v. *Lamport*, 34 L. J. 196, Ch.;
The Highlander, 2 W. Rob. 109;
The Innisfallen, L. Rep. 1 Adm. & Ecc. 72; 16 L. T. Rep. N. S. 71; 2 Mar. Law Cas. O. S. 470.

Clarkson for the plaintiff.—The plaintiff is in possession of his shares, and is consequently in the position of co-owner, and entitled to bail for safe return. The plaintiff cannot enforce his security at all if he cannot arrest the ship and hold her to bail. As mortgagee in possession the plaintiff could institute an action of restraint at once, and would, I submit, be entitled to demand bail for safe return; the court should make the release in this action conditional on the defendant giving bail for safe return. The voyage upon which the vessel is bound will last at least a year, and the plaintiff will have his security at risk all that time, and hence the charter-party, if allowed to be performed without bail being given, will in fact be prejudicial to the sufficiency of the security. The distinction between this case and *The Innisfallen* (*ubi sup.*) is that there the mortgagee was

never in possession; here he has taken possession.

Phillimore in reply.—If the plaintiff is to be treated as a co-owner he cannot have bail because he has allowed his authorised agent, the managing owner, to enter into a contract and cannot now do anything to repudiate that contract. If he is to be treated as mortgagee he cannot be in a better position than his mortgagor, and can only take possession of the ship subject to any engagements made on her behalf by the mortgagor or his authorised agent.

Sir ROBERT PHILLIMORE.—In this case the plaintiff is mortgagee of 16-64 shares in the ship of which the managing owner seems to have been unanimously appointed by his co-owners in Nov. 1877. The plaintiff did not do any act which would create him mortgagee in possession until May 28, 1878, when he wrote to the managing owner, informing him of his claim, and demanding the freight. On the 8th June the ship was arrested, and this is an application to order her release, and condemn the plaintiff in damages and costs. There is no application for bail for safe return indorsed on the plaintiff's writ, the indorsement on which is confined to the claim of the plaintiff for payment of his mortgage debt. However, I must exercise an equitable jurisdiction in such a matter, and if I thought that the voyage for which the vessel is chartered would be likely to be prejudicial to the plaintiff's interests as mortgagee, or likely to lessen the sufficiency of his security, I should probably order the release on terms satisfactory to the plaintiff. But I see in this action and in the arrest of the ship nothing but an attempt on the part of the mortgagee to compel the other owners to purchase the shares which he holds. It would be very injurious to the shipowning interest if, after a charter-party has been made, a mortgagee could step in and set aside what the managing owner has done, merely because he seeks payment of his debt at that moment. In this case there is nothing to show that the voyage will create any danger to the mortgagee's interests beyond what will arise from the usual perils of the sea, which every ship must encounter, and which can be covered by insurance. In the absence of precedent to the contrary, and on principle, I must order the ship to be released, and I condemn the plaintiff in the costs incidental to obtaining the release, and in the costs of this motion.

Solicitors for the defendants, *Pritchard* and *Sons*.

Solicitors for the plaintiff, *Toller* and *Sons*.

July 24 and 30, 1878.

THE ANDALUSIAN.

Limitation of liability—Launch—Ship—Recognised British ship—Registration—Shipbuilder—17 & 18 Vict. c. 104, ss. 2, 18, 19, 106, 516—25 & 26 Vict. c. 63, s. 54.

A vessel at the time of her launch, and before registration, is not a "recognised British Ship," and cannot avail herself of the limitation of liability granted by sect. 54 of the Merchant Shipping Act 1862, for damage done by her to another vessel.

Quære, whether the limitation of liability clauses apply to the case of a shipbuilder under contract to build and launch safely before delivery.

THIS was a suit for "limitation of liability" brought by F. R. Leyland, the builder and sole owner of the *Andalusian*, a vessel built as a screw steamship and subsequently registered as of 1722 tons, against the owners of the *Angerona*. The collision, in consequence of which this action was instituted, occured on the 14th July 1877, when the *Andalusian* was still in motion after being launched. Cross-actions for damage were tried in the Admiralty Court, that against the *Angerona* being *in rem*, and that against she *Andalusian in personam*, and on the 7th Aug. 1878 judgment in that action was delivered, by which the *Andalusian* was held alone to blame, and the amount of damage referred to the registrar and merchants.

The *Andalusian* had originally been built under contract for Mr. Leyland, a term of the contract being that delivery was to be made after the safe launching of the vessel, but, previous to the launch, the contract under which she was built had been set aside, and Mr. Leyland had come into possession of the unfinished vessel and the materials, and had completed her himself. It was the intention of the owner to sail the *Andalusian* under the British flag, and, before the launch, she had been partially measured by a surveyor of the Board of Trade for the purpose of registration; but at that time the houses on deck were not finished, nor were the engines on board.

The *Andalusian* was launched with her screw, and the aftermost piece of shafting and sea-cocks and valves in their places, but without masts or engines or boilers, and unregistered.

The plaintiff, in the limitation of liability suit, contended that he was only liable to pay compensation at the rate of 8*l.* per ton on the gross tonnage of the *Andalusian*, as found on the certificate of registration subsequently issued by the Board of Trade. The owners of the *Angerona*, on the other hand, maintained that under the circumstances the statutes for limitation of liability did not apply, and that they were entitled to *restitutio in integrum*.

On the 24th July 1878 the cause came on for hearing before Sir R. Phillimore.

Sir *J. Holker*, A.G., *Butt*, Q.C., and *E. C. Clarkson*, for the plaintiff, builder and owner of the *Andalusian*.

Benjamin, Q.C., *Myburgh*, and *W. G. F. Phillimore*, for the defendants, owners of the *Angerona*.

The sections of the Acts of Parliament on which the arguments turned, and the judgment was based, are as follows:

Merchant Shipping Act 1854 (17 & 18 *Vict., c.* 104):

Sect. 2. In the construction and for the purposes of this Act (if not inconsistent with the context or subject-matter) the following terms shall have the respective meanings hereinafter assigned to them; that is to say,

"Ship" shall include every description of vessel used in navigation not propelled by oars.

Description and ownership of British ships.

Sect. 18. No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description; that is to say,

(1.) Natural born British subjects.

Sect. 19. Every British ship must be registered in manner hereinafter mentioned. . . . And no ship hereby required to be registered shall, unless registered be recognised as a British ship.

Sect. 106. Whenever it is declared by this Act that a ship belonging to any person or body corporate qualified according to this Act to be owners of British ships, shall not be recognised as a British ship, such ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships, and shall not be entitled to use the British flag, or assume the British national character: but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship, or by any person belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognised British ship.

Sect. 516. Nothing in the ninth part of this Act contained shall be construed.

To lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman; or

To extend to any British ship not being a recognised British ship within the meaning of this Act.

Merchant Shipping Acts Amendment Act 1862 (25 & 26 *Vict. c.* 63):

Liability of shipowners (part ix. of Merchant Shipping Act 1854).

Sect. 54. The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity; that is to say,

(4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room.

In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship.

In the case of any foreign ship which has not been and cannot be measured under British law, the surveyor of general tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by direction of the court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand, stating what would in his opinion have been the tonnage of such ship if she had been duly measured according to British law, and the tonnage so stated in such certificate shall, for the purpose of this section, be deemed to be the tonnage of such ship.

Sir *John Holker*, A.G.—In this case the court will have to decide three questions: (1) Was the *Andalusian* a ship? (2) Was she a British ship? (3) Was she, at the time of the collision, in the course of navigation? She was a vessel protentially used in navigation, and certainly not propelled by oars, and therefore she comes within the definition of a "ship" given in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 2. The fact that she was not registered does not prevent her being a ship; a vessel on the stocks, unfinished, and which never has been afloat, is a ship:

Re Softly, 33 L. T. Rep. N. S. 62; L. Rep. 20 Eq. 746.

It was unavoidable that the ship was not yet registered, and therefore advantage cannot be taken of that fact to deprive the plaintiff of the limitation of his liability given by sect. 54 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), for if the court is satisfied that this vessel is a ship, it will also be satisfied that she is a British ship, and entitled to all the privileges and immunities of such. Sect. 516, which declares that an owner of a ship shall not be entitled to the privileges of limitation unless such ship is recognised as a British ship, applies only when the time at which registration was possible has arrived. In this case it had not arrived, for the engine and boilers were not yet in. Sect. 19, which is the first of the sections relating to measurement, confines its operation to vessels "hereby required to be registered," therefore there must be some British ships not required to be registered. [Sir R. PHILLIMORE.—You contend that the Act is penal only for default of registration, and that you have been guilty of no default; the defendants, that it confers a privilege on registration, and that you are not in a position to avail yourself of that privilege.] That no doubt will be their contention, but it will also be contended, I presume, that the ship was not in the course of navigation when the accident happened. There is no definition of navigation in the Act of Parliament, but this court has frequently held that a vessel dropping down the river with the tide is navigating, also a vessel warping out of dock negligently has been held to be guilty of improper navigation (*Wood* v. *The London Steam Owners Association*, L. Rep. 6 C. P. 563); as also one negligently moored in dock (*Laurie* v. *Douglas*, 15 M. & W. 746). Sir R. PHILLIMORE.—When, in my previous judgment in this case, I found the *Andalusian* to blame, it must have been on account of bad navigation.] That this ship is entitled to limit her liability as a ship, is also shown by the case of *The Glengarry* (L. Rep. 2 P. Div. 235; 30 L. T. Rep. N. S. 341; 2 Asp. Mar. L. C. 230), which was similar to this in all respects except that the action there against the launched vessel was *in rem*, which therefore shows that the launch was subject to the ordinary maritime law.

Benjamin, Q.C., for the defendants.—Sect. 54 of the Merchant Shipping Act 1862 was enacted in the place of sects. 502, 503, 504 of the Merchant Shipping Act 1854. It is therefore incorporated in part ix. of that Act, and therefore applies only to those British owned vessels which are recognised as British ships (sect. 516 Merchant Shipping Act 1854). To come within that enactment a vessel must comply with the provisions of sects. 18 and 19 of the same Act. Sect. 18 declares indeed the requirement that unless a vessel is British owned she cannot be a British ship, but does not say that the fact of being British owned alone constitutes a British ship. That is declared by sect. 19, with the provisions of which this vessel has not complied. The only question is whether the *Andalusian* was registered or not. If she had been, she could have availed herself of the statutory privilege given to registered British ships, but failing registration she cannot. Moreover this vessel, in her then condition, was not a ship at all, any more than a building without a roof would be a house; nor does she come within the definition given in sect. 2 of the Merchant Shipping Act 1854. To satisfy that definition she

must have been "used in navigation," and there is no authority for reading in the words "or to be" into that definition. [Sir R. PHILLIMORE.—You contend, then, that in no case could a launch claim any limitation of liability?] Certainly, that is our contention; and the fact that it has never before been raised is immaterial. Navigation is the movement of a ship from a port or place in the water to another port or place in the water, not from a place in shore; a lifeboat carried in a truck on shore could not be said in any sense to be navigated. Another point is, that the Act only limits the liability of a shipowner, and leaves the liability of a shipbuilder for injuries resulting from his negligence to the common law. Here the plaintiff, though he happened to be owner, must for the purposes of this suit be considered only in his capacity of builder, as having undertaken to complete the contract of building entered into by the builder, had the original contract been carried out. The builder was responsible for the safe launching of the *Andalusian*, and had this accident occurred whilst the original contract was in force the owners of the *Angerona* would have had an action against the builder for the full amount of the damage done, and they cannot be put in a worse position by means of a subsequent arrangement between the builder and the plaintiff, to which they were not parties: (*Union Bank* v. *Lenanton*, 3 Asp. Mar. Law Cas., 600; L. Rep. 3 C. P. Div. 243, per Cockburn, C. J., p. 246; 38 L. T. Rep. N.S. 698.)

Sir *J. Holker* in reply.—A vessel, so soon as she assumes the condition of a ship, is a ship; and if further she is then owned by a British subject, she becomes a British ship. Suppose a crime to be committed on board a vessel so situated, but which for some reason had not been registered, could it be contended that our courts had not jurisdiction because it was not a British ship; or again, suppose a child to be born on board such a vessel, would it not be a British subject? (sect. 156 Merchant Shipping Act 1854). The fact of the plaintiff being builder does not prevent him taking advantage of his other position as owner; it may be that, in any ordinary collision, caused by the negligence of the master, there is a remedy in full against him independent of the remedy against the owner should it be worth while to pursue it.

Cur. adv. vult.

July 30.—Sir R. PHILLIMORE.—On the 14th July 1877 the *Andalusian*, a vessel in the imperfect and unfinished state of equipment which is termed a launch, having been built in a building-yard on the Cheshire side of the river Mersey, was launched into that river and brought into collision with a ship called the *Angerona*, which ship brought an action against the *Andalusian* in this court, and I pronounced that the *Andalusian* was alone to blame for the collision. The *Andalusian* now brings an action for limitation of her liability under the Merchant Shipping Acts, and this action is opposed on behalf of the *Angerona*, upon the grounds—first, that the *Andalusian* is not a ship; secondly, that she was not used in navigation at the time of the collision; and thirdly, that she was not a British registered ship. The court is much indebted to the able and ingenious arguments of the Attorney-General and Mr. Benjamin upon all these points.

By the 2nd section of the 17 & 18 Vict. c. 104, it is enacted that "ship" shall include every description of vessel used in navigation not propelled by oars. I am disposed to consider that a ship of this character in this imperfect state of a launch might be included under this provision. The 18th section of the same Act provides that "no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description:" it is only necessary to mention one category, namely, "natural born British subjects." The *Andalusian* is proved to have been the property of a natural born British subject, and therefore is in one sense a British ship. The most important question remains to be considered. At the time of the collision this launch-ship had not her engines and boilers and other portions of her machinery on board, and was not in a condition to be registered, and as a matter of fact was not registered. By the 19th section of the same Act it is enacted, "That every British ship must be registered in manner hereinafter mentioned" (with certain exceptions which it is not necessary to mention); and it is further enacted that "no ship required to be registered shall unless registered be recognised as a British ship." The 25 & 26 Vict. c. 63, s. 54, limits the liability of shipowners with reference to the registered tonnage of sailing ships, and the gross tonnage of steamships without deduction on account of engine-room, and the 516th section of the first statute provides that nothing in that part of the Act (Pt. IX.) which relates to the limitation of liability shall be construed to extend to any British ship not being a recognised British ship within the meaning of the Act. It has been contended by the Attorney-General that these clauses should not be construed to deprive a vessel such as this launch not yet ripe for registration, but intended to be registered when the proper time has arrived, of the benefit of this limitation of liability; that it would be very harsh to put this construction upon the sections; that this launch is not a ship required to be registered, because at the time of being launched she was not ready for registration, inasmuch as a launch cannot, and in this instance did not, take place with all the machinery and fittings on board which it is necessary she should have at the time of registration; that she is not an offender against the law by reason of not having been fully registered, and that being owned by a British subject, and intended to be registered, she might be recognised as a British ship. After much consideration I am unable to arrive at the conclusion. It is, in the first place, to be remembered that the limitation of liability is a creature of statute law; that upon general principles of jurisprudence and natural equity I think Dr. Lushington more than once said the sufferer is entitled to *restitutio in integrum* at the hands of a wrongdoer; that it is not a question of the launch being liable to a penalty for necessary non-registration, but a question whether she is entitled to a privilege—which operates severely upon the sufferer—unless she brings herself strictly within the plain meaning of the provisions of the statute. Now it appears to me that, however unfortunate it may be that the collision should have happened before the privilege of limitation of liability accrued, it has so happened, and that with respect to this privilege I, at least, understand the

Merchant Shipping Acts from beginning to end to treat a registered British ship as the only recognised British ship entitled to this privilege.

I must therefore reject the claim of the *Andalusian*, the plaintiff in this suit, and there must be judgment for the defendant with costs.

Solicitors for the plaintiff, owner of the *Andalusian*, *Duncan*, *Hill*, and *Dickenson*.

Solicitors for the defendants, owners of the *Angerona*, *Bateson*, and *Co*.

Tuesday, July 9, 1878.

THE LADY DOWNSHIRE.

Collision—Regulations for preventing—Local Act —25 & 26 *Vict. c.* 63, *ss.* 25, 31, *Sc. Table C. Art.* 7—36 & 37 *Vict. c.* 85, *s.* 17—37 & 38 *Vict. c.* 52, *s.* 1.

An Act (37 & 38 *Vict. c.* 52) *prescribing additional regulations to be observed in a particular place or channel to those contained in the "Regulations for Preventing Collisions at Sea" is, though passed subsequently, to be read as a part of those regulations, and a breach of it will be visited by the penalties prescribed by sect.* 17 *of the Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85).

Vessels at anchor in the sea approaches to the river Mersey are required by sect. 1 *of* 37 & 38 *Vict. c.* 52 *to exhibit a white light at the main or mizen mast in addition to the white light prescribed by* 25 & 26 *Vict. c.* 63, *Sc. Table C., Art.* 7, *and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to a collision, be held to blame under sect.* 17 *of* 36 & 37 *Vict. c.* 85.

THIS was a cause of damage arising out of a collision between the *Edward John*, a three-masted British schooner, and the *Lady Downshire*, a screw steamer of 131 tons burthen and 50-horse power nominal. The collision took place about 11.30 p.m. on the 12th May 1876, in the Crosby Channel of the river Mersey, at a place in that channel between the first and second red buoys; the wind was S.E., the weather moderately fine, and the tide flood.

The *Edward John* was at anchor in the channel, and had one light exhibited on her forestay. The *Lady Downshire* was bound up the Mersey; those on board her observed the white light of the *Edward John*, and close to it first a green and then a red light, from which they concluded that the lights were all shown from a steamer until close to her and too late to avoid the collision. The argument turned upon the effect of the following statutes:

Merchant Shipping Act Amendment Act 1862 (24 & 25 *Vict. c.* 63):

Sect. 25. On and after the first day of June 1863, or such later day as may be fixed for the purpose by Order in Council, the regulations contained in the table marked (C) in the schedule hereto shall come into operation and be of the same force as if they were enacted in the body of this Act; but Her Majesty may from time to time, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, annul or modify any of the said regulations, or make new regulations in addition thereto or in substitution therefor, and any alterations in or additions to such regulations made in manner aforesaid shall be of the same force as the regulations in the said schedule.

Sect. 31. Any rules concerning the lights and signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessel, which have been or are hereafter made by or under the authority of any local Act, shall continue and be of full force and effect, notwithstanding anything in this Act or in the schedule thereto contained.

Table C.

Art. 7. Ships, whether steamships or sailing ships, when at anchor in roadsteads or fairways, shall, between sunrise and sunset, exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all round the horizon, and at a distance of at least one mile.

The regulations contained in this Table C were repealed by Order in Council of January 1863, but Art. 7 was re-enacted by the same order in precisely the same words.

The Merchant Shipping Act 1873 (36 & 37 *Vict. c.* 85):

Sect. 17. If in any case of collision it is proved to the court before which the case is tried that any of the regulations contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

An Act to make regulations for preventing collisions in the sea channels leading to the river Mersey (37 & 38 *Vict. c.* 52):

Sect. 1. Any general regulations for preventing collisions at sea for the time being in force under the provisions of the Merchant Shipping Acts shall be construed as if the following regulations were added thereto, that is to say—

(1.) Every steamship, and every vessel in tow of any steamship, when navigating in the sea channels or approaches to the river Mersey, between the Rock Lighthouse and the farthest point seawards to which such sea channels or approaches respectively are for the time being buoyed on both sides, shall, whenever it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such steamship or vessel in tow.

(2.) Every ship at anchor in the said sea channels or approaches, within the limits aforesaid, shall carry the single white light prescribed by Art. 7 of the General Regulations for Preventing Collisions at Sea, made under the authority of the Merchant Shipping Acts Amendment Act 1862, at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow of the ship where it can be best seen; and, in addition to the said light, all ships having two or more masts shall exhibit another similar white light, at double the height of the bow light, at the main or mizen peak, or the boom topping lift, or other position near the stern where it can be best seen.

Milward, Q.C. and *W. G. F. Phillimore*, for the owners of the *Edward John*.—The Mersey Approaches Act only orders the second light to be shown in addition to that required by the general regulations. The not carrying the second light could not be subject to the same penalties as that incurred by an infringement of the regulations, and the Act cannot be included in a regulation made before the Act was passed, unless the Act itself contains a clause to that effect, and there is no such clause in this Act. It is not a place such as is contemplated by sect. 31 of the Merchant Shipping Act 1862, as it is neither a "harbour, river, or inland navigation." The proper method for making a new regulation which shall be incorporated with those contained in Table C is given

by sect. 25 of the Act of 1862, and that method has not been adopted. Besides, as there is no general law requiring vessels to have on board more than one lantern of the sort used for showing an anchor light, we are not to blame for not being provided with a second one; and, not being provided with a second one, it was not possible to conform to the regulations, and therefore we are not liable to any penalty. The fact of our not having two lights had nothing to do with the collision at all. If we were visible at all—and it is admitted that our light was seen—it was the duty of the *Lady Downshire* to avoid running into us. We did not move, being at anchor; and therefore the whole fault of the collision rests with the *Lady Downshire*.

Butt, Q.C., and *E. C. Clarkson* for the *Lady Downshire*.—The Mersey Approaches Act must be read in with the Merchant Shipping Acts and Order in Council as to lights. Sect. 31 of the Merchant Shipping Act 1862 expressly provides for future regulations being made by a local Act, and says they are to be of full force and effect, that is, of the same force and effect as those contained in the schedule to the Act, or made subsequently by a competent authority (sect. 25 of the Merchant Shipping Act 1862); and therefore disobedience to this regulation as to the second light is to be treated as disobedience to any of the other rules. The penalty of that disobedience is given by sect. 17 Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), as interpreted by this court and the Privy Council (*The Magnet, The Duke of Sutherland, The Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 478; L. Rep. 4 Ad. 417; 32 L. T. Rep. N. S. 129, 646, and subsequent cases); and it cannot be contended that the total absence of a light is not a material infringement of a regulation requiring it to be exhibited, nor that it might not by possibility cause or contribute to the collision by misleading those who saw it. The very object of the Act was doubtless to make greater distinction between steamers and vessels at anchor; and had we known in time, as we ought to have been informed, that this was a vessel at anchor, we should have taken steps to avoid her; as it was, we steering a course which would have taken us clear of a steamer coming down, at the last moment discover that this was not a vessel so situated, but, in consequence of the neglect of those on board the *Edward John*, we do not make the discovery till at a time when embarrassed by having to clear two ships instead of one, we are unable to avoid her.

Milward, Q.C. in reply.

Sir R. PHILLIMORE.—The first question to be determined in this case is whether the "Act to make regulations for preventing collisions in the sea channels leading to the river Mersey 1874" (37 & 38 Vict. c. 52) is or is not brought within the provisions of sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). Now, the Mersey Approaches Act 1874 (37 & 38 Vict. c. 52) enacts: [His Lordship then read sect. 1, sub-sect. 2, of the Act (37 & 38 Vict. c. 52, *sup.*), and proceeded:] It is an admitted fact that the *Edward John*, the plaintiff, was a three-masted brigantine, and ought according to this direction to have carried two lights, whereas she only carried one, which was on her forestay, and a light of considerable power. It is argued that this provision of the Mersey Approaches Act as to a second light is not incorporated in the Merchant Shipping Act, because the Liverpool Act speaks of the light prescribed by those Acts, and says that that light is to be carried "in addition." Now, sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) is as follows. [His Lordship then read the section (*ubi sup.*) and proceeded:] After giving the best attention in my power to the arguments on both sides with respect to the question whether this section includes the Liverpool regulation, I am of opinion that it does include it. That regulation, it is admitted, was infringed on this occasion, and with respect to the other part of the case I am of opinion that no circumstances have been shown to make a "departure from the regulation necessary." The pilot was perfectly aware of the law, and told the man to put up two lights. The master said he had no second light and could not exhibit it. I am therefore of opinion that the *Edward John* must be held to blame under that statute, no sufficient reason being given for the non-compliance with the Mersey Approaches Act. But the question remains whether the *Lady Downshire*, the defendant, is not also to blame. The Trinity Masters think that the *Lady Downshire*, if she saw a red light, could not have thought that it was on board the same ship on which she saw the white light. It has been said, indeed, that the single white light was a misleading light; but it is to be observed that the side light would have been proper to have been avoided, yet she ran straight into it. I must hold both vessels to blame.

Solicitors for plaintiffs, owners of the *John Edwards*, *Fallows* and *Brown*.

Solicitors for defendants, owners of the *Lady Downshire*, *Stokes* and *Co.*

CIRCUIT COURT OF THE UNITED STATES.

EASTERN DISTRICT OF NEW YORK.

IN ADMIRALTY.

Reported by E. D. BENEDICT, Proctor and Advocate in Admiralty.

August, 1878.

JOSEPH W. DYER AND OTHERS *v.* THE NATIONAL STEAMSHIP COMPANY.

Collision—Steamer and ship—Crossing courses—Steamer porting and failing to stop—Damages—Limitation of liability.

An American ship loaded with guano, which she was bringing from the Chincha Islands to New York under a charter from the Peruvian Government, came into collision when about fifty miles from New York with a British steamship, bound from New York to Liverpool. The night was clear, and both vessels had the regulation lights set and burning. The wind was about northwest, and the ship was close hauled on the wind, heading a little south of west. The lights of the steamer were seen on her starboard bow at a distance of several miles, and she kept her course till just as the vessels were coming together, when her helm was changed, but not so as to affect her course. The steamer was heading east by south half south. The green light of the ship was seen from her deck two or three miles distant, a little on the port bow, her helm was ported, but the bearing of the light was not changed. Her speed was not

checked till the collision was inevitable, when her helm was also put hard-a-port. She struck the ship on the starboard bow, and the latter soon sank. The steamer also received injury, and was put about for New York; but in the entrance of the harbour she took the ground and became a wreck. Her owners took off from her and sold a quantity of wreckage.

Held, that the steamer was in fault in continuing her port wheel, although the bearing of the ship's light was not changed, and in not stopping till the collision was inevitable, and was solely responsible for the collision.

That, as the owners of the steamer had taken no proceedings in accordance with the Act of Congress of 1851, limiting the liability of shipowners, to obtain a limitation of their liability, and inasmuch as they had not made a surrender of the steamer to the owners of the ship and cargo, as required by the general maritime law, there was no limitation of the personal responsibility of the owners of the steamer for the damages caused by the collision, by reason of the wreck of the steamer. (a).

(a) The effect of this decision, and of the decisions cited in the argument, appears to be that no shipowner is entitled to the benefit of the Act limiting their liability unless he takes the steps or proceedings provided by that Act for obtaining such limitation. Prior to the passing of the Judicature Act it was always supposed that no judgment could go against a shipowner for loss or damage within the meaning of the 54th section of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63) for a larger amount than the sum limited by that section, although the defendant made no claim in his pleadings for such limitation; in fact, at common law, such claim could not have been made as it would have been a plea to damages. The question, however, was never formally raised, probably because in almost every case the limitation was claimed by other proceedings in Chancery or Admiralty in order to avoid a multiplicity of actions. Since the Judicature Act, however, it appears that under the new system of pleading a party must insert in his pleading all the claims to relief which he seeks; and therefore in an action for damage by collision or other negligence, the defendant shipowner must claim in his defence to have his liability limited in accordance with the statute, otherwise he is not entitled to limitation. It is true that this would not make much practical difference in a case where there were many separate claims depending against the same defendant, as he would in such case be sure to take the necessary means to limit his liability by instituting a separate action for that purpose; but in the case of there being only one plaintiff all the persons injured joining in one action, the rule of pleading as now in force is important to remember. The case by which this rule is applied to actions of this nature is as follows:

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

May 11, 1876.

WAHLBERG AND ANOTHER *v.* YOUNG AND OTHERS.

THE statement of claim alleged that the plaintiffs were the owners of the Russian barque *Ystavat*, and the defendants were the owners of the steam tug *Tuskar*, that the plaintiffs engaged the *Tuskar* to tow the *Ystavat* from Swansea to Cardiff for reward to the defendants in that behalf, and upon the terms, amongst others, that the defendants should use due and reasonable care in and about towing the said barque, and managing the said tug; that the *Tuskar*, in pursuance of the said engagement, started from Swansea with the *Ystavat* in tow; the *Ystavat* being in charge of a duly licensed pilot; that whilst the *Ystavat* was being towed those in charge of the *Tuskar* neglected to use due and reasonable care in and about the management of the tug, and neglected to obey the orders of the pilot, and, by reason of the said neglect and misconduct of those on board the *Tuskar*, the *Ystavat* was run aground, and sustained severe injury.

That the damage for the loss of the cargo of guano was to be arrived at by taking the maket value in the port of New York, and deducting there-

The statement of defence after stating certain facts, and traversing the negligence and misconduct alleged in the statement of claim, contained the following paragraph:

7. "The defendants say that the matter complained of, if any such occurred, and the defendants are liable for them, which they deny on the grounds hereinbefore stated, constituted a loss or damage by reason of the improper navigation of the said steam tug *Tuskar*, then being a British registered ship, caused to another ship, that is to say, the said barque *Ystavat*, and the defendants say that the same occurred without the actual fault or privity of the defendants, and that the gross tonnage of the said steam tug, without any deduction on account of engine room, amounted to ninety-seven tons, and no more, and the defendants claim that they are not liable in any event in respect of the premises to an aggregate amount exceeding 8*l.* per ton of the said ninety-seven tons."

To this 7th paragraph the plaintiffs demurred on the ground that the matter therein stated afforded no defence in law to the plaintiff's claim as alleged in the statement thereof, either in whole or in part; and upon this the defendants joined the demurrer.

Milward, Q.C. (*R. E. Webster* with him) for the plaintiffs in support of the demurrer.—The 7th paragraph is in effect a plea to damages, and therefore bad on general demurrer. The action is for breach of contract in not towing with due care, and in not obeying the orders of the pilot; the Merchant Shipping Act 1862, sect. 54, sub-sect. 4, is applicable only to cases of tort, as shown by the use of the words "improper navigation."

E. C. Clarkson for the defendants.— Whatever may have been the rules before the Judicature Acts 1873—1875, a defendant seeking relief of whatever nature must claim it by his pleadings. By the Judicature Act 1873, sect. 24, sub-sect. 3, the court has power to grant to any defendant "all such relief against plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." By Order XIX., rule 4, of the Supreme Court Rules, every pleading must contain as concisely as may be a statement of the material facts on which the party pleading relies. Before the Judicature Acts it may be that the defendants could at the trial of an action have given evidence which would have entitled him to have the judge direct the jury that the damages were not to exceed the amount limited by the Merchant Shipping Act 1862; but he could not have so pleaded, as a plea to that effect would have been a plea to damages. But since the Judicature Acts a defendant must plead all the relief he claims. The injury here complained of did arise from improper navigation of the tug; there is nothing to prevent limitation of liability from being claimed in respect of a loss arising from a breach of contract: (*The London and South-Western Railway Company* v. *James* 1 Asp. Mar. L. Cas. 526; L. Rep. 8 Ch. App. 241.) The action here is for breach of duty.

Webster in reply.

LORD COLERIDGE, C.J.—In this case the plaintiffs have sued the defendants as the owners of a steam tug called the *Tuskar*, for damages resulting from an injury which was produced by the mismanagement of the said steam tug. It is alleged in the statement of the plaintiff's claim that they had contracted with the defendants for the *Tuskar* to tow the plaintiff's barque on the terms, amongst others, that the defendants should use due and reasonable care in and about the towing of the said barque, and in and about the management of the said tug. That probably is merely stating, as my brother Archibald has remarked during the argument, as part of the contract, what the law would imply. Then the breach alleged is that whilst the barque was being towed those in charge of the *Tuskar* neglected to use due and reasonable care in its management and neglected to obey the orders of the pilot, and by and through the said neglect the barque was run aground and injured. The defendants have pleaded a plea which it may be assumed for the present purpose admits the statement of the plaintiff's claim, and that damage resulted from the neglect to use due and reason-

from all the expenses which would have attended its sale there, and a reasonable mercantile profit. That the owners of the steamer must be decreed to pay the damages occasioned by the collision, with 6 per cent. interest from the time of the collision.

able care in and about the management of the tug, and states that this constituted a loss or damage by reason of the improper navigation of the said steam tug, and that therefore in effect the 54th section of the Merchant Shipping Amendment Act 1862 applies, and the damages ought to be limited to 8*l.* per ton of the gross tonnage of the steam tug. That plea has been demurred to and a preliminary discussion arose as to whether the objection to the plea properly formed a ground of demurrer. Mr. Clarkson has satisfied me that I was wrong in the view I first took in the case, and that the plea is one which may properly be pleaded, and therefore he demurred to. He referred us to sect. 24, sub-sect. 3 of the Judicature Act 1873, and to Order XIX., and pointed out that sub-sect. 3 of the 24th section in effect requires a person who has any claim in equity against any plaintiff in respect of which he seeks relief, to properly claim it by stating it in his defence, and that by Order XIX., rule 4, he must state in his pleading the material facts on which he relies. Now it is clear under the old practice the defendants might have obtained a decree in equity limiting their liability under the Merchant Shipping Act 1862 if that Act applied; and therefore it follows that under the Judicature Acts this is a relief which if they desire to have it against the plaintiffs, they must now claim by pleading it. That shows that the pleading has been properly framed in the present case, to raise the question, whether in law the case comes within sub-sect. 4 of sect. 54 of the Merchant Shipping Amendment Act 1862. The case has been extremely well argued, and the court has received therefore considerable assistance from counsel, and the question is whether in these pleadings and the facts which are admitted by them, the sub-sect. 4 of the 54th section applies, Now I wish to adopt the language of Mellish, L.J., in *The London and South-Western Railway Company* v. *James*, and to say as he says: "The case being directly within the words, it ought to be held within the Act, unless it is clearly not within what was the scope and intention of the Legislature in passing the Act;" and I think the case here is both within the words and meaning of the Act. The contract between the plaintiffs and the defendants is a contract about the management of the defendants' tug, and the injury which the vessel of the plaintiffs received is from the breach of such contract in not using due and reasonable care, and in not obeying the orders of the pilot. That appears to me to be an injury to the towed vessel, caused by the improper navigation of the tug. It was argued unsuccessfully in *The London and South-Western Railway Company* v. *James* though only faintly, that the case of a breach of contract was not within the 54th section of the Merchant Shipping Act 1862, but if that case had never existed, I should have considered that there was nothing to exclude the case from the limitation of liability given by the statute, merely because the injury arose from a breach of contract. The limitation is to be construed in favour of shipowners, and applies equally whether the damage done be from a breach of contract, or from a simple tort. The navigation of the tug is to be considered in the relation in which it stands to the other vessel, and it may be, and here it must be, admitted that the neglect to obey the order of the pilot was such an improper navigation of the tug, as to produce the disastrous result which ensued. It is true that there may be a breach of the contract to tow which may not be from any improper navigation of the tug; if, whilst it is towing another vessel damage be done to such other vessel, it appears to me to be within sub-sect. 4 of the 54th section. Here it stands admitted on the pleadings that the loss occurred by the improper navigation of the steam tug, for by demurring the plaintiffs must take the statements of fact in the defence demurred to as being true, and therefore if the matter was bare of authority I should consider it right to hold that the plea is properly pleaded, and that our judgment should be for the defendants; but the case does not stand there, because, though the facts are distinctly different from those in *The London and South-Western Railway Company* v. *James*, the contention of counsel there went to the extent to which it has been put forward here, and the judgment of the Lord Chancellor was there that the Merchant Shipping Act 1862 applied and limited the liability of shipowners as well when the damage occurred from a breach of contract as when it occurred from tort. For these reasons I therefore think our judgment on this demurrer should be for the defendants.

BRETT, J.—The demurrer is to the 7th paragraph of the statement of defence, and the first point which arose was assuming the 7th paragraph was wrongly pleaded; yet, as it was only a statement limiting the amount of damages, and therefore merely a plea to the damages, and no good ground of defence to the claim, or to any part of it, whether it was not within Order XXVII. of the Judicature Act 1875, and the demurrer an improper mode of getting rid of it. But when the 7th paragraph is properly looked at, it will appear that it contains a statement of facts which will have to be proved, and which, if proved, would have entitled the defendants before the Judicature Acts to an injunction; and, as that is the case, the defendants are by virtue of sect. 24 of the Judicature Act 1873 entitled it by pleading it in their defence, and therefore if such statement amounts to a defence, it is here properly pleaded, and also properly demurred to; and consequently the question is whether the facts stated in the plaintiff's claim, and in this 7th paragraph of the defendants' statement of defence, shows that the 54th section of the Merchant Shipping Amendment Act 1862 is applicable. On the part of plaintiffs it was said that this paragraph merely disclosed a breach of contract, and did not show a loss from improper navigation within the 54th section of the Merchant Shipping Amendment Act 1862. On the part of the defendants it was contended that it showed not only a breach of the towing contract, but that the loss or damage had been under circumstances which were admitted to amount to an improper navigation of the tug. I think it right to say that a mere breach of the towing contract would not bring the case within the 54th section of the Merchant Shipping Amendment Act 1862; but I am of opinion that if there has been such an improper navigation as would bring it within that section, the case is not ousted out of that section because there has also been a breach of the towing contract. It seems to me that the real question raised is this, viz., whether the tug so put herself in relation to the ship she was towing that there might be an improper navigation of the tug as regards such ship, which would be an improper navigation within the enactment, although it would not be an improper navigation of the tug as regards herself. The words of the 54th section are large enough to admit a loss or damage to the ship by such improper navigation of the tug in the relation it stood to the ship; and I think such loss or damage is within the section. But for a mere breach of contract such as refusing to take the ship in tow, I doubt if it be within the 54th section, and I should say that if there had been only a breach of contract, the owner of the tug would not be protected by the section. That, however, is not the present case, and I think the defendants are entitled to the protection of the Act.

ARCHIBALD, J.—I think we must deal with the facts of this case as they appear on the record. Now, here the statement in the plaintiffs' statement of claim is that the plaintiffs engaged the defendants to tow the plaintiffs' vessel for reward, and upon the terms that the defendants should use due and reasonable care in and about the management of the tug. These terms are stated as a matter of contract, but they might have been stated as a matter of law, for they are nothing more or less than what the law would imply. Then disobedience of the orders of the pilot whilst towing the plaintiffs' vessel is alleged as a neglect to use due care in the management of the tug; so that the cause of action might have been put as a tort. Now, the 7th paragraph of the defendants' statement of defence is in substance that what is complained of constituted a loss by the improper navigation of the tug within the 4th sub-sect. of the 54th section of the Merchant Shipping Amendment Act. 1862. I confess when the case was first opened I doubted whether this was a matter which ought to be pleaded at all, and, consequently, whether it was properly subject to demurrer, because before the Judicature

ON the night of Dec. 1, 1866, a collision occurred between the ship *Kate Dyer* and the steamship *Scotland*, about fifty miles from the port of New York, which the steamship had left some hours before, bound to Liverpool. The ship was struck on her starboard bow by the stem of the steamship, and sank in a short time. Of her crew of twenty-seven souls only fourteen were saved. The steamship was also injured and caused to leak by the collision, and was in consequence put about and headed for New York, but the water gained on her so that when she reached the Outer Middle at the entrance of the port, she took the ground. A storm came up not long after, and she became a wreck. The owners of the ship being American citizens, filed a libel in Admiralty against the National Steamship Company, a British corporation, owners of the *Scotland*, in the Eastern District of New York, to recover the value of the vessel and her cargo of guano, of which they were common carriers, and by a foreign attachment upon property of the defendants compelled its appearance. The cause was tried before the district judge as to the merits of the collision, and he, in March 1869, held that the steamship was solely in fault for the collision, and that the defendants were liable for the damages, and ordered a reference to a commissioner to ascertain the amount of such damages.

A passenger on the ship named Rollins had joined himself as co-libellant to recover the value of his property lost in the collision; and the Republic of Peru also became a co-libellant to recover for itself the value of the cargo of guano, which question of value was much contested in the case. The facts out of which that question arose were that the ship had taken on board the cargo at the Chincha Islands in the Pacific Ocean to bring to New York, under a charter to the Peruvian Government. Peru had a monopoly of that guano, and it was not allowed to be sold at the Chincha Islands, but was shipped by the Government to various parts of the world. The defendants insisted that the owners of the cargo could only recover the value of the cargo at the port of shipment, while the owners insisted that they were entitled to recover the value of the cargo at the time of the collision in the port of New York. The district judge held that they were entitled to recover its value in the port of New York, less the estimated expense of performing the small remaining portion of the voyage.

An appeal was taken from the decree of the District Court to the Circuit Court, and the cause was heard anew on all the questions passed on by the district judge, and also on the question whether the defendants were not freed from all responsibility for the collision by the subsequent wreck of the *Scotland*. In their answer in the District Court they had averred the destruction of the *Scotland*, and that there was no liability *in personam* against them for the loss of the *Kate Dyer*, but the question was not presented to or passed upon by that court.

An Act to limit the liability of shipowners was passed by the Congress of the United States in 1851. Its main provisions are as follows:

Sect. 3. And be it further enacted, that the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

Sect. 4. And be it further enacted, that if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatsoever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this Act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease.

In 1872, after the interlocutory decree in this cause had been made, but before the question of damages was determined, and two years before the final decree of the District Court was made in this cause, that Act was for the first time brought before the Supreme Court of the United States for construction in the case of *The Norwich Company* v. *Wright* (13 Wallace's Rep. p. 104), and that court held that Congress intended by that Act to give to shipowners the exemption from liability given by the general maritime law, which extended to damage by collision. At the same time that court made a set of rules as to the practice to be followed and the proceedings to be taken by a shipowner who desired to avail himself of the benefit of the Act, which rules are also published in the same volume of Wallace's Reports.

Acts it was a matter only to be taken at the trial, and not by way of pleading; but Mr. Clarkson has satisfied me that it is now necessary to state this in the statement of defence, in order to entitle the defendants to claim relief. That being so, and it being demurred to, the question is whether this is a case within sect. 54, sub-sect. 4, of the Merchant Shipping Amendment Act 1862. The plaintiffs contend that the cause of action is a mere breach of the contract to tow, and therefore that the case is not within the enactment, but, as I have already observed, what is stated in the plaintiffs' statement as to using due and reasonable care is only what the law would imply, and consequently the action might have been in tort. Though it is unnecessary to determine the point, yet I agree with my brother Brett in thinking that a damage from the breach of a mere towing contract would not be a damage from improper navigation within the meaning of sect. 54, sub-sect. 4. Here, however, the parties have admitted on the pleadings that the damage was such as fell within the words of that enactment; and the allegation that it happened from the want of due care in the management of the tug is consistent with its arising from the improper navigation of such tug as alleged in the defence, and which must be taken by the demurrer to be admitted. Then if, as alleged, and also as admitted, that this occurred without the actual fault or privity of the defendants, it falls within sect. 54, sub-sect. 4, and on that ground, and that ground only, I decide this demurrer in favour of the defendants.

Solicitors: For the plaintiffs, *T. Cooper*; for the defendants, *Ingledew*, *Ince*, and *Greening*.

[The above case was by error omitted from the earlier numbers of these reports.—ED.]

The defendants in this case took no proceeding in accordance with those rules. But on the hearing in the Circuit Court they insisted that by virtue of that Act, and also of the general maritime law, they had been by the destruction of the *Scotland* free from all personal responsibility. The libellants gave evidence that a large quantity of wreckage, of many thousand dollars value, had been saved from the *Scotland* and sold by the defendants; and they insisted that the defendants being a foreign corporation, could not claim the benefit of the statute of the United States, and that, as they had neither taken the proceedings allowed by that statute, if applicable, nor made a surrender of the vessel to the libellants as required by the maritime law to be done by shipowners if they would free themselves from personal liability for the acts of their agents, there was no limitation of their liability.

BLATCHFORD, J.—The evidence is entirely satisfactory, that the steamer was wholly in fault for the collision, and that the ship was free from fault. The wind was from north-west to north-north-west. The ship was close hauled on the wind, and heading a little south of west. The steamer was heading in such a manner that her course crossed the course of the ship at an angle of about two points. The ship showed her green light to the steamer, and the steamer saw that light, and no other light on the ship, and saw that light a little over the port bow of the steamer. The steamer showed her masthead light and her red light to the ship, and the ship saw those lights, and no other lights on the steamer, and saw those lights a little over the starboard bow of the ship. The steamer saw the ship's light at a sufficient distance off to have avoided her, and yet the steamer ported and persistently ported, although the ship's light continued to draw towards the bow of the steamer, and was not shaken off as the result of the steamer's porting; and in spite of the danger which this condition of things indicated, the steamer did not slow or stop and reverse, until just before the collision. Her speed was so great when she struck the ship, that she cut off entirely the forward part of the ship, and passed some distance beyond her. The ship did not change her course before a collision was inevitable; and it is doubtful whether she changed it even then. She made no change which contributed to the collision or embarrassed the steamer's freedom of action. The answer charges as faults on the part of the ship, that she had no look-out, and was not properly manned and navigated, and changed her course. No one of these points is established by the respondents. The foregoing conclusions were those arrived at by the District Court.

But there is one question which has been presented to this court, that was not discussed or considered in the court below. The answer of the respondents alleges as follows: "Respondents further answering say that said steamer *Scotland* was by said collision sunk and destroyed, and that there is no liability *in personam* against these respondents for said loss of the *Kate Dyer*." Under this allegation the respondents insist that their liability, as owners of the steamer, did not extend beyond the value of their interest in the steamer, and in her freight, pending at the time of the collision; that, as the steamer was lost by he collision, and no freight money or passage money was earned by her, the respondents are thereby discharged from liability; and that the District Court had no right to exercise jurisdiction by issuing a writ of foreign attachment against the respondents, and no right to seize any property belonging to the respondents, under such writ. The answer does not state whether the alleged non-existence of liability is claimed under the Act of Congress of March 3, 1851 (9 U.S. Stat. at Large, 635), or under the general maritime laws. The question may first be considered on the view that the Act of 1851 applies to this case. Under the 3rd section of that Act, the liability of the respondents, as owners of the steamer, for the damages sustained by the libellants by this collision, cannot exceed the amount or value of the interest of the respondents in the steamer and her freight, pending at the time of the collision. Sect. 4 of that Act provided that the respondents might take appropriate proceedings in any court for the purpose of apportioning the sum for which, as owners of the steamer, they might be liable, amongst the parties entitled thereto. The claims sued for and represented by the libellants in this case are the claims for the loss of the ship and of her freight and cargo, and of the personal effects of her master and crew, and of property owned by a passenger on the ship. They comprise all the claims which could exist for any loss or damage growing out of such collision, so far as appears. This being so, and those claims being all before the District Court in this suit, it was easy for the respondents to institute appropriate proceedings in that court to have the limitation of their ability adjudged, and to have the sum for which they were liable apportioned among the parties making such claims. No such proceedings were instituted, although the rules of proceeding were made by the Supreme Court, in May 1872, and some of the testimony as to damages was put in after that time, and the commissioner's report was made after that time, and the question of damages was heard by the District Court after that time, and the final decree of that court was not made until July 17, 1874. Moreover, the 4th section of the Act provided that it should be a sufficient compliance with its requirements, on the part of the respondents, if they should transfer their interest in the vessel and freight, for the benefit of the persons making claims, to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the persons who might prove to be legally entitled thereto, and that from and after such transfer, all claims and proceedings against the respondents should cease. The District Court was a court of competent jurisdiction to appoint a trustee in this case, but no such proceeding was had. But it is insisted by the respondents that there was nothing in the shape of vessel or freight, or interest therein, or value of interest therein, which existed after the libel herein was filed on the 17th Dec. 1866, to which the Act of 1851 could apply. In *Norwich Company* v. *Wright* (13 Wallace, 104), it was held by the Supreme Court that by the maritime law, the liability of the owner of the vessel doing damage by collision was limited to his interest in the vessel and freight, and he was discharged by giving up that interest or by loss of the vessel on the voyage; that, by the English law, as constituted by statute, such liability was limited to the amount and value

of the vessel and freight at the time of the injury; and that the Act of 1851 intended, so far as collisions are concerned, to adopt the rule of maritime law; therefore, under the Act of 1851, it is sufficient to surrender the vessel and any freight that may have accrued, without paying into court anything further, and it is not necessary to pay or give security for the value of the vessel at the time of the collision, and of the freight for the voyage. But, to enjoy the benefits of the Act of 1851, so long as there is anything left of the vessel to be surrendered or transferred, or in or of which to have an interest capable of being surrendered or transferred, what is so left, or the interest in it, or the value of it, or of such interest, must be surrendered or transferred. In the present case, it is shown that there was a large amount of anchors, chains, rigging and cabin furniture saved from the steamer and delivered to the agent of the respondents, and what was so saved was of the value of several thousand dollars. That was a part of the vessel, and should have been surrendered or transferred, if the Act of 1851 was to be availed of. Nor is there yet time for the respondents to institute proceedings under the Act of 1851. No sufficient excuse is shown, as in *Norwich Co.* v. *Wright*, for not having taken such proceedings. There was more than two years' time after the rules of practice were prescribed in May 1872, and before the final decree of the District Court was made, during which the proceedings might have been taken in that court. The respondents, especially in view of the allegation in their answer as to their non-liability, because of the alleged destruction of the steamer, must, after allowing a final decree to go against them in the District Court, without instituting any proceedings under the Act of 1851, be held to have waived all right to institute such proceedings now.

I have not found it necessary to determine the question, whether the Act of 1851 applies to the owners of a foreign vessel, who seek the benefit of that Act. Undoubtedly, under the general maritime law, the liability of the owner of the vessel doing damage by collision, for the wrongful act or negligence of the master or crew of the vessel, if such owner was personally free from blame, was limited to his interest in the vessel and its freight, and ceased by his abandoning and surrendering those to the parties sustaining loss. But he could not discharge himself without abandoning vessel and freight; nor, if vessel and freight were lost, could he discharge himself without surrendering all claims in respect of vessel and freight, such as insurance, &c. If, in consequence of the loss of the vessel on the voyage, no interest in vessel or freight remained, the shipowner was discharged, but if any interest in vessel or freight remained, he could not be discharged without surrendering such interest. Therefore, if non-liability be claimed in this case under the general maritime law, the respondents have not put themselves in a position to claim it, because they have not surrendered, or offered to surrender, what remained of the vessel. On the contrary, the respondents retained what was saved from the steamer, and permitted the decree below to pass against them without surrendering it. If the answer be considered as averring that the steamer was in such wise, and to such extent, sunk and destroyed by the collision, that, under the rule of the maritime law, the respondents were discharged from liability, then the answer is not supported by the evidence, for there was something left of the vessel, and what was left was capable of being surrendered. As the personal liability of the respondents was not discharged, a cause of action in the Admiralty existed against them, and the jurisdiction of this court to administer the relief asked by the libel was properly enforced by the process of attachment issued.

The owners of the ship have appealed because the decree below awards them less than the value of the ship, and because it awards them interest at the rate of 6 per cent. instead of 7 per cent. upon the amount of their damage for the loss of the ship and for her freight, and for the personal effects of the master and crew of the ship. I examined the question of the rate of interest in the case of *The Aleppo* (7 Benedict, 120), and for the reasons there stated, and in the cases there cited, the rate of interest allowed was correct. The point that the value of the ship was fixed too low is not insisted on, on such appeal.

The proper rate of interest on the value of the cargo is 6 per cent, and the appeal of the Republic of Peru on that point is not sustained. The final decree of the District Court, besides awarding specified sums for the loss of the ship and of the freight on the cargo and of the personal effects of the officers and crew of the ship and of the property of the passenger, awarded to the Republic of Peru, as owners of the cargo of guano, which the ship was carrying, and which was totally lost by the collision, the sum of 64,731.27 dols. in gold coin of the United States, with interest thereon in like gold coin at six per cent. This amount was arrived at in the District Court, by taking the market price of the guano at the port of New York, and deducting therefrom the costs and charges which would have been incurred from the time of the loss, until it could have been placed in New York, ready for sale. It is contended by the respondents, that this rule of damages was erroneous, and that the proper rule in this case, is the cost of the cargo at the place of shipment, with the expenses and charges actually incurred and interest thereon. I had occasion in the case of *The Aleppo* (before cited) to examine this general subject, and to consider the decision in regard to it. In that case a cargo of wool was lost by a collision on the high seas, a few miles from the harbour of Boston, and it was urged, that the proper measure of damages was the market value of the wool in Boston on the day of its loss, less duties, freight, charges for landing, and cost of insurance from the place of loss to Boston; and that the result arrived at by such method of computation would be the value of the cargo at the time and place of its destruction. But the result of the principles laid down in the cases cited and considered was held to be that the proper rule of damages was the value of the cargo at the port of shipment, including the expense of lading it on board and transporting it to the place of collision, with interest at 6 per cent. from the time of collision; that all beyond that was expected earnings or profits; and that the loss of them was not a proper measure of damages. The cases in the Federal Courts to which I refer are those of *Murray* v. *The Charming Betsey* (2 Cranch. 64), *The Lively* (1 Gallison, 315), *The Anna Maria* (2 Wheaton, 327), *The Amiable Nancy* (3 Wheaton, 546), *Smith* v. *Condry* (1

Howard, 28), *Williamson* v. *Barrett* (13 Howard, 101), *The Ocean Queen* (5 Blatchf. C. C. R. 493), and *The Vaughan and The Telegraph* (2 Benedict 47: 14 Wallace, 258, 267). It is urged that the owner of the cargo must be indemnified to the extent of the loss sustained; that complete indemnity for such loss cannot be given in this case by taking as the rule the market value of the guano at the place of shipment; that there never was a market price, as the evidence shows, for the guano at the Chincha Island, where it was shipped, it having there neither market value nor ascertainable cost; that nevertheless it was an article of value, and could at the time and place of its loss have been easily exchanged for gold at a large price; and that, on any other rule, the recovery for the cargo would be only 1,424.25dols., being the cost of preparing it for shipment, and the charges incident to shipment. Indemnity for loss, in the sense of the law of damages, is indemnity to a party for his having lost what he once had. In common speech, a party may lose a market, or may lose an expected profit. But that is not correct language to use in considering the law of damages. The value of this cargo of guano at the time and place of loss did not embrace any part of the profits which would have been realised on the cargo if it had safely reached New York. It is impossible to take the market price at New York as the standard without taking in the probable and prospective profits. To say that this cargo could have been sold to arrive, or could have been easily exchanged for gold at a large price at the time and place of the loss, does not meet the difficulty. Selling the cargo to arrive, is only selling it to be paid for if and when it arrives, and leaves it subject to the contingencies of the voyage; and if it never arrives, the price, which is a New York price, and includes profits, is not paid. The transaction of delivering the cargo at the time and place of loss, on a sale then and there just before the loss, and receiving pay for it on the spot, based on a New York price for it, as if it were at New York, and deducting only the expense of carrying it to and landing it at New York, is not a real or probable transaction. It would be a transaction in which the seller would receive all the profit and take none of the risk of the voyage, and one which might as well be supposed to take place at the Chincha Islands, in respect to the cargo on board of the vessel, as at any point of the voyage short of the port of destination. The fact that the cargo was lost within but a short distance of New York, compared with the length of the entire voyage, makes no difference in principle, because, the fact of its loss at the place where it was lost by collision, shows that there was greater danger of its loss by collision at that place than at any previous point in the voyage. If the *Scotland* had not run into the ship, she might have been run into by some other ship nearer to New York, or the cargo might have been lost in some other way nearer to New York. If the collision had occurred one mile farther from New York, and the cargo had thereby been lost, the rule contended for by its owners might have been urged with equal weight; and so in respect to any collision farther and farther from New York, embracing even a collision close to the port of shipment. The contingency of a safe arrival of the cargo at New York, so as to enable its owners to realise their probable or prospective profits, was, during the whole voyage, a matter of conjecture, and the result shows that there was not any less peril so near to New York than during the prior part of the voyage. To allow such profits in this case would make it necessary to allow them, if the cargo had been lost by a collision close to the Chincha Islands, and would establish a rule which the Supreme Court rejected in *Smith* v. *Condry*. In opposition to this view two cases are relied on. In *Bourne* v. *Ashley* (1 Lowell, 27), the question was as to the value of a whale converted in the Okhotsk Sea. The court held that the market price was the rule in the case of articles which had a market price; that the wrong-doer could not escape paying damages by showing the absence of a market for the article; that there was no market price for whales anywhere, and no market for oil and bone, in the Okhotsk Sea; that, nevertheless, the fair value of the whale must be paid for, that that could not be arrived at by conjectural testimony of experts, as to what they would be willing to give for whales in the Okhotsk Sea; that the court was obliged to discover, as well as it might, the value of a whale, to a person who happened to want it at the time and place in question: that that value must be the price of the oil and bone in some market, less the expense of making the oil and bone out of the whale and getting it to market; and that as the market of New Bedford was the controlling market of the country, as well as the home port of both vessels, the proper standard was the value at New Bedford of the oil and bone made, or which might have been made from the whale, less the average necessary expenses of converting the whale into oil and bone, and freight, insurance, and other usual charges, with interest on the sum thus arrived at. In *Swift* v. *Brownell* (1 Holmes 467) the question was as to the value of a cargo of oil and bone lost in the Arctic Ocean by a collision between two whaling vessels. The court adopted the rule laid down in *Bourne* v. *Ashley*, and took the price of the oil and bone at New Bedford at the time when it would probably have arrived there, and not the New Bedford price at the time of the collision. Both of those cases proceed upon the principle that, if there is an ascertainable market value for the cargo at the time and place of the loss, that ascertainable market value is to govern; and that if there is no such ascertainable market value, and yet the cargo is of value to its owner, the wrong-doer cannot escape by showing that there is no such ascertainable market value. But to show that there is no such ascertainable market value, it is not sufficient to show that the place of loss was on the high seas, where traffic does not take place, and buyer and seller do not meet in market. That is the case in every case of loss by collision on the high seas; yet in such cases, if the cargo came from a port of shipment where traffic in it did or could take place, the value there and not the value at the port of destination is the rule laid down. The cases of the whale and of the cargo of oil and bone are exceptional cases. The articles in question in those cases were not shipped at any port of shipment where traffic in them did or could take place, and no value at the time and place of loss, predicated upon any value at any port of shipment, could be affixed to them. Whales and their products commence their existence as property on

the high seas, and their value, if to be dealt with as a value of the property in some market, could, in those cases, be dealt with only as a value in the port of New Bedford. The property had never been in a port or at a place where any definite or ascertainable value had been or could be given to it, as a market value. Not so with this cargo of guano. This guano, with all the guano at the Chincha Islands, was the property of the Peruvian Government, which exported it to foreign countries on its own account, and prohibited its exportation by any other parties. It was not bought and sold in Peru as a general article of commerce. Any citizen of Peru was at liberty to take it from the Chincha Islands for use in Peru, without paying anything for it, but he could not export it from Peru. Guano so taken was sold in Peru, subject to such restriction as to its use in Peru, at 12dols. a ton, gold. But such guano did not form more than one-twentieth part of the guano taken from the islands. The guano in the *Kate Dyer* belonged to the Peruvian Government, and cost it nothing but the labour of digging it only, and loading it on the ship, and was being exported by it to be sold on its own account and for its own profit. One sale by the Peruvian Government of 25,000 tons of guano, for 30dols., gold, per ton, net, in 1864, to be exported, is shown. The price of guano at New York, at the time the *Kate Dyer* would probably have arrived there, was 60dols. a ton, gold. The owners of this guano ought to receive, as compensation, a fair indemnity for its actual loss of guano, but not for its failure to realise probable profits. The value of this guano, at the time and place of loss, based on its value in Peru, can, I think, be ascertained from the evidence in such manner as to give to its owners such fair indemnity, and yet not limit it to the recovery of only 1,424.25dols. as the expense of shipment, with no value in the guano itself. This can be done without conflicting with the general rule. Because the Peruvian paid nothing for the guano, it does not follow that no value, as substantially a market value of it in Peru, can be ascertained. Nor, on the other hand, does the 12dols. a ton gold, or the 30dols. a ton gold, on the exceptional sales referred to, furnish a fair standard of market value. Mr. Hobson, a merchant residing in the city of New York, who has been for thirty years in the business of importing goods from the west coast of South America and other South American ports, testifies as follows: "Q. Suppose an article of merchandise is produced or obtained in Peru, the same not being there sold as an article of commerce for exportation, and for which there is a market in the United States, what would you, as a merchant, consider its value in Peru, in reference to the net proceeds of its sale in the United States, if it could be bought in Peru for exportation? A. With reference to net proceeds, and looking to a fair average profit, I should think it would be worth from 10 to 12 per cent. off from the net proceeds. To get at the net proceeds, I would take out shipping expenses, freight, duties (if any), marine insurance, and all port charges here, also commission for selling. If it could be bought at such rates in Peru for exportation, that would create a demand for it there for exportation." "By this fair average profit," the witness states that he means the usual mercantile result after paying for the article in a foreign country and all charges on it. There is no testimony in contradiction to this, or naming any other percentage as a deduction for a "fair average profit." The Government of Peru, in respect of its guano, was a merchant, exporting it and selling it in the market of New York, and making a mercantile profit on it. To be sure, the Government made a larger profit on it than the mere mercantile profit, and which larger profit included the mercantile profit; but the value in Peru which is to be ascertained is the value of the guano as an article to be dealt with there by a merchant seeking to export it and realise only a fair mercantile profit on it. That value is the proper value in this case, and can be readily ascertained in the method testified to by Mr. Hobson. The rate of profit is a matter of expert knowledge, as to which Mr. Hobson, as an expert, can speak. No expert contradicts him, or gives any other rate than that which he gives. Under the customs laws, where actual market value in the foreign port is required to be stated in invoices, it has been held that, in the absence of sales of offers to sell in the foreign port, the cost of manufactured goods, with a manufacturer's profit added, may be resorted to as a means of ascertaining the market value of such goods in the foreign port: (*Six Cases of Silk Ribbons*, 3 Benedict, 536.) In every case where market value abroad is sought to be ascertained, and there is no standard by sales abroad, that method of ascertaining such market value or its equivalent must be resorted to, which, under all the circumstances of the particular case, furnishes the nearest approach to such value abroad, as that a fair mercantile profit, and no more and no less, will be allowed to the merchant, in view of the net proceeds at the place of importation. That was the view in the case of the silk ribbons, and that is the view of this case. The decree in respect to the guano will be drawn up on the basis indicated.

On the appeal by the owners of the ship the respondents must have costs of appeal. On the appeal by the respondents, the appellees, other than the Republic of Peru, must have costs of appeal: and on such appeal, as between the appellants and the Republic of Peru, the appellants must have costs of appeal. On the appeal by the Republic of Peru, the respondents must have costs of appeal. The decree below is affirmed as to damages, except as to the amount awarded to the Republic of Peru, and it is affirmed as to the costs it awards, except as it awards costs to the Republic of Peru.

Solicitor for the owners of the *Kate Dyer*, *H. E. Scudder*.

Solicitors for the cargo, *Pritchard* and *Smith*.

Solicitors for the passenger, *Benedict*, *Taft*, and *Benedict*.

Solicitors for the respondents, *W. A. Butler*, *T. E. Stillman*, and *J. Chetwood*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins and W. Appleton, Esqs., Barristers-at-Law.

May 4, 16, 17, *and July* 2, 1878.

(Before Brett, Cotton, and Thesiger, L.JJ.)

Porteous and others *v.* Watney and others.

Shipping— Charter-party — Demurrage — Bill of lading—"All other conditions as per charter-party."

In a charter-party entered into between plaintiffs and B. and Co., it was stipulated that fourteen days should be allowed for loading and unloading, and ten days on demurrage. Defendants were indorsees of a bill of lading, which contained the terms "paying freight for said goods and all other conditions as per charter-party." Defendants' goods were stowed at the bottom of the hold, and, owing to the delay of the consignees of the goods stowed above the defendants', the defendants were unable to obtain delivery of their goods within the lay days, and three days' demurrage were incurred:

Held (affirming the judgment of Lush, J.), that the defendants were liable for the demurrage, as the charter-party was incorporated in the bill of lading. (a)

The words "paying freight and all other conditions as per charter-party" in a bill of lading include all the terms of the charter-party as to demurrage, so as to render an indorsee of the bill of lading liable for such demurrage if incurred.

When a bill of lading or charter-party (the terms whereof are incorporated in the bills of lading) contains a clause providing that the cargo of the ship shall be discharged in a certain number of days or demurrage paid, a consignee of part of the cargo whose goods are not discharged within the lay days provided, is liable for demurrage, although the delay has been caused by no default of his, but by the default of other consignees whose goods are stowed above his in the ship, provided there is no default on the part of the ship owner.

This action was tried at the Hilary sittings in London before Lush J. without a jury. Judgment was given for the plaintiffs for 150*l.*, the whole amount claimed.

The facts were as follows: The plaintiffs, the owners of the ship *Stamford*, entered into a charter-party with Brand and Co. for the conveyance of a cargo from Cronstadt by which it was stipulated that fourteen days were to be allowed for loading and unloading at the port of discharge and ten days on demurrage at 35*l.* per day; the master to sign bills of lading without prejudice to the charter-party, but at not less than chartered rate, and to have an absolute lien on cargo for freight, dead freight, and demurrage; the cargo to be brought and taken from alongside at merchant's risk and expense.

The defendants were consignees of a portion of the cargo, which portion was stowed at the bottom of the main hold, and under that of the other consignees. The bills of lading, one of which was endorsed to the defendants, stipulated for the delivery of the goods to order or assigns, "on paying freight for the said goods, and all other conditions as per charter-party." Owing to no neglect of the defendants, but owing to the delay of other consignees in unloading the cargo above the defendants' goods, the defendants were unable to obtain delivery of their goods, and three days' demurrage were incurred, for which this action was brought.

The case was reserved for further consideration, and on March 8th, 1878, the following judgment was delivered by

Lush, J.—The circumstances under which the defendants are sought to be made liable to demurrage are precisely the same as those in *Straker* v. *Kidd and Co.* (a) The only distinction between the

(a) The effect of this decision is to make each of the consignees liable to demurrage, whether his goods remain on board or not, after the expiration of the lay days, provided there is no default on the part of the former.—Ed.

(a) Straker *v.* Kidd and Co.

This was also an action tried during Hilary Sittings in London, before Lush, J., without a jury, and reserved for further consideration. The facts are fully set out in the judgment.

Russell, Q.C. and *M'Leod* for the plaintiff.

Watkin Williams, Q.C. and *J. C. Mathew* for the defendants.

March 8.—Lush, J.—This is an action for two days' demurrage of the steamer *Charles Mitchell*, which had been chartered by Messrs. Gibsone and Co., for the conveyance of a cargo of wheat from Dantzic to London. Eight bills of lading were given by the master for various portions of the wheat shipped by the charterers, one of which had been indorsed to the defendants. Each of them contained the following clause: "Three working days to discharge the whole cargo, or 30*l.* sterling per day demurrage." The vessel arrived on the morning of the 23rd of May, was reported at the Custom House at eleven o'clock, and was ready to discharge at noon of the same day. None of the consignees, however, were ready to receive delivery on that day, and the discharge did not commence till the morning of the 24th. One question raised at the trial was whether the lay days commenced at noon of the 23rd or on the following day. In the view which I take of the contract it becomes immaterial to decide this question. It happened that the defendants' portion of the cargo, except a comparatively small quantity which lay in the bunker and upon which no question arises, was part of a larger bulk stowed at the bottom of the hold, which belonged to the defendants and to another consignee in given proportions. This bulk was not reached till between two and three o'clock on Saturday the 26th. The barges of the other consignee being alongside first, his portion of the bulk was first delivered; and the defendants, though their barges had been in readiness the whole day, were unable to get any part of their cargo till after five o'clock. The discharge was, therefore, only commenced that afternoon, and was not completed till the Monday, whereby the vessel lost two days' sail. The defendants contended that, as they could not get their goods in time to clear the ship on that day, they were entitled to a reasonable time on the Monday to complete; that the default, if any, was that of the master, who was unable, and therefore was not ready, to deliver in time to enable them to discharge the ship within the lay days. On the other hand it was argued that the plaintiffs were always ready and willing to discharge the cargo, and that the risk of being prevented from getting their goods by the delay of other consignees is a risk which falls on the consignees and not on the shipowner. The first question is, what is the contract which is implied by the acceptance of a bill of lading containing the stipulation in question? It cannot be said that the words have no meaning, or that they were not intended to be binding to some extent; for the obvious purpose of the shipowner in inserting them was to secure the payment of a stipulated sum per day for demurrage, in case his ship should be detained in the process of unloading beyond three

two cases is in the form of the bill of lading. In the present case the ship was chartered to convey a cargo of grain from Cronstadt to this country, and to be delivered here as directed by bills of lading. The charter stipulates that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* day by day. The bills of lading, one of which for part of the cargo contained the words "paying freight for the same goods and all other conditions as per charter-party." Seven days had been consumed at the port of loading, so that seven working days remained for unloading at the port of discharge. It was argued that the words of reference in the bill of lading import into it only so much of the stipulation in the charter-party as applies to those particular goods—that is, that it gives the consignee such a proportion of the seven days for discharging them as his part of the cargo bears to the whole. But this is not the natural meaning of the words, nor can it have been the intention of either party. The object of the shipowner obviously was to place the consignees under the same obligation as to payment of demurrage as the charter imposed on the charterer; and any consignee knows before he reads the charter that if lay days are provided they are given for discharging the whole cargo. The bill of lading must be read as if instead of the words referring to the charter-party it had contained the entire stipulation, expanded so as to be adapted to the facts. "Seven working days are to be allowed for unloading the ship at the port of discharge, and ten days on demurrage at 35*l.* day by day." This puts the present case exactly on a parallel with that of *Straker* v. *Kidd and Co.*, and I therefore, for the reasons given in the judgment in that case, hold that the defendants are liable for the three days demurrage claimed by the writ, making 105*l.*, and give judgment accordingly with costs.

From this judgment the defendants appealed.

May 4, 16, *and* 17.—*Butt*, Q.C. and *Mathew* for the defendants.—The terms "all other conditions as per charter-party" must be held to mean such conditions as are applicable to these goods. If the meaning is not restricted in this sense the contract becomes unreasonable; the holder of the bill of lading becomes liable for the delay of a third party. But the default of this third party is as between the shipowner and the other consignees the default of the shipowner. The ship cannot be said to be ready to unload as regards the defendants until she is in such a state that they can reach their goods, and the lay days do not begin to run against the defendants until the ship is ready for them to remove their goods.

A. L. Smith and *R. T. Reid* for the plaintiffs.—The bill of lading incorporates the charter-party so far as the same is applicable to the subject of the contract in the bill of lading, that is, such clauses as refer to the carriage and delivery of these goods. Therefore the condition that all goods are to be cleared in fourteen days refers to these goods, and therefore the holder of the bill of lading is liable when there is no default of the shipowner. The consignees are in the position of co-sureties; they contract that the ship shall be

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days, demurrage at the rate of 30*l.* per day shall be paid. This is the alternative which the bill of lading presents, and which the consignee implied agrees to by taking the benefit of it. The objection raised against this rendering of the clause is undoubtedly striking. It virtually makes each holder of such a bill of lading answerable for the others as well as for himself, though he has no control over their acts. But no other construction can be put upon the clause without doing violence to the words or introducing a qualification which destroys their force. If the words had been, as the defendants contend they should be read, "Three days to discharge the goods in this bill of lading or demurrage," the defendants would have been in no better position; for the words must have been construed as an absolute contract to clear the goods within that time. The argument on the part of the defendants requires the insertion of a proviso, making the liability to demurrage conditional on their not being delayed by the acts or defaults of the other consignees. That would make it an entirely different contract, and defeat the obvious intention of the shipowner, which was to put pressure upon all the consignees, and make it the interest of all of them to clear the ship within the stipulated period, under the penalty of their having to pay 30*l.* per day, leaving it to them to settle between themselves how, by whom, and in what proportions the demurrage account should be paid. It seems to me, therefore, impossible to construe this clause otherwise than as a contract to pay stipulated demurrage if the ship is not cleared within three days. There is, of course, an implied condition that the shipowner shall be ready and willing to deliver. If he wrongfully refuses to give over the goods, or if by reason of any default of his or of any obstacle for which he is responsible, the consignee is unable to get his goods, this would afford a good answer to the claim, and this is the substance of the defence which is pleaded. Now, the only thing which prevented the delivery in the present case was the inability of the master to get at the goods, because they were stored at the bottom of the hold, and because the owners of the superincumbent goods had neglected to take those goods away in proper time. Can this neglect of the other consignees be said to be the default of the master? If not, it is immaterial whose fault it was; for the defendants undertook that, whether they were able to get away their goods or not, they would pay demurrage if the ship was not cleared within the stipulated period, the contract being, as I have said, an absolute and not a conditional contract. The defendants are therefore liable, unless they can show that some act or default of the owner, or of someone for whom he is responsible, prevented them from performing their contract. Now, it is clear that the master was not in default, he was ready and anxious to deliver. The leaving those goods in the ship which overlaid the defendants' was not his act but was the act of third persons, not with his consent, but against his will. The case, therefore, falls within the principle laid down in *Thiis* v. *Byers* (3 Asp. Mar. Law Cas. 147) and the cases there cited, that when the vessel has arrived at the place of discharge, and the master is ready to commence and complete the delivery, the lay days begin to run, and the consignee must bear the risk of any ordinary casualty or obstruction which might occur to interrupt the process of discharge. The cases on this particular point are but few, and they are conflicting. In *Leer* v. *Yates* (3 Taunt. 387) the Court of Common Pleas held, after taking time to consider, under a similar bill of lading, that the consignee was liable for demurrage, though he was prevented from getting his goods by the delay of other consignees whose goods lay above his. But Lord Tenterden, in two subsequent cases—*Rogers* v. *Hunter* (M. & M. 63) and *Dobson* v. *Droop* (M. & M. 441)—dissented from this doctrine; and directed the jury in a similar case that if a consignee cannot get his goods because some other person's goods prevented him, he is not liable for the detention of the vessel. I do not find that this ruling was questioned by motion to the court, nor do I find any subsequent decision on the point. *Leer* v. *Yates* (3 Taunt. 387) has however, been repeatedly quoted as an authority and is I think, upon principle, a sound decision. Lord Tenterden's dictum describes the position of a consignee whose bill of lading mentions no specific time for unloading, but it overlooks the nature and effect of such a stipulation as was contained in the bill of lading in those cases, and as is contained in the bill of lading now in question. My judgment is, therefore, for the plaintiff for two days' demurrage at 30*l.* per day, and costs.

Judgment for the plaintiff.

Solicitors for plaintiff, *Hollams, Son,* and *Coward.*
Solicitors for defendants, *Stocken* and *Jupp.*

clear, or they will pay. The argument *ab inconvenienti* is not on the side of the defendants; and in any case this is a contract, and must be kept, and the hardship is no answer. They cited

Wegener v. *Smith*, 15 C. B. 285; 24 L. J. 25, C. P.;
Chappell v. *Comfort*, 10 C. B. N. S. 802;
Gray v. *Carr*, 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522; 25 L. T. Rep. N. S. 215; 40 L. J. 257, Q. B.;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 147; L. Rep. 1 Q. B. Div. 244; 34 L. T. Rep. N. S. 526; 45 L. J. 511, Q. B.
Rogers v. *Hunter*, Moo. & M. 63;
Dobson v. *Droop*, Moo. & M. 441;
Fry v. *Chartered Bank of India*, L. Rep. 1 C. P. 689; 14 L. T. Rep. N. S. 709; 35 L. J. 306, C. P.; 2 Mar. Law Cas. 346.

Cur. adv. vult.

July 2.—The following judgments were delivered:—

Thesiger, L.J.—I am of opinion that this appeal should be dismissed.

By the terms of the bill of lading the consignee is only to receive his goods on the payment of freight for them, and on the fulfilment of all other conditions as per charter-party. Among these conditions is that by which the shipowner stipulates for payment of demurrage at a fixed rate in the event of the vessel carrying the goods being detained beyond the working days allowed by the charter-party. The language used, if construed according to its natural meaning, imports a liability on the part of the consignee for demurrage co-extensive with the liability of the charterer, and the court ought not to depart from what is the natural meaning of words selected by the parties to the contract, unless compelled by strong reasons or distinct authority. In *Wegener* v. *Smith* (15 C. B. 285; 24 L. J. 25, C. P.) the words of the bill of lading were substantially the same as here, viz., "against payment of the agreed freight and other conditions as per charter-party," and the construction put upon them was that to which I have referred. It is true, as was pointed out in the later case of *Smith* v. *Sieveking* (4 E. & B. 945; 24 L. J. 257, Q.B.), that there the demurrage sued for had arisen from the default of the defendant, but this fact was not even alluded to in the judgments of the learned judges who decided the case, and was not the ground of the decision. In *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) the words were "he or they paying freight and all other conditions or demurrage (if any should be incurred) for the said goods as per the aforesaid charter-party," and although the Court of Exchequer Chamber decided against the shipowner on the ground that the claim set up by him for damages for short loading was not provided for under the term "dead freight" used in the charter-party, so that the case is not a direct authority upon the point under consideration, yet, inasmuch as the majority of the court, consisting of four out of six judges, were of opinion that under the words "all other conditions as per the aforesaid charter-party" the holder of the bill of lading would have been liable for dead freight if any had been payable, the case at least indirectly confirms the authority of *Wegener* v. *Smith* (*supra*.) The cases of *Chappel* v. *Comfort* (10 C.B. N.S. 802), *Fry* v. *The Chartered Mercantile Bank of India* (L. Rep. 1 C. P. 689; 2 Mar. Law Cas. O.S. 346), and *Smith* v. *Sieveking* (4 E. & B. 945) which have been cited on behalf of the defendants in the present case, so far from weakening the authority of *Wegener* v. *Smith*, appear to me to tend still further to strengthen it. In each of them the reference to the charter-party contained in the bill of lading was either expressly by the use of the words "freight as per charter-party," as in the two first cases, or impliedly by the use of the words "paying for the said goods as per charter-party," as in the last case, limited to the condition in the charter-party relating to freight, and was held to be made simply for the purpose of ascertaining the rate of freight, and not for the purpose of imposing an obligation upon the holders of the bill of lading to perform the conditions of the charter-party generally. In none of these cases was any doubt thrown upon the correctness of the decision in *Wegener* v. *Smith*, while in *Smith* v. *Sieveking* it is expressly approved of, and the court in referring to the language of the bill of lading says: "This plainly indicated to the consignee that before he was entitled to the delivery of the goods he was bound to make a payment beyond the freight; and there was a reference to the charter-party for some condition to be performed beyond the payment of freight. That condition was payment of demurrage, and the bill of lading was construed as if it had expressly made the payment of demurrage a condition on the performance of which the goods were deliverable. The consignee accepting the goods under such a bill of lading could not escape the payment of demurrage by denying his liability to pay it." The true result of the authorities, therefore, is that a bill of lading, in which the words "and all other conditions as per charter-party" follow the expression "on paying freight" or "paying for the said goods," or similar expressions, imports a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of charter-party to which it refers.

It is said, however, on the part of the defendants, that the present case is distinguishable from those of *Wegener* v. *Smith* and *Gray* v. *Carr*, by the fact that in them the bill of lading comprised the whole cargo, while here it comprises only a portion of the cargo; but, with the exception of an observation of Maule, J. (made in the course of the argument in the former case), I can find nothing which would justify me in supposing that such a distinction exercised any material effect upon the decisions in those cases, and the absence of any reference in the judgments to it is an argument against its existence. For myself, I feel a difficulty in seeing how the construction of a bill of lading, which on its face may not, and in many cases will not, prove the fact whether the goods to which it refers do or do not constitute the whole cargo of a chartered ship, can, upon a point like that under consideration, alter according to whether the parol evidence establishes that fact in the affirmative or negative. One view by which it is suggested that this difficulty is met is that the construction is not altered, but that the conditions of the charter-party are to be read into the bill of lading not absolutely, but with reference to the goods which are the subject of it; and that, just as the freight, if regulated by the charter-party, is proportionate to the goods carried under the bill of lading, so the demurrage is to be divided

among the consignees in proportion to the value of their goods. But this view, by attempting to remove one difficulty, raises another; for it would, if adopted, be incapable of being worked out as a matter of convenient practice. It is impossible to suppose that a shipowner whose ship has been detained beyond the lay days could in practice assert liens or bring actions against all the bill of lading holders for proportionate amounts of demurrage, ascertained by a sort of average statement; and the result would therefore be that a clause in the bill of lading, which would appear to have been inserted for the very purpose of securing the liens to which the shipowner is entitled by the charter-party, would become practically inoperative. Another view presented is, that the working day under the charter-party must be allotted among the consignees of the cargo in proportion to the amount of cargo to be respectively received by them, so that, if in the present case there had been seven consignees of the cargo in equal portions, then there being seven working days left for unloading at the port of discharge, each consignee would be entitled to one day for unloading, and would only be liable for demurrage if he exceeded, and to the extent that he exceeded that one day. But this view is as unpractical as the other to which I have just referred, and would, if adopted, lead to the same consequences. There is in reality no practicable middle course between the right of the shipowner to treat each consignee as liable *in solido* for the demurrage secured by the charter-party, and the right of the bill of lading holder to have his goods entirely freed from the conditions contained in the charter-party as to demurrage; and, even if a middle course were practicable, the parties to the bill of lading contract could only be held to have adopted it by giving a strained interpretation to the words used by them. But then it has been urged upon us that the inconvenience and hardship which would arise if the consignee of a small parcel of goods were held liable for the whole demurrage under the charter-party afford a strong practical argument against the construction of the bill of lading contended for by the plaintiffs. This might be so if it were possible to construe the bill of lading so as to exclude altogether the condition as to demurrage; but, if that condition must be included, as for the reasons I have already given, I think it must, and the words by which it is included in their natural meaning import, as I also think they do, that the condition is to be read as if it had been introduced into the bill of lading, while any other construction of the bill of lading would lead to an utterly impracticable result, the argument founded upon the alleged inconvenience and hardship to the consignee becomes of little force. It is no doubt a startling consequence if the construction which this court puts upon the bill of lading is the true one—if, as it has been suggested, and as I understand Brett, L.J. holds—the shipowner can recover the demurrage against all as well as against any one or more of the consignees, so that he may be paid over and over again. If the words of the charter-party are to be read into the bill of lading in such a manner as that reference to the charter-party, and to what is done under the charter-party, except for the purpose of reading the words in, cannot be made, such a consequence would follow; but in that case *Leer* v. *Yates* (3 Taunt. 387) becomes an authority that, notwithstanding that consequence, the consignee is liable for the entire demurrage; and *Leer* v. *Yates*, notwithstanding the dissent from the doctrine laid down in it expressed by Lord Tenterden in the cases of *Rogers* v. *Hunter* (M. & M. 63) and *Dobson* v. *Droop* (M. & M. 441), still stands as an authority.

But on the other hand, without taking upon myself to express an opinion upon a point which is not directly before us, especially in the face of the opinion of Brett, L.J., I must at least say that I do not think it altogether clear that, when a bill of lading stipulates that a consignee under it is to have his goods on payment of freight, and on the performance of all other conditions of the charter-party, and in point of fact all demurrage due under the charter-party has been paid to the shipowner by some other consignee under a similar bill of lading, so that the condition in the charter-party as to demurrage has been performed, although not by the particular consignee, that fact would not constitute in equity, if not at law, a defence to an action for demurrage brought against the first consignee. Be this how it may, I feel bound, by the language of the contract between the parties in this case, to hold that the plaintiffs were entitled to recover against the defendants the demurrage claimed, and consequently that the decision in their favour by the learned judge in the court below was right, and should be affirmed.

COTTON, L.J.—I entirely agree in the decision and also in the reasons which have been given by Thesiger, L. J. for the conclusion which he has arrived at. The real question we have to decide is this, What is the contract and the consequences of the contract entered into between the defendant and the shipowner by means of this bill of lading? Now, I have considered for some time whether or not a distinction might be drawn in this case in consequence of its being a bill of lading of part only of the cargo, and whether we should introduce with all its consequences those conditions of the charter-party which are relied upon into the bill of lading; but I find it impossible, according to the ordinary and usual rule of construction, to come to any other conclusion. This is simply a question of construction, subject to any decisions which have laid down rules for our guidance, and subject to which we must always consider the meaning where parties have expressed themselves in an ambiguous way which is capable of two meanings, and carry into effect the intention of the parties with regard to the contract they have entered into; but the words, to my mind, of the bill of lading, combined with the charter-party, are sufficiently clear to establish that the plaintiffs in this case are right. The bill of lading is this: "paying freight for the same goods, and all other conditions as per charter-party." That, of course, must be performing all other conditions as per charter-party. Now, here we have an express provision in the charter-party that the shipowner shall have an absolute lien on the cargo for all freight, dead freight, and demurrage. It is impossible not to import that into the contract entered into by the bill of lading without rejecting those words, "all other conditions." We are not entitled to reject them unless there is something manifestly inconsistent. The lien generally is on the cargo, and on every part of it; and although the bill of lading

refers to one part of the cargo, yet my opinion, as a matter of construction of the contract between the parties, is that the condition shall be introduced, and being introduced there is a lien on every part of the cargo for demurrage, and therefore on the construction of the contract the plaintiff is right. If parties choose to make these contracts they must take the consequences, and not come to the court to enforce an unnatural construction of words simply for the purpose of avoiding an inconvenience which possibly they may not have conceived, but which is the result of a fair construction of the contract into which they have entered. As regards the questions whether the plaintiffs could recover from each holder of a bill of lading the full amount of the demurrage, the question does not arise before us; therefore I think it better not to express any opinion upon it, though I do not in any way express dissent or any opinion either way on that point. We have simply to consider this, whether or no the plaintiffs have or have not, under their contract with the defendants, a right to recover the sums sued for, and in my opinion they have.

BRETT, L.J.—I must confess I have struggled long and hard to be able conscientiously to differ from the judgment, but I have not being able to do so, and notwithstanding the somewhat astounding results to which the decision brings one, in consequence of what I cannot help thinking (I suppose for some good business reason) the obstinate persistence of merchants to accept bills of lading in this form, I cannot differ from the decision, and the reason why is this, that I think one would be obliged to break too many settled rules of law. The bill of lading is taken "on paying freight for the same goods, and all other conditions as per charter-party." I tried in *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115, 120; L. Rep. 6 Q. B. at p. 533) to give what I thought was a reasonable interpretation to those words "and all other conditions as per charter-party." but my interpretation was not accepted by the majority of the court; and I take the decision in *Gray* v. *Carr* to have been that those words in a bill of lading are to be treated as words of reference to the charter-party, and that they therefore introduce into the bill of lading every condition that is in the charter-party by way of reference; so that they bring into the bill of lading every condition of the charter-party in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that if, taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible, not because they are not introduced, but because being introduced they are impossible of application. The bill of lading must therefore be considered as if all the conditions of the charter-party had been absolutely written into it originally, and then we have a bill of lading in this form: Fourteen working days for loading and unloading, and ten days on demurrage. Now, it is impossible to say that that condition is not applicable to a bill of lading, although the bill of lading represents only part of the cargo. It is applicable, although it seems strange that a person should enter into such a contract. Now, what is the next rule? The bill of lading claims to be a contract between the shipowner and the person taking the bill of lading. There is no relation at all between the holders or takers of other bills of lading and any one holder of a bill of lading. There is no relation between them at all. They are not co-sureties. It therefore seems to me that, when it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them we are looking at other bills of lading which cannot be put in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading; and therefore, when it is said that the bill of lading represents a part of the cargo, and that the other bills of lading are in the same form. we break the rule which forbids us to look at them; for we do not know whether the other bills of lading are in the same form at all. Then what is the contract represented by the bill of lading with the stipulation in it? It seems to me that the cases of *Randall* v. *Lynch* (2 Camp. 352), *Leer* v. *Yates* (3 Tannt. 387), and particularly the late case of *Thiis* v. *Byers* (3 Asp. Mar. Law Cas. 147), show what the contract is when that contract is in this form. It is not that the holder of the bill of lading will discharge his cargo within a reasonable time after he is able to do so; it is that, if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond, however the delay may be caused, unless it is by default of the shipowner; he has made himself liable to pay the demurrage. That is stated to be so in *Thiis* v. *Byers* (3 Asp. Mar. Law Cas. 147). Therefore the holder of a particular bill of lading is bound to pay according to that contract for every day beyond the days during which the ship remains with the cargo in her, unless that is caused by the fault of the shipowner.

Now, in the case before us there is no fault on the part of the shipowners. The delay might be caused by accidents over which none of the holders of the bills of lading had any control, or it may have been caused—although it is not so found—by delay of the holders of cargo above that of the defendants. But even supposing it is by their neglect, in the contract between the shipowners and the defendants, there is no stipulation about the negligence of other people. The defendants are to pay unless it is the fault of the shipowners. The negligence of the holder of the upper cargo is not the fault of the shipowners; therefore the negligence of owners of the upper cargo would be one of those negligences the consequence of which the defendants have undertaken to pay for. Therefore, whether the owners of the upper cargo were negligent or not, it seems to me that on their contract the defendants must pay. If I could arrive at an opposite conclusion I would, for I do not share the doubt of Thesiger, L.J. I think that, if the holder of a similar bill of lading had been called upon to pay the whole demurrage to the shipowners. the holder of another bill of lading, if sued, could not set that up as a defence. That defence would arise in respect of a contract with which he has nothing to do, and he would have no right to prove that other and wholly independent contract; and therefore I accept the proposition that it would be no defence to the

defendant, the owner of the bill of lading, to say that the shipowner had been paid the same sum by all other holders of bills of lading for cargo in the ship. This must follow if people will make such contracts. Therefore I think that we are bound to follow the decision of the court in *Leer* v. *Yates* (3 Taunt 387). I cannot do so without considerable hesitation, when I know what judges of the authority of Lord Tenterden and Sir James Mansfield thought upon the matter. We have to decide upon a conflict of authority, and I prefer the decision in *Leer* v. *Yates* (3 Taunt. 387) to that in *Rogers* v. *Hunter* (Mood. & M. 63) and *Dobson* v. *Droop* (Mood. & M. 441).

There is another solution of the problem which has been ingeniously suggested by Mr. Maclachlan in the last edition of his book, at page 496, where he suggests that there are two elements which enter into this question, namely, time and amount; and he proposes a solution somewhat between Sir James Mansfield and Lord Tenterden; but it seems to me that his solution would break the rule and cannot be admitted, and therefore, although I accept the result that the shipowner, where there are this number of contracts, may sue each and every one of the holders of the bill of lading, and recover against each and every one of them, I also accept the result that no one of the holders of bills of lading can defend himself by saying that others have paid before him or may be made liable to pay behind him. He has nothing to do with those independent contracts, he is bound by his own contract—a written contract in terms—and he must pay if the circumstances have arisen. Nothing can relieve him but the fault of the shipowner. It has suggested itself to me that, if the holder of the bill of lading of the upper cargo were to delay the ship by unreasonable delay, it is possible that the holder of the cargo under his might have an action against him for injury to himself by reason of that delay. It may be they owe that duty to each other that no one of them shall negligently delay; but there may be difficulties in bringing such an action. He may not have notice of the contract, or there may be other difficulties; still I think it is possible he may have that remedy—it is reasonable, but to my mind he certainly can have no other; he cannot maintain an action against the others for contribution. So that I accept the whole consequence that was seen by Sir James Mansfield in *Leer* v. *Yates* (3 Taunt. 387); but at the same time I think the rules of law oblige us to say that the holder of each bill of lading is liable if the ship is delayed beyond the number of days allowed in his bill of lading. Therefore I think that the judgment of Lush, J. is correct, and must be affirmed.

Judgment affirmed.

Solicitors for the plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for the defendants, *Plews, Irvine,* and *Hodges.*

May 30, 31, *June* 1 *and* 4, 1878.

(Before BRETT, COTTON and THESIGER, L.JJ.)

KALTENBACH *v.* MACKENZIE.

Marine insurance—Constructive total loss—Notice of abandonment.

Notice of abandonment is a condition precedent to a claim for a constructive total loss, except in the one case where such notice could not possibly be of any benefit to the underwriters.

Plaintiff's vessel was insured with the defendants on a voyage from Saigon to Hong Kong. The ship sailed from Saigon on 14th Jan. 1871, *and on the 22nd she struck upon a bank, and was damaged. On the 24th she was towed to Saigon, and discharged her cargo. She was then surveyed, and the surveyors recommended she should be sold. On 7th Feb. the owners' house at Singapore made up their minds to sell, and wrote to the captain to that effect. On 11th Feb. the ship was condemned, and on the 23rd was sold. On 27th Feb. the Singapore house wrote to their agents in London, stating the survey and that the ship had been sold, and directing them to inform the underwriters in London. On 11th March the plaintiff's firm claimed for a total loss against the underwriters.*

Held (reversing the decision of the C. P. Div., Grove, Denman, and Lopes, JJ.), that notice of abandonment was necessary, that no such notice was given, and that plaintiff was consequently not entitled to recover.

Potter *v.* Rankin (18 *L. T. Rep. N. S.* 712; 22 *L. T. Rep. N. S.* 347) *distinguished.*

APPEAL from a decision of the Common Pleas Division.

The action was on a policy of marine insurance, claiming as for a total loss.

The defendant paid money into court for a partial loss.

The facts proved at the trial were as follows:

The plaintiff is a partner in the firm of Kaltenbach, Engler, and Co., who carry on business at Paris, Singapore, and Saigon. In 1867 they became the owners of the ship *Admiral Protet,* of which the plaintiff was the only registered owner, the other members of the firm being foreigners.

On the 4th Oct. 1870 the *Admiral Protet* was insured under Lloyds' policy, for 4000*l.* for a voyage from Saigon to Hong Kong, the policy being made in England in consequence of the Franco-Prussian war.

On the 14th Jan. 1871 the ship sailed from Saigon with a cargo of rice; and on the 22nd Jan. she went ashore on Britt's Shoal, and sustained great injury. She was floated off the same day, and on the 24th she was towed into Saigon, and discharged her cargo. She was then surveyed, and the surveyors, on the 3rd Feb., made their report, recommending that she should be sold.

On the 30th Jan. 1871 the plaintiff's house at Saigon wrote to the house at Singapore, giving particulars of the disaster, and stating that the condemnation of the ship was highly probable.

On the 3rd Feb. the surveyors' report having been made, the master of the vessel wrote to the Singapore firm stating the survey and that it was recommended that the vessel should be sold. On the 7th Feb. the firm at Singapore wrote to the master of the vessel, stating that they thought it

best that he should follow the advice of the surveyor and let the vessel be sold.

On the 20th Feb. the Singapore firm received a letter from Saigon as follows:

You may depend that *Admiral Protet* average documents will be made with the utmost care. We will do all in our power to avoid trouble on behalf of the underwriters. The *Admiral Protet* will be sold on the 23rd.

The ship was sold on the 23rd for 1600 dollars.

On the 27th Feb. the Singapore firm wrote to Messrs. Im Thurn and Co., the plaintiff's agents in London, as follows:

We are sorry to inform you that, at a survey held on the *Admiral Protet* in the Government dock at Saigon, it has been found that the damages are so serious that it would cost from 18,000 to 20,000 dollars to repair the same, and that the repairs would take four months' time, as Government cannot place the dock at the ship's disposal for such a length of time, the same being more specially reserved for repairing ships of war. Considering, also, that in her present state she could not sail for some other port for repairs, and as the costs of repairs would have exceeded the amount insured on her, the surveyor recommended that the *Admiral Protet* should be sold on account of the underwriters, and the sale was to take place on the 23rd Feb. We do not know as yet how the sale has turned out. Kindly inform the underwriters.

On the 11th March the owners gave notice that they claimed for a total loss. This claim was resisted by the underwriters on the ground that notice of abandonment was necessary, and had not been given to them by the owners.

At the trial Lord Coleridge, C.J. nonsuited the plaintiff, on the ground that notice of abandonment was, under the circumstances of the case essential, and that there was no evidence of any such notice having been given.

A rule *nisi* for a new trial was afterwards obtained by the plaintiff on the ground of misdirection.

The Common Pleas Division made this rule absolute.

The defendant appealed.

The case in the court below is reported *ante*, p. 15; 38 L. T. Rep. N. S. 942.

Butt, Q.C., *Cohen*, Q.C., and *Hollams*, for the defendant.—There was plenty of time between the 7th and 23rd Feb. for the Singapore firm to communicate with the underwriters, and there was no necessity for an immediate sale. The Singapore house had all the materials before them for the purpose of making their election whether they would abandon the vessel or not, and they ought as a matter of law to have given notice of the abandonment within a reasonable time. They cited.

Potter v. *Rankin*, 2 Asp. Mar. Law Cas. 65; 18 L.T. Rep. N. S. 712; 22 L. T. Rep. N. S. 347; L. Rep. 6 E. & I. App. 83;
King v. *Walker*, 9 L. T. Rep. N. S. 259; 33 L. T. Ex. 167, Ex. Ch. 325; 1 Mar. Law Cas. O. S. 384;
Farnworth v. *Hyde*, 12 L. T. Rep. N.S. 231; 34 L. J. 207, C. P.; in error L. Rep. 2 C. P. 204; 15 L. T. Rep. N. S., 395; 2 Mar. Law Cas. O.S. 187, 429;
Stringer v. *English, &c., Insurance Company*, 22 L.T. Rep. N. S. 802; L. Rep. 4 Q. B. 677; Mar. Law Cas. O.S. 440;
Wallace v. *Fielden* (*The Oriental*), 7 Moo. P. C. 398;
Proudfoot v. *Montefiore*, 16 L. T. Rep. N. S. 585; L. Rep. 5 Q. B. 511; 2 Mar. Law Cas. O.S. 512.

Sir *H James*, Q.C., *W. Williams*, Q.C., and *J. C. Mathew*, for the plaintiff, contended that no notice of abandonment was necessary, and if it was necessary, that sufficient notice had been given. They cited.

The Cobequid Marine Insurance Company v. *Barteaux*, 2 Asp. Mar. Law Cas. 536; 32 L. T. Rep. N.S. 510; L. Rep. 6 P. C. 319;
Roux v. *Salvador*, 3 Bing. N. C. 266;
Dent v. *Smith*, 20 L. T. Rep. N. S. 868; L. Rep. 4 Q.B. 414; 3 Mar. Law Cas. O.S. 257.

BRETT, L J.—Two questions are raised in this case: first, whether notice of abandonment was necessary; and, secondly, whether it was given in time. It seems to me that, before going into the particulars of the case, I ought to state what my view of the law is.

I agree that there is a great difference between abandonment and notice of abandonment, and I agree with what has been said by Lord Blackburn, that the doctrine of notice is not peculiar to a policy of marine insurance. It is part of the doctrine of indemnity, and wherever persons have entered into a contract of indemnity, and claim an absolute indemnity, there must be an abandonment and a notice of abandonment. The doctrine of abandonment can only arise where the assured claims for a total loss. There are two kinds of total loss: 1, actual; 2, constructive; but in both the assured claims for a total loss, and abandonment must take place in both. For instance, if there is a total loss, and, as was said by Lord Abinger, the ship has become a wreck or mere *congeries* of planks, or something remains of the cargo which is not the goods themselves but the remains of goods, there must be abandonment; but if there is an actual total loss there is, of course, no abandonment, because there is nothing to abandon. But in cases of constructive total loss notice of abandonment is necessary. How came that doctrine to arise? Some judges have said that it is a necessary equity. I doubt whether that is the origin of notice of abandonment. I think it was introduced by the unanimous consent of shipowners and underwriters, and has therefore become part of their contract. I think, therefore, that being part of the contract, the notice of abandonment is a condition precedent to a claim for a constructive total loss. Now, a loss may occur in any part of the world, and losses frequently occur in places where the underwriter has no power to get notice of the loss except from the assured, and there might be great danger that the owner of the ship or goods might take his own time to consider what to do, and to wait and find out whether the markets were likely to rise or fall before he arrived at any decision, and this is the reason why in all cases it is made a part of the contract that, when there is a claim for constructive total loss, notice of abandonment must be given. That being so, and this being made part of the contract, then came the office of the judges, as disputes arose as to when notice of abandonment must be given. It was questioned whether or not the notice must be given when the assured first heard of the loss, and the judges decided that the assured must have reasonable time to ascertain the nature of the loss. For instance, if the owner hears that his vessel is damaged, that is not sufficient information; he must know the nature of the damage. If he hears that his ship is captured in the time of war, then it is obviously a total loss. If he hears that his ship is stranded with her bottom out and her

back broken, yet still is in existence, but is in such a state that any reasonable man must know that she is in imminent danger of being utterly lost, then he must at once give notice of abandonment. When he hears that the damage is such as to cause imminent danger of total loss, then he must give notice of abandonment: but if his information be otherwise, then he can have a reasonable time to wait. Notice of abandonment is a condition precedent, and must be given directly after the assured knows that his ship is in so dangerous a condition as to be likely to prove a total loss; but in cases of uncertainty a reasonable time is allowed. But then there is this state of things to be considered, when the ship and goods are put in danger, and neither the assured nor the underwriters is at hand. Then the captain of the vessel alone must act; indeed, under such circumstances, captains have sold ship and cargo where they were not insured. As a general rule, as to the propriety of sale and the title a captain can give, I say that he has in himself no right without the consent of the owners; but, if it be a case of urgent necessity, then he becomes an agent so as to bind the owner of the ship and goods. The rule is then that, if the circumstances are such that any reasonable person having authority would sell, then the captain can sell, and what he does is binding on the owners. When, therefore, there is a constructive total loss of the ship or cargo, circumstances may or may not have arisen to justify the captain in selling, and he may or may not have sold. If the first information which the assured has of the damage to his ship or goods, although it be not of an actual total loss by the perils of the sea, is accompanied also by the information that the captain has sold them, and he has done so justifiably, that is the time when the assured should give his notice of abandonment. In the case of *Potter* v. *Rankin* (*ubi sup.*) it was held that, where no possible advantage could accrue to the assurer from notice of abandonment, then such notice was a mere idle ceremony, and need not be given: but the decision in that case went no further. I will not say that, if it could be shown that the subject-matter was in such a condition that it would disappear before notice of abandonment could be given, the assured might not be excused from giving notice; but I say that nothing short of that would excuse him. I think to go further would let in all the dangers against which the doctrine of notice of abandonment was made part of the contract.

Now for the present case. The ship was undoubtedly badly injured, and, in order to consider the ruling of the learned judge at the trial, we must take it that she was so badly injured that there was imminent danger of her becoming a total loss—that she was, in fact, a constructive total loss; that is to say, in such a condition that if the owners had fulfilled their duties they might have claimed as for a constructive total loss, which must be the existing state of things before a sale takes place or notice of abandonment is given, and that the assured was entitled to abandon. The questions are (1) was the assured excused by the circumstances from giving notice of abandonment? (2) Did he give such notice? (3) If such notice was given, was it given in legal time? It was argued before us that the ship was an actual total loss, but I am of opinion that there is not the least doubt that she was not. I think we must say that she was a constructive total loss, and that the circumstances were such that the owner had a right to consider that the costs of repairing the vessel would be greater than the value of the vessel, and that therefore there was imminent danger of a total loss, and that at the time of the inspection of the vessel he would make such an election as any reasonable man would make, and that then he was bound to give notice of abandonment unless he was excused by the circumstances of the case. The owners were a firm, some at Singapore, and some at Saigon, and I think that the firm at Singapore were the owners who were bound to act. They received information on the 7th Feb. as to the condition of this ship, and I think that they did not receive material information after that time. I think the information they received was such that, unless they were otherwise excused, they were bound to act upon it, as upon information of the imminent danger of the vessel. That being so on the 7th Feb., the ship was not sold, and therefore this case is not within *Potter* v. *Rankin* (*ubi sup.*). Then arose a dispute as to whether or not the firm at Singapore ought to have made a communication by telegram to the underwriters in London. If the telegraph was in use, and was known to be so by the firm at Singapore, then I think that they ought to have made use of this means of communication; but, if it were not so, then they would be justified in sending a letter. There was no evidence which could warrant a jury in saying that the ship would have perished before an answer could be received; and therefore that question did not arise. They ought to have sent a notice of abandonment to the underwriters as soon as was possible. If they were only bound to send this notice by post, then they had no right to let an unreasonable time elapse before sending it. I do not think that they intended to consider the rise or fall of the markets; but, instead of sending the notice to the underwriters or their agent, they only communicated with the owner at Zurich, and therefore failed to give notice of abandonment. None of them made up their minds in time to give notice of abandonment, nor did they send it in due time. The only mode of abandonment under a policy of marine assurance is to give notice, and here I think that the evidence was that the assured did not give notice of abandonment in proper time; and that therefore Lord Coleridge was right in his decision, and the divisional court wrong. I think that they carried the words of Lord Blackburn in *Potter* v. *Rankin* (*ubi sup.*) further than the decision required, and further than Lord Blackburn intended.

COTTON, L.J.—The question raised in this case is whether or not Lord Coleridge was right in his decision. Although the claim was for a total loss, the ship still existed as a ship, and we must consider that the damages were such as to constitute her a constructive total loss. Where the damages to a ship are such that the owner can treat her as a total loss or else repair her, he has a right to elect which course he shall pursue; and if he has elected to treat her as a total loss, he must transfer to the underwriter the ship or thing insured which has not quite perished. As a general rule he must give notice of abandonment as soon as he has received information of the condition in

which his ship is; and I think there are two reasons for this rule; the first is, that when he has once made his election to treat the vessel as a total loss, the underwriters can insist upon his doing so, and he cannot go back from his decision; and the second reason for his notice of election is, that the underwriters may do the best they can and make the most they can. I think in this case that there was no evidence of great danger. I think that before the ship was placed in dock she was damaged considerably, but that the leaking was afterwards of a minor character, and such as to justify a jury in finding that she was not in imminent danger. I think that notice of abandonment was not given in due time, and that Lord Coleridge was right and the Court of Common Pleas was wrong, and that their decision must be reversed.

THESIGER, L.J.—I am also of opinion that the judgment of Lord Coleridge was right.

In this case the plaintiff seeks to recover for constructive total loss. It is impossible for him on the facts of the case to put his claim higher, and the underwriters do not contend that the facts proved were otherwise than sufficient to establish such a claim. That being so, the assured had to prove either that he gave notice of abandonment as soon as he received full information as to the state of the vessel; that is to say, as soon as he had all the materials to enable him to elect what course he would pursue, or to prove that the state of circumstances was such as to make a notice of abandonment unnecessary. Before Lord Coleridge the plaintiff adopted the latter alternative; and it was there urged on his behalf that the sale was reasonable and prudent, that the communication of the fact of the sale could not have reached the underwriters in time for them to have given their orders, that the case was within the decision in *Potter* v. *Rankin* (*ubi sup.*), and that no notice of abandonment was necessary. Lord Coleridge assumed, as he was bound to do, that the sale was reasonable and prudent; but he held notwithstanding that the assured must give notice of abandonment, and I agree with him. In the first place, it was a question of fact, whether or not it was impossible to communicate with the underwriters in time. I think even there the assured has failed to establish the impossibility. On the 7th Feb. he was in possession of full materials to enable him to decide whether to abandon or not. There was a telegraph in existence between Singapore and Europe; but I think there is no need for us to decide on that question of fact. I will assume that the question of the telegraph was one for the jury.

But then the question arises as to whether these facts bring this case within the decision in *Potter* v. *Rankin* (*ubi sup.*) in the House of Lords. And now to distinguish between that case and the present case. When, at the time of the assured electing to consider the vessel as a constructive total loss, there is no possibility of the insurer getting any advantage from a notice, then there is no necessity for the mere idle ceremony of giving notice of abandonment. Lord Chelmsford says in *Potter* v. *Rankin* (2 Asp. Mar. Law Cas. 65; L. Rep. 6 E. & I. App.): 'In *Farnworth* v. *Hyde* (*ubi sup.*), under similar circumstances of the loss of the ship insured, and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice when it is wholly out of their power to take any steps to improve or alter their position." Again, Lord Colonsay says. "I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the notice of abandonment is given, and he could gain nothing by it, then it is not necessary to give that notice." And Lord Hatherley, remarks: "I apprehend, my Lords, that certainly no authority has been cited to show that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly accrue to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the value of the ship when repaired, then there being something *in esse* to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportunity of making the best use of what remains. . . . . But in this case there is nothing suggested, and nothing can be suggested (except one single point which I will notice in a moment), as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured." It is said that there is something in Lord Blackburn's judgment to extend the principle further; but I say that when the whole of Lord Blackburn's judgment is read it does not help the plaintiff, and goes no further than the decision of the House of Lords, that when no part of the subject-matter is in existence, so that notice of abandonment could be of no advantage to the underwriters, then the assured may be discharged from giving such notice. When we think how far the principle set up on the part of the plaintiff might be carried, we cannot hold in favour of such a construction.

Now, with regard to the facts of this case, there was no evidence to the effect that there was an absolute necessity of selling the ship, although she was a constructive total loss in this sense, that the cost of repairing her would be more than she was worth, but there was no evidence to show that if the sale had been postponed for two or three or four months she was in danger of becoming an actual total loss. I do not think that the plaintiff can say that the immediate necessity for sale excuses him from giving notice of abandonment. Then arises the question, Did the plaintiff in fact elect to abandon in reasonable time, and give notice of abandonment in reasonable time? The letters from the firm at Singapore to Kaltenbach at Zurich were only letters of information, and not notice of abandonment. If the letter of the 27th Feb. can be called a notice of abandonment, it is at all events the first one. On the 7th Feb. the firm at Singapore had full information and materials to elect whether to abandon the vessel or treat her as a partial loss. Then the firm elected to abandon on the 7th Feb. or on the 23rd (the day of sale), or later. If on the 7th, then there are no facts by which the assured can

account for the delay between the 7th and the 27th. If the election to abandon was made at a later date, then there is an assumption that the plaintiff was called upon to elect before that date, and that his election was too late.

For these reasons the onus of proof was on the plaintiff, and he failed to give evidence of election of abandonment or notice of abandonment in due time; and I am of opinion that Lord Coleridge was right, and the court below wrong.

Judgment reversed.

Solicitors for the plaintiff, *Parker* and *Clarke*,

Solicitors for the defendant, *Hollams, Son*, and *Coward*.

March 5, *May* 15 *and* 16, 1878.

(Before Brett, Cotton, and Thesiger, L.JJ.)

Pickup *v.* The Thames and Mersey Marine Insurance Company (Limited).

Shipping — Marine insurance — Seaworthiness — Onus probandi—Presumption—Misdirection.

Under a plea of unseaworthiness in an action on a policy of insurance, the onus of proof lies upon the defendants throughout, and is never, as a matter of law, shifted to the plaintiffs; but where it is shown by the defendants that the vessel shortly after leaving port is compelled to return disabled, or is totally lost, the shortness of time between the leaving port and the damage or loss may raise a presumption that she was lost or damaged, not by reason of perils insured against, but by reason of unseworthiness before sailing, which presumption requires to be rebutted by the plaintiffs' evidence, and whether such presumption is to prevail or is rebutted, is a question for the jury only.

In an action on a policy of marine insurance the evidence was that eleven days after leaving port the vessel encountered bad weather, and put back in a disabled condition. The judge directed the jury, as a matter of law, that the burden of proof of seaworthiness was shifted from defendants to plaintiff, and that it was for plaintiff to prove that the ship was rendered unseaworthy by perils of the sea encountered after sailing, and insured against.

Held that this was a misdirection.

Watson *v.* Clark (1 *Dow.* 336) *distinguished and explained.*

Action against underwriters on a policy of insurance on freight on a cargo of rice shipped on board the ship *Diadem*, for a voyage from Rangoon to a port in the United Kingdom.

The case was tried at the Guildhall before Field, J. and a special jury.

The facts proved at the trial showed that the ship sailed from Rangoon, and that after encountering severe weather within eleven days, she had to put back and return to Rangoon. That on a survey which took place several days after her return to Rangoon, her bottom was found to be very much worm-eaten, and that the river at Rangoon was much infested with a species of worm that injured ships.

Field, J., upon these facts, directed the jury as a matter of law that the space of eleven days was sufficient to shift the burden of proof on the issue of seaworthiness from the defendants to the plaintiff, and the jury thereupon found for the defendants.

A rule *nisi* for a new trial on the ground of misdirection was obtained in the Court of Queen's Bench Division.

The rule was argued in the Q. B. Div. in Feb., when

Watkin Williams, Q.C. (with him *W. G. Harrison*, Q.C.) and *Lodge* appeared for the defendants, and

Butt, Q.C. (with him *Cohen*, Q.C. and *J. C. Mathew*), for the plaintiff.

The facts of the case and the arguments sufficiently appear from the judgment of the Q. B. Div., *post*. *Cur. adv. vult.*

March 5.—The judgment of the court (Cockburn, C.J., Mellor and Field, JJ.) was delivered by Cockburn, C.J.—This was an action on a policy of insurance on freight on a cargo of rice shipped on board the ship *Diadem*, on a voyage from Rangoon to a port in the United Kingdom. Amongst other defences was one of unseaworthiness. The cause came on for trial before my Brother Field and a special jury at Guildhall, when, under the direction of the learned judge as to the law applicable to the case, the jury found a verdict for the defendants on the ground that the vessel was unseaworthy on commencing the voyage. The facts, as far as they are necessary for the present purpose, may be expressed in a few words.

The ship having conveyed a cargo of coals to Point-de-Galle, proceeded in ballast to Rangoon, where she loaded a cargo of rice, the freight on which was the subject-matter of the insurance in question. She arrived at Rangoon on the 25th April 1874. Amongst other issues in the cause was one of unseaworthiness at the commencement of her voyage from Galle to Rangoon; but that issue the jury decided in favour of the plaintiff, and no question upon that arises here. For the present purpose the ship must be taken to have been seaworthy on her arrival at Rangoon. She remained there till the 4th June following, when, having loaded her cargo, she set sail on the homeward voyage. Between the 9th and 15th June she encountered severe squalls and a heavy sea, and laboured heavily, and made so much water that the master and crew, becoming alarmed for the safety of the ship, and, satisfied with her inability to perform the voyage home, determined on putting back to Rangoon. On the 19th June, when in the Rangoon river, she grounded on the Silver Sand, but was got off again, and proceeded to Rangoon, where she arrived on the 20th June. In the course of the month of July surveys were held on the ship. She was found to be very much strained, and, in several places where her copper was off, to be very much worm-eaten; and on the 15th July she was pronounced to be unseaworthy, and there was no contest as to her having been so at that time. The question was whether the rough weather she had encountered between the 9th and 15th June, and the straining thereby occasioned had caused her leaky condition; in which case that condition would have been consistent with her having been seaworthy on starting on the voyage; or whether her leaky state had been brought about by the action of the worms, which, from the defective condition of some parts of the copper, had been able to eat their way into her planks, so as to render many of them in an unsound condition.

Arguing on the latter hypothesis, the defendants contended that the worm-eaten condition must have arisen during the period the ship was loading in the Rangoon river, namely, from the 25th of April to the 4th of June; the plaintiff on the other hand contending that the leaky state of the vessel was due to the weather she had encountered, and that the worm-eaten condition, as apparent in the survey, had been produced during her stay at Rangoon, between the time of her return thither and the time of her survey, that is to say, between the 20th of June and the 15th of July, the water there being greatly infested with the species of worms by which wooden vessels are liable to be attacked, and which, owing to portions of her copper having been rubbed off on the occasion of her stranding, had been thus enabled to get at the vessel.

After the close of the evidence, and during the addresses to the jury, the question was raised as to the party upon whom, in this particular case, the onus of proof lay; and the counsel for the underwriters submitted to the learned judge to tell the jury as a matter of law that the onus of proof was in this instance shifted to the plaintiff. This course, however, the learned judge, at that time, declined to adopt, but left the whole issue to the jury, putting the question of burden of proof also to them in the language of Lord Eldon in *Watson* v. *Clark* (1 Dow. 344), and laying before them the evidence on one side and the other necessary to enable them to arrive at a conclusion. At the close of the summing up the jury retired to consider their verdict, and after a protracted absence, returned into court, saying that they were unable to agree on their verdict. In answer to a question put by the learned judge, whether there was any point upon which he could give them any assistance, the foreman asked "whether the judge could give them any more precise and positive directions as to which of the parties had the onus of proof cast upon him," upon which my brother Field again used the language of Lord Eldon, but dealt with it this time as a direction in point of law, and directed the jury as matter of law that, while the presumption of law was *primâ facie* in favour of seaworthiness, and the burden of proving unseaworthiness was, in consequence, in the first instance, on the insurers; yet that, if the inability of a ship to proceed on the voyage becomes evident in a short time after her sailing, the presumption of law is that the inability arose from causes existing before she set sail, and that in such event the burden of proof becomes shifted, and that it then rests with the assured to show that the inability arose from causes occurring subsequently to the commencement of the voyage; and, in reference to the particular case, the learned judge directed the jury, as matter of law, that the time which elapsed between the departure of the ship from Rangoon on the 4th June and her putting back on the 15th, was a sufficiently short time to shift the onus of proof and to make it incumbent on the assured to satisfy the jury that the unseaworthiness of the vessel arose from causes occurring subsequently to her setting out on the voyage.

We are of opinion that this direction cannot be upheld, and that there must be a new trial; and in this view the learned judge on consideration himself concurs. We do not say that time may not be an element in the consideration of a question of unseaworthiness. If a vessel very shortly after leaving port founders or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability, the irresistible inference arises that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as, in the absence of every other possible cause, the only conclusion which can be arrived at is that inherent unseaworthiness must have occasioned the result. Indeed, on clear consideration, it becomes apparent that time enters to a very limited extent in arriving at this conclusion. If the vessel strikes on a rock or a sandbank immediately after leaving port, or, while still in sight of it, is overpowered by a storm, the shortness of time which has elapsed since she started becomes at once immaterial. On the other hand, though the vessel may have been at sea days, or even weeks, if during the whole of the time she has had favourable weather, fair winds, and calm seas, and yet goes down, or proves unable to continue on her course, the same inference as to inherent unseaworthiness presents itself as in the former case, though perhaps with diminished cogency in proportion as the interval has been longer. But in the latter case, as in the former, the inference arises from the impossibility of ascribing the result to any other cause than the condition of the vessel on starting on the voyage, the interval of time being matter of very secondary consideration if of any. It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited extent only, if it enters at all, into the question as a factor in leading to the result. It certainly cannot be said of itself and without more, to give rise to any new presumption of law, or, as matter of law, to shift the onus of proof from the party on whom the law has cast it.

This reasoning applies with peculiar force to the case before us. The ship had been at sea eleven days before she put back. Assuming for the moment that shortness of time, intervening between the departure of a vessel and her inability to keep the sea, could shift the burden of proof, we think it cannot be said that an interval of eleven days would be sufficiently short to warrant the application of such a principle or to raise any presumption independently of other circumstances. In that time—it was the stormy season in the eastern seas—the vessel might possibly have encountered a cyclone. As it was, she was exposed during several days, from the 9th to the 15th June, to severe squalls and a boisterous sea, and laboured heavily. The question was whether her inability to pursue her voyage and the unseaworthiness as afterwards ascertained were due to the action of the winds and waves; in other words, to the perils insured against, or to the antecedent causes of unseaworthiness, to which the defendant ascribed them. Under these circumstances, the time the vessel had been at sea became a matter of secondary consideration, and, if to be taken into account at all, could only be so as an element in the inquiry, and as one of the facts of the case. It

could not properly be held to be of itself, and independently of the other facts, sufficient to take the case out of the ordinary rule, and, by giving rise to a new presumption, to shift the burden of proof from the insurer to the shipowner. As we are of opinion that the direction cannot be upheld, and as it is clear from what took place on the trial that the verdict of the jury was determined by the direction so given, it follows that judgment cannot be given for the defendants on the finding, and that the rule must be made absolute for a new trial.

May 15 *and* 16.—On appeal, the same counsel appeared, and the following authorities were referred to:

Watson v. *Clark*, 1 Dow. 336;
Paddock v. *The Franklin Insurance Company*, 11 Pick. 226;
Douglas v. *Scougall*, 4 Dow. 269;
Parker v. *Potts*, 3 Dow. 23;
Foster v. *Steele*, 3 Bing. N. C. 892;
Sutton v. *Saddler*, 3 C. B. N. S. 87.

The arguments sufficiently appear from the judgments.

Brett, L.J.—I agree with the judges of the Queen's Bench Division that the direction given by my brother Field to the jury cannot be upheld, because it amounts to what in law is called a "misdirection."

Now, a good deal has been said before us about the "burden of proof" and "presumption," and I cannot help thinking that although in many cases these two expressions are identical, yet that, if they are considered as invariably identical, it may cause confusion. The burden of proof upon a plea of unseaworthiness raised upon a policy of marine insurance lies upon the defendant who alleges the unseaworthiness; and, as far as the burden of proof goes, *i.e.*, the burden of proof on the pleadings, it never shifts at all, but remains the same from the beginning to the end. But, when evidence of facts is given, it is often said that certain presumptions, which are really inferences of fact, arise and shift the burden of proof, and so they do as a matter of reasoning and as a matter of fact; and it is true to say, as a matter of reasoning and as a matter of fact, that where a ship sails from a port and sinks to the bottom of the sea, or becomes exceedingly leaky very soon after she has sailed, and there is nothing in the weather to account for such a disaster, she was unseaworthy when she started, and a jury may be properly told that, upon such a state of uncontradicted evidence, any reasonable man may presume that unseaworthiness; that is, that as a matter of reasoning, in drawing an inference of one fact from other facts almost all reasoning men would find that, under such circumstances, the ship must have been in an unseaworthy condition when she started, it being recollected that the definition of unseaworthiness is that when she started she was not in a fit state to encounter the ordinary vicissitudes of the voyage; and if a jury with no other evidence than that were to find the contrary, it would be such a finding against the reasonable inference of facts that anybody would say that it was a verdict against evidence. But it is a question of fact, not a question of law. It is a very proper guide to a jury upon a question of fact, and the mode in which they are to draw inferences, to tell them what is so often laid down, and I think well laid down, in Arnould (vol. 2, p. 618, 5th edit.), namely, that where a ship became so leaky or disabled as to be unable to proceed on her voyage soon after sailing on it, and this cannot be ascribed to any violent storm or extraordinary peril of the sea, the fair and natural presumption is that it arose from causes existing before her setting out on her voyage, and, consequently, that she was not seaworthy when she sailed. I think that is a very good guide to a jury, and they should be told to adopt that view. But what is the result? The only result of that is to tell them that "if nothing else is shown from the beginning to the end of the case, I should advise you to find, and I think as reasonable men you ought to find, that the ship when she started was not seaworthy." But it does not settle the matter, because, if so far the matter is proved, still, as Arnould says, in such cases it is incumbent upon the assured to show that at the time of her departure she was in fact seaworthy, and that her inability has arisen from causes subsequent to the commencement of the voyage. The assured must, therefore, show facts to prove that she was seaworthy before starting, and I think that all a judge can do is to lay before the jury a proposition that must be supported by certain evidence, and that it is for them to say whether or not the evidence supports it, and whether or not there is anything else to account for the injury the ship has received, than the fact that she was unseaworthy before starting. But the question of what is a short time after sailing must surely depend on the circumstances; for instance, if a ship sails from Greenwich and goes down to Gravesend in the Thames, I should say a short time after starting from Greenwich is a very different "short time" to what it would be in a case where a ship sails out of Bombay, and the moment she is out of harbour she is in the Atlantic. I say the circumstances would be very different. Therefore what is or is not "soon after sailing" depends on the circumstances of each case, and it is for the jury to say whether, under the circumstances of the particular voyage, they think that the time of the loss was so soon after the sailing that it raises the presumption of unseaworthiness. It is a question for a jury as much as any other question, and I know of no case myself where the question of time—of what is a short time, or what is a long time—or any similar question, could be for a judge.

Now, if that be true, let us see whether there is any authority to the contrary. The case of *Watson* v. *Clark* (1 Dow. 336) is cited to us. No doubt it is a case often cited, but I think it is more often cited for the question of law which Lord Eldon enunciated than for his treatment of the facts. It is cited as an authority for saying that it is a clear and established principle that if a ship was seaworthy at the commencement of the voyage, although she became otherwise only an hour after sailing, the warranty is complied with, and the underwriter is liable. There then was a proposition of law for which the case is cited in every book. I do not deny that it was cited as a case for that proposition, and the proposition of presumption arising from the facts, and the inference to be drawn; I do not deny that it is often cited also as an authority for the form of enunciating that proposition. But Lord Eldon and Lord Redesdale were sitting as a

Court of Appeal from a decision in Scotland in an Admiralty Court, a court which decided both law and fact, and they were called upon therefore, as upon a rehearing, not only to determine what the law was, but also to determine whether they agreed with the other court upon the facts; and thus it was that they gave their reasons for agreeing with the other court's decision as to the facts, and that Lord Eldon stated the mode of reasoning by which he arrived at the inference which he had to draw. And I say, therefore, it is a very good guide to us when we find Lord Eldon and Lord Redesdale pointing out in the clearest terms a process of reasoning which is almost irresistible, in pointing out to a jury in clear language the process of reasoning which they ought to follow. But I have never heard that this case was an authority for showing that the inference of fact is really a proposition of law, and, if it ever has been said, I can only say that I do not agree with it.

Now I think that it cannot be denied that my brother Field so expressed himself that the jury would consider themselves bound to take it as a matter that was decided, and one which they were not bound to consider, that eleven days after sailing was, as a matter of law, a short time, and a short time which shifted the presumption; and my brother Field, who was a party to the judgment of the Divisional Court, himself admitted that his decision was wrong. He said that he intended to lay it down as a matter of law, and that he saw himself that his direction was erroneous. Therefore, upon the question of seaworthiness, and upon the policy on the freight, there cannot be a doubt that this was fatal to the case.

There is a somewhat greater difficulty about the other case, and a difficulty that has been raised with regard to both policies, about the finding that the loss was by perils of the sea. Now, I am not prepared to say, if that had appeared on the record alone, that one could have said that this was a misdirection on the point of law. But when in this particular case one sees that the question of whether the ship was lost by perils of the sea really had as its only antithesis the question whether or not she was worm-eaten at the time she started, and that the proposition came to be this: If she was not worm-eaten at the time she started from Rangoon, there is nothing to account for this loss; but if she was worm-eaten at Rangoon, the evidence of sea peril is not sufficient to show that she was lost by perils of the sea—then it seems to me upon the facts of this case that, when the jury were practically told that as a matter of law they were to take it that she was worm-eaten at Rangoon, unless the shipowners could show that she was not, that must have had a vital effect upon the finding of the jury upon the loss by perils of the sea, and that, therefore, even though it might be said as a matter of abstract proposition that this would not be a misdirection upon that plea, it was such a direction in this case as to be a wrong direction as to an inference of fact, turning an inference of fact into an inference of law, and such that it would almost inevitably lead to a wrong consideration of the issue by the jury; and that, therefore, the trial, and the finding of the jury upon that other issue cannot upon either proposition or consideration be satisfactory. Therefore, I think, there must be a new trial as regards both policies.

Cotton, L.J.—I agree that there must be a new trial in this case on the ground of the misdirection by Field, J. Now one must consider how he was induced to give that direction, on which reliance was placed for showing that he misdirected the jury. The jury had retired for some time, and they came into court and made some communication to him. From what he says, it is evident that they doubted in whose favour they could find the issues left to them, amongst others, that of seaworthiness. Now, that being so, the learned judge says that he came to the conclusion that, for the purpose of enabling the jury to arrive at a decision, he would give them such a ruling as he could on the question of where the onus of proof lay. In the previous part of his summing up, he lays down (which was apparently not objected to), amongst other things, that the onus of proof as regards seaworthiness was on those who alleged unseaworthiness, that is to say on the insurers. Now, that being so, on the question of seaworthiness, that issue was doubtless on those who alleged unseaworthiness. The proof of certain facts might to a certain extent satisfy the doubts of the jury, that is to say, if there is nothing proved to explain or answer those facts, it would stand in this position, that it would enable the jury to say, and justify them in saying, that unseaworthiness was made out. And so, if it was true that a very short time after leaving port there was nothing else to explain how it came that the ship was unable to perform her voyage, it might be that it would move the jury to find that she was unseaworthy when she left the port. But, of course, there might be evidence on the other side, or facts might come out in the evidence, as to the shortness of the time when the ship became unable to complete its voyage, which might afford some sort of answer; and then the jury would have to consider on which side the balance lay; and, in considering that, one must remember that the onus and the burden of the particular issue of unseaworthiness was throughout on those who alleged unseaworthiness, though facts had been proved, such as that a very short time after the ship's leaving port she was found to be unable to complete her voyage. Had there been nothing else, they might find that the burden had been discharged, and might consider that that fact being proved was sufficient to call for an answer, and in that sense to shift the burden of proof, or onus of proof, on the insurers who alleged unseaworthiness.

Now, what is the direction of the learned judge that is complained of? It practically comes within the very last few words which Field, J. used on the return of the jury into court, and made a communication to him; and those are the very few words which the jury had to take as a clear statement of the law from the learned judge, and which are complained of as a misdirection. They are as follows: "I say, as a matter of law, the time is such that I direct you that the onus of proof was shifted."

Now, on two grounds I consider that there was a misdirection. First of all, the question of whether or not the time is sufficiently short to satisfy the burden of proof, thrown upon those who had to prove unseaworthiness, must not, under the cir-

cumstances, be a question of law, but must be a question of fact, as to which the judge is to direct the jury. When he directs them as a matter of law as to the time, they of necessity, taking the direction from him, thought they could not find the contrary; then on that I think he is wrong. The question for them to consider is whether, under the circumstances, the time is so short that it satisfies them that the ship was so unseaworthy that that would account for it. Then there is another point on which I think that they were misled, namely, by the learned judge directing them that the onus of proof was shifted. If he had stated that the time was so short that, *primâ facie*, the insured had satisfied the burden thrown upon them of showing that the ship was unseaworthy by reason of her becoming in so short a time unfit to perform her voyage, that would have been right. But I think the way in which Field, J. directed them, in saying that, as a matter of law, the time was such that the onus of proof was shifted, probably induced them to think that the onus was not upon the person who properly had to make out the case, but that the onus of proof was on the other person who had not that burden upon him. That is probably what they thought.

Thesiger, L.J.—I agree that this case must go back for a new trial.

There are two questions which the court have to decide. First, was there a misdirection; and, secondly, did that misdirection, within the meaning of Order XXX., r. 3, occasion substantial wrong or miscarriage. not only on the question raised by the issue of seaworthiness or unseaworthiness, but also upon the issue that was raised as to the cause of loss? Now it is convenient, I think, to take these two questions separately; and, first, to consider whether or not there was a misdirection upon the issue of seaworthiness or unseaworthiness.

What is the position of the facts in the case at the time when the learned judge gave his direction? On the one hand there had been evidence, I do not give any opinion as to the strength or weakness of that evidence, but there had been evidence that the ship had met with some severe weather during the course of the eleven days which elapsed between her leaving Rangoon and the time when she set sail to return to Rangoon. On the other hand there was evidence that, upon her return to Rangoon, upon the first survey some traces of worming were discovered, and, upon a latter survey taking place, at a considerable period after her return to Rangoon, her bottom was found to be very seriously worm-eaten—so much so as to be quite sufficient to account for the return to Rangoon. Under these circumstances what direction, either in fact or in law, could the learned judge give to the jury? It seems to me that he could not direct the jury that the burden of proof was shifted either in fact or in law. All that he could say was this: the burden of proof remains as it originally remained, namely, that if there had been no evidence on the one side or on the other, the plaintiff would have been entitled to a verdict on the question as to whether the ship was or was not seaworthy at the commencement of the voyage. There being evidence on both sides, it is for you, the jury, to consider whether the evidence as to the weather was such as to induce you to think that the loss was due to the weather, and therefore to a peril insured against, or whether the evidence which has been given as to the worming, coupled with the evidence as to the weather, satisfies you that the weather was insufficient to account for the loss, while the worming was amply sufficient. That seems to me to be the whole extent to which the learned judge could, under the circumstances of the case, fairly direct the jury. That being so, what is the direction he gives them. He tells them perfectly correctly that upon the issue of seaworthiness the burden of proof rested upon the underwriters originally. But then he proceeds to tell them that, only eleven days have elapsed since the vessel left Rangoon, and between that time and the time of her return to Rangoon, the burden of proof which originally lay upon the underwriters had shifted, and the burden was thrown upon the plaintiff of showing that the loss of the vessel was due to the causes which had arisen subsequent to her sailing; the meaning of that being obviously this, that the jury must, from the short time that elapsed after her voyage commenced, presume *primâ facie* that, instead of the vessel being seaworthy, as they would have presumed without any evidence, they must presume that she was unseaworthy at the commencement, unless such evidence was given on the part of the plaintiff as to satisfy them that the loss was not due to unseaworthiness, but due to the perils insured against. Therefore it appears to me that, even presuming that the argument of Mr. Williams and Mr. Harrison were correct, and that although the words "as a matter of law" are used, what the learned judge really intended to say was that the burden in point of fact had been shifted. Then again it seems to me even then that the learned judge misdirected the jury, because there is nothing to show or to justify him in saying that the burden of proof as a matter of fact had shifted; because at the very same time that it was proved that there was a short time that had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. Therefore, upon the question of seaworthiness, it seems to me that there was a clear misdirection.

Now arises the question, was the misdirection such, upon the question of seaworthiness, that it must necessarily have affected the minds of the jury upon the other issues? It appears to me that the question should be answered in the affirmative. In the first place I think there was a misdirection as regards the issue raised upon the question of the cause of loss, and for this reason: it is perfectly true that upon that issue the burden of proof lies upon the plaintiffs, and it may be true that the presumption of unseaworthiness, or the question of the onus of proof upon the issue of unseaworthiness is one that relates, as has been argued, solely to that issue, and does not in any way touch the issue of cause of loss; but, on the other hand, this much is clear, that there is no presumption against seaworthiness, and that the plaintiff, undertaking, as he is bound to undertake, upon the issue to prove that the loss was occasioned by a peril insured against, would have fulfilled the burden thrown upon him if he proved that the policy had been effected on his vessel, that the vessel had started upon her voyage, and

that after the voyage the vessel met with such weather as would fully and fairly account for the loss which was sustained by him under the policy. But the position in which the learned judge left the matter to the jury under this subsequent direction placed a very much heavier burden upon the plaintiff, because he had directed the jury that the mere fact of this short lapse of time was such as to raise a presumption counter to the original presumption of seaworthiness. And, logically followed out, that must mean a presumption of unseaworthiness, and consequently the plaintiff, instead of undertaking the burden of proving a loss by perils insured against upon a ship which at all events is not presumed to be unseaworthy, although it may not be proved to be seaworthy, was undertaking a burden of proving that loss in respect of a ship, which, according to the learned judge's direction, was presumably unseaworthy when she started.

For these reasons it appears to me that there was a misdirection upon both points, and the observations which I have just made are sufficient to show that that misdirection must have been the cause of substantial wrong or miscarriage. Nothing could show that more plainly than this, that the very point on which the jury seemed to have been in disagreement when they returned and discussed the matter with the judge, was the point as to on which side the onus of proof lay, and in the argument before us it was stated that the minds of the jury were equally balanced upon this point, so that it was necessary to give some direction upon it. If their minds were in that state of equal balance, it follows from that, that that is just the occasion when the learned judge must necessarily be most accurate in the language which he uses to the jury on the point which they discuss with him.

There is only one other matter to which I wish to refer, and that is the question of authority. The learned judge, in giving his direction to the jury, appears to have relied upon the passage in *Watson* v. *Cooke* (1 Dow. 336), taken from the opinion given by Lord Eldon. But in that case Lord Eldon was judge both of fact and of law; and when the passage, upon which the learned judge relies, is looked at, I think it is clear to every mind that Lord Eldon was not speaking of a presumption of law, but was speaking of a presumption of fact, or an inference which his mind would be led to form from the facts of that particular case. And I think in the use of that expression "burden of proof" in the cases there has been a little confusion. Burden of proof always remains the same as a matter of law. No doubt the burden of proof in fact may shift, and must shift during the course of evidence in any particular trial. But while the learned judge has to direct a jury upon the burden of proof as a matter of law, I take it it is not the duty of a learned judge under any circumstances to direct the jury as to the question of the burden of proof in fact; that is a question for the jury, and beyond deciding the question which a judge must always decide, namely, whether there is any evidence at all to go to the jury, it seems to me, as a matter of fact, on questions of fact the province of the learned judge does not entitle him to go. But in Lord Eldon's opinion he says this (1 Dow. 344): "*Primâ facie* the onus of proof that she is not seaworthy lies on the defendants, but when the inability of the ship to perform the voyage becomes evident within a short time after the sailing, the presumption is that it arises from causes existing before she set sail on the voyage, and that the ship was not then seaworthy; and the *onus probandi*, in such a case, rests with the assured to show that the inability arose from causes subsequent to the commencement of the voyage." Now two points arise upon the observations that were made. In the first place it is clear that, when Lord Eldon speaks of the "inability of the ship to perform the voyage becoming evident a short time after the sailing, and the presumption being shifted," he must mean (and it is obvious from the context that he did mean) where there is only that proof and no proof beyond. But where at the very same time that the lapse of the voyage is proved, and is relied upon to raise a presumption, there is also a cause proved which might fairly account for the loss, he cannot have meant in that case, even as a matter of fact, that the presumption shifts back and is thrown upon the other party. And, again, the second point for observation is this: that, when he speaks of the presumption shifting back, he is not speaking of a presumption of law, but he is speaking of a presumption of fact. Therefore, it appears to me that there is nothing in the law, as laid down in the cases, which alters the position which would be taken up, and which I should take up certainly apart from the cases. Consequently, I think that there has been in this case a misdirection, and such a misdirection as necessitates a new trial.

Judgment affirmed.

Solicitors for the plaintiff, *Hollams, Son, and Coward.*

Solicitors for the appellants, *Freshfields and Williams.*

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by J. A. Foote, Esq., Barrister-at-Law.

Wednesday, July 3, 1878.

(Before Denman, J.)

Hayn, Roman, and Co. *v.* Culliford and Clark.

Bill of lading — Ship — Liability of owners — Broker's signature—Stowage, loss caused by negligence in—Excepted perils.

The plaintiffs were the consignors of sugar to be carried from Hamburgh to London at an agreed freight in the defendants' steamship, and received bills of lading signed by "P. and K., agents." The steamship was at the time under charter to P. and K., who were merchants at Hamburg, but the plaintiffs had no knowledge of such charter. Evidence was given that, in the case of steamships, it is the custom for the broker of the ship, and not the master, to sign the bills of lading. The court were empowered to draw inferences of fact, and found that P. and K. signed the bills of lading as agents for the defendants, and with their authority. The sugar having been damaged by negligent stowage:

Held, that the defendants were liable on the bill of lading; and, semble, they would have been so even if P. and K. had had no actual authority to

sign for them, there being nothing to call the attention of the plaintiffs to look to any one save the master or owners to stow the goods safely.

The bill of lading excepted liability in respect of "all accidents, loss, and damage of whatsoever nature . . . . occasioned by any act, neglect, or default whatsoever of the pilot, master, or mariners, in navigating the ship . . . . it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods . . . . be considered the servants of the shipper, owner, or consignee," of the goods.

Held, that the owners were liable for negligent stowage.

CASE heard on further consideration before Denman, J. The damages were assessed by the jury, all other questions being left to the decision of the learned judge.

The facts are fully set out in the judgment.

Butt, Q.C. and *J. C. Mathew*, for the plaintiffs.—First, we say as a matter of fact that Pott and Korner, who signed the bill of lading, did so as agents for the defendants, and with their authority. Secondly, even if there was no authority in fact, the defendants are nevertheless bound. The bill of lading was signed by the brokers of the ship, purporting to bind the owners; the persons signing it had the control and management of the ship, and the consignors had no notice of any charter. The defendants, therefore, cannot protect themselves by such a charter:

Peek v. *Larsen*, 1 Asp. Mar. Law Cas. 163; L. Rep. 12 Eq. 378;
Sandeman v. *Scurr*, L. Rep. 2 Q. B. 86; 15 L. T. Rep. N. S. 608; 2 Mar. Law Cas. O. S. 446;
Sack v. *Ford*, 32 L. J. 12, C. P.;
The St. Cloud, Br. & Lush. 4; 1 Mar. Law Cas. O. S. 309.

Thirdly, it is the duty, *primâ facie*, of the master and owners so to stow the cargo that dangerous goods do no damage (*Brass* v. *Maitland*, 26 L. J. 49, Q. B.); and the clause in the bill of lading, excepting the owners from liability for the consequences of negligence in "navigation" does not relieve them of that duty. Such a liability is not imposed by the bill of lading, but exists apart from it:

Schuster v. *McKellar*, 26 L. J. 281, Q. B.;
Czech v. *General Navigation Company*, 17 L. T. Rep. N. S. 246; L. Rep. 3 C. P. 14; 3 Mar. Law Cas. O. S. 5.

Watkin Williams, Q.C. and *C. Bowen*, for the defendants.—The defendants cannot be made liable simply because Pott and Korner represented that they had authority to sign bills of lading for them. They had no authority in fact, and were not held out as having any. And even if the defendants are to be bound by the bill of lading, this loss comes within the exceptive clause. They cited

Murray v. *Currie*, 23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24; 2 Mar. Law Cas. O. S. 497;
Mitcheson v. *Oliver*, 5 E. & B. 419;
British Columbia Saw Mill Company v. *Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 499; 3 Mar. Law Cas. O. S., 65.

July 3.—DENMAN, J. delivered judgment.—The plaintiffs in their statement of claim alleged that they delivered to the defendants 280 bags of sugar in good condition, to be carried by the defendants' steamship *Cleanthes* from Hamburg to London for agreed freight, upon the terms of a bill of lading by which the goods were to be delivered in good condition, certain perils only excepted (by which perils it was alleged that delivery in good condition was not prevented); that the defendants did not deliver the goods in good condition, but damaged and unmerchantable, and that such damage was caused by the sugar becoming tainted with oxide of zinc, owing to the improper and negligent stowing of their goods and cargo.

The defence, so far as it is material to the questions remaining for my decision, is as follows: That the ship was before the time mentioned in the statement of claim chartered for a voyage from Hamburg to London under a charter-party, by which it was agreed that the ship should be under the control of the charterers, and that the master of the ship should act as the servant and agent of the charterers for the purpose of signing bills of lading, and not as servant or agent of the defendants; that, in pursuance of the charter-party, a cargo shipped by different shippers, including the 280 bags shipped under the bill of lading mentioned in the statement of claim, was taken on board; that the goods were not delivered to the defendants but to the charterers, or the master as their agent or servant, and not otherwise; that the shippers of the sugar and the plaintiffs had notice of the charter-party, and that the master was servant and agent of the charterers to sign bills of lading, and not servant or agent of the defendants; that the bill of lading contained a clause by which the defendants would not be liable for the damage complained of, even if bound by the bill of lading; and that the damage, if any, and the delivery in bad condition, were acts and defaults for which the charterers and not the defendants were responsible.

The charter-party, which was put in at the trial, was dated the 15th Nov. 1877, and was made between the defendants, "owners of the steamship *Cleanthes*," and Messrs. Pott and Korner, merchants, by the intercession of the shipbroker, W. Zoder;" and it bound the ship, after discharging her inward cargo, to load from the said merchants a full and complete cargo of general lawful merchandise, and to proceed to one wharf only in London, as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7*s.* 6*d.* sterling, in full, per ton, gross weight delivered; "it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owner shall have an absolute lien . . . on the said cargo, which lien they shall be bound to exercise; the charterers' liability to cease when cargo is shipped and bills of lading signed; the captain shall sign bill of lading at rates as presented, without prejudice to this charter-party." The charter-party was signed by "H. W. Pott and Korner," and "by telegraphic authority of the owners, W. Zoder, as agent." Alphonse Roman, one of the plaintiffs, who was examined at the trial, swore that his firm had no knowledge of the existence of a charter until 10th Dec., after a claim had been made upon the defendants for the damage for which this action was brought. The plaintiffs bought the sugar in November, and received the bill of lading after paying for it, and gave the bill of lading to Messrs. Middleton, wharfingers, who took the bill of lading and got delivery from the ship. The freight at the bill of lading rate was paid to one Watkins, who, according to an answer to one of the interrogatories adminis-

tered by the plaintiffs to the defendants, "acted as broker for the ship in London." Watkins received the freight, and gave a receipt to the plaintiffs headed "Freight per *Cleanthes*," and signed, "Received for the owners." It was admitted at the trial that the sugar was damaged by improper stowage, but there was no evidence as to the employment or otherwise of a stevedore, except that in their answers to interrogatories the defendants said they believed the cargo was stowed by a stevedore employed by Zoder, who was the agent of the ship at Hamburg, at the expense of the ship. A letter was read at the trial, of the 4th Dec. 1877, in which the defendants' firm in London wrote to the same firm in Sunderland, stating that a serious claim was pending, "apparently through the fault of the captain," expressing a hope that the amount of damage might turn out to be exaggerated, and containing this passage: "Watkins will, no doubt, make best of case for steamer; but why the captain stowed poison in casks on top of sugar in bags it is difficult to understand, and may prove serious to him." On the 5th Dec. the plaintiffs wrote to Watkins and to the defendants, informing them of the damage, and inclosing their claim for the full value of the sugar as being rendered totally worthless. On the 6th, Watkins wrote denying that there was any proof of the sugar being damaged or totally spoilt, and adding that "if damaged, it was no doubt by perils of the sea." On the 10th Dec., Watkins, by desire of the defendants, referred the plaintiffs to the charterers.

Evidence was given at the trial, and admitted, subject to objection, that in the case of steamships it is uniformly the custom for the broker of the ship, and not the master, to sign the bills of lading. The witnesses who proved this usage said, on cross-examination, that the brokers frequently charter the ship, and when they sign bills of lading for chartered ships, they sign them for the owner or for the charterer, according to the authority they may have; and, on re-examination, they said that, if they were themselves the charterers, they would sign it in their own name.

The bill of lading relied on by the plaintiffs was objected to by the defendants' counsel as evidence in the cause, on the ground that it was signed by Pott and Korner, agents, and that there was no evidence of any authority to them to sign it on behalf of the shipowners. I admitted it subject to objection; and it was, I think, admissible in evidence, if on no other ground, because it was referred to in the pleadings, and not denied to exist; on the contrary, it was in part set out by the defendants in order to raise one of their defences. The question, of course, was still open to the defendants whether it was binding upon them, and whether, if binding, it exempted them from liability.

The question then arises, was there, under the circumstances of the case, any contract between the plaintiffs and the defendants for the carriage of the goods in question, or was this a contract with the charterers, Pott and Korner? It was submitted, on behalf of the defendants, that the very form of the bill of lading, coupled with the fact that Pott and Korner had, in fact, a charter of the ship, was conclusive against any liability on the shipowners. The bill of lading, omitting the exceptive clause (on which the second contention of the defendants depends) was as follows: "Shipped in good order, and well conditioned, in and upon the good steamship *Cleanthes*, whereof is master P. Andrews, now lying at Hamburg, and bound for London, 280 bags, &c., which are to be delivered in like good order to Hayn, Roman, and Co. (the plaintiffs), or their assigns, freight, &c., to be paid by consignee. In witness whereof the master or agent of the said ship has signed four bills of lading of this tenor and date. Dated in Hamburg, this 19th day of Nov. 1877, Pott and Korner, agents." It was contended that, inasmuch as Pott and Korner were in fact the charterers, whether on their own behalf or on behalf of some other persons unknown, it ought to be presumed, in the absence of any express evidence of authority to sign the particular bill of lading on behalf of the shipowners, that it was signed by them on their own behalf, and not on behalf of the defendants; and that, so far as this was a question of fact, I ought so to find.

It was agreed at the trial that, except so far as the question of damages was concerned, all questions of fact and inferences of fact arising upon or to be drawn from the evidence were to be disposed of by me or by any court before whom the case may come.

Looking at all the facts of the case, I am of opinion that the bill of lading was in fact signed by Pott and Korner, not on their own behalf, but as agents for the owners, and with their authority; and that it is on that ground a document binding upon the defendants. I think it impossible to doubt that the defendants knew that bills of lading were to be signed and had been signed on their behalf by Pott and Korner, and only repudiated the bill of lading after they knew that a heavy claim had arisen upon it. The letters and telegrams put in at the trial and upon the argument seem to me to establish beyond all doubt that the bill of lading was their contract with the plaintiffs as shippers or consignees of the goods.

This renders it unnecessary to consider minutely the other grounds upon which the plaintiffs contended that the defendants would be liable, even if the bill of lading was not binding upon them as a document signed with their actual authority. I think that even in that case there would have been strong reason for holding the defendants liable. But the result of the able and elaborate argument before me was to convince me that, under circumstances such as those of the present case, the defendants would be liable, upon the principles explained in *Sack* v. *Ford* (32 L. J. 12, C. P.), *The St. Cloud* (B. & L. 4; 1 Mar. Law Cas. O. S. 309), *Gilkison* v. *Middleton* (2 C. B. N. S. 134; 26 L. J. 209, C. P.), and *Sandeman* v. *Scurr* (2 Mar. Law Cas. O. S. 446). The plaintiffs in the present case had no notice whatever of any charter-party until after the damage. The bill of lading, though not signed by the master, was signed by persons purporting to act for the defendants: there was nothing calling the attention of the plaintiffs to look to anyone, save the master or shipowners, to perform that which is the *primâ facie* duty of the master and shipowner, viz., to stow the goods safely. Under the circumstances I think that, that duty having been negligently discharged, especially where it was discharged in so palpably negligent a manner as that described in the defendants' letter of the 4th Dec., it is clear that an action would lie against the shipowners, and that the shipowners would be estopped from relying on

a charter-party of which the plaintiffs had no notice for any purpose. (See *Peek* v. *Larsen* 1 Asp. Mar. Law Cas. 163: L. Rep. 12 Eq. 378; 25 L. T. Rep. N. S. 580, per M. R.) The authorities and text-books are all uniformly to the effect that, subject to any stipulations to the contrary in the bills of lading, and in the absence of any notice of a charter, one of the primary duties of the master is to stow the goods carefully. This appears to me to be a duty arising upon the mere receipt of the goods for the purpose of carriage, and to be one which it would require an express contract to supersede or excuse.

Holding, however, as I do, that the bill of lading is binding between the parties as having been actually signed with the authority of the defendant, it becomes necessary to consider another point made by the defendants, viz., that by the terms of the bill of lading itself they are exempt from liability for the damage in question. This turns upon the true construction of the exceptive clause in the bill of lading, the material parts of which are as follows: "The act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss, and damage of whatsoever nature or kind, and howsoever occasioned, from machinery, boilers, steam and steam navigation, or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship: the owners of the ship being in no way liable for the consequence of the causes above excepted; and it being agreed that the captain, officers, and crew of the vessel, in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner, or consignee." The defendants in their statement of defence set out the above clause, and alleged that, if the goods were not delivered in good condition, it was owing to the "acts, neglects, or defaults of the pilot, master, or mariners in navigating the ship." It was contended for the defendants that the word "transmission" in the above clause was never more extensive than the word "navigating," and that it included everything to be done with the goods, from the receipt of them from the hands of the consignor to their arrival at their destination, and *Good* v. *London Steamship Owners' Association* (L. R. 6 C. P. 563) was relied on, in which it was held that an injury which happened to a ship moored at a quay where she was lying, having put back to coal, which injury was owing to the negligent leaving open of a sea-cock, was "damage caused by reason of improper navigation," within the meaning of a deed by which an association of shipowners agreed to indemnify each other against "loss or damage, which by reason of the improper navigation of any such ship may be caused to any goods on board." In that case Willes, J. said, "Improper navigation, within the meaning of this deed is something improperly done . . . . in the course of the voyage." I do not think that the case assists the decision of that before me, beyond being an authority that the ship need not be in a state of motion in order to be in a state of navigation, within the meaning of that word as used in the deed there in question. Other cases have decided that the word "navigation" for some purposes includes a period when the ship is not in motion; as, for instance, when she is at anchor. But I do not think that these cases have any strong bearing upon the question how the words "navigating the ship" and "transmission of the goods" ought to be construed in such a clause as the present. The contention for the plaintiffs was, that the words "in transmission of the goods," if operative at all, had a limiting effect upon the alleged generality of the previous words, and confined their application to a period subsequent to the period at which locomotion in the ship should commence, and they cited *Czech* v. *General Navigation Company* (*ubi sup.*) as showing that the tendency of the courts was strong to require clear affirmative proof on the part of the shipowner to enable him to claim exception under exceptive clauses such as the present; and also *Taylor* v. *Liverpool and Great Western Steamship Company* (2 Asp. Mar. Law Cas. 275; 30 L. T. Rep. N. S. 714; L. Rep. 9 Q. B. 546), in which Lush, J. uses this expression, "The word . . . . is ambiguous, and being of doubtful meaning, it must receive such a construction as is most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exceptions are framed." I am of opinion that the contention of the plaintiffs on this point ought to prevail. Though it may be quite correct to say, that for many purposes negligent stowage is a portion of negligent navigation, and, though in the case of *Good* v. *London Steamship Owners' Association* (*ubi sup.*), in answer to an observation of counsel, "Would damage arising from negligent stowage be within this deed?" Willes, J. answers, "Certainly, unless in a port where stevedores are employed," I do not think it follows that, in the case of an exceptive clause such as that now in question, the words "in navigating the ship" or "in transmission of the goods" include stowage On the contrary, I think that, applying the principle laid down by Lush, J., in *Taylor* v. *Liverpool and Great Western Steamship Company* (*ubi sup.*), which I think ought to be applied in such cases, and, considering how easy it would have been to use apt words to exempt the shipowners from liability for improper stowage, it is more reasonable to hold that the case of negligent stowage is not included under the words relied upon than that it is included.

I therefore think that the plaintiffs are entitled to judgment for the sum assessed by the jury—501*l.* 6*s.*—and I give judgment accordingly for that amount and costs.

Solicitors for the plaintiffs, *W. A. Crump* and *Son.*

Solicitors for the defendants, *Hollams, Son,* and *Coward.*

EXCHEQUER DIVISION.

Reported by HENRY LEIGH, Esq., Barrister-at-La

Nov. 8 *and* 15, 1878.

(Before KELLY, C.B. and CLEASBY, B.)

THOMAS AND ANOTHER *v.* LEWIS.

APPEAL FROM INFERIOR COURT.

Ship and Shipping—Ship's husband—Authority of—Cancellation of charter-party by—Validity of cancellation.

A ship's husband, who, with the authority of the shipowners, has entered into a charter-party, under which a commission on freight, primage and demurrage is payable to the charterers on execution of the charter-party, cannot, by virtue of his office as ship's husband, enter into an agreement with the charterers to cancel the charter-party and pay them a sum of money in lieu of commission, that shall be binding on the shipowners without their express authority so to do, notwithstanding that such agreement may be for the benefit of the shipowners.

THIS was an action by the plaintiffs to recover 24*l.* 0*s.* 6*d.*, a sum agreed to be paid to them in lieu of commission under the circumstances stated by the judge of the County Court of Monmouth for the opinion of the court in the following

SPECIAL CASE.

3 and 4. During all the time herein mentioned the defendant was part owner of the vessel *Myvanwy*, of 162 tons register or thereabout, and one Thomas Robbins Rees was ship's husband of the said vessel, appointed by the defendant and others, part owners of the said vessel, by an appointment in writing dated the 31st Dec. 1873.

5. That the said T. R. Rees, as such ship's husband, entered into a charter-party with the plaintiffs, dated the 9th Feb. 1876, the vessel then being at Amsterdam, whereby it was stipulated that the vessel should, with all convenient speed, proceed in ballast to Scarborough, Tobago, for orders, or as near thereunto as she might safely get, and there, at the customary place, load from factors of the said merchants a full and complete cargo of sugar $\frac{\text{and}}{\text{or}}$ other lawful produce, timber and cotton excepted, the vessel to proceed to Queenstown, or any convenient port of call, for orders to be given in reply to captain's telegram, to discharge at one safe port in the United Kingdom and discharge in such dock as charterers appoint, and deliver the same on being paid freight at the rate of 47*s.* 6*d.* per ton of 20cwt. net delivered at the Queen's Beam; and it was stipulated by the said charter-party that should the vessel not arrive in Tobago by the 1st of April the charterer's agent was to have the option of cancelling or confirming the charter-party, and that 5 per cent. commission on the amount of freight, primage, and demurrage was due on the execution and signment of the charter-party, and to be paid to the plaintiffs, ship lost or not lost.

6. The ship being at Amsterdam Rees informed the plaintiff's agent that the ship could not get to Tobago in time, and that if she was not there in time she might not get a cargo, and in the month of March, at the request of Rees, the plaintiffs agreed to and did cancel the charter-party upon the aforesaid agreement of Rees to pay the sum of 24*l.* 0*s.* 6*d.*, being the amount of commission at 5 per cent. on the amount of the cargo, which was estimated at 200 tons of sugar at 47*s.* 6*d.*, if the charter-party had been carried out, with the addition of 5*s.* 6*d.* for stamps on the charter-party, and that sum was to be paid forthwith by Rees, but he neglected to do so, and on the 29th July 1876 he gave to the plaintiffs' agent his promissory note at one month's date for the amount, 24*l.* 0*s.* 6*d.*, which note was not paid by Rees, and is still unpaid.

7. Evidence was given at the trial of the above facts, and also that the vessel did not go to Tobago, and that the cancellation of the charter-party was for the benefit of the owners.

8. It was contended for the plaintiffs that the committee was due on the execution and signing of the charter-party as therein expressly stipulated. That the plaintiffs had done all on their part to be done to entitle them to be paid the said commission, and that their right to recover the said commission accrued immediately upon the execution and signing of the said charter-party and existed at the time of cancellation, and did not depend upon the said cancellation, and that the charter-party was only cancelled upon the express agreement of Rees to pay the commission; that it was within the scope of his authority as ship's husband to cancel the charter-party, and to agree upon the terms of such cancellation, more particularly as it was for the benefit of the vessel.

9. Each of the points referred to in the last paragraph was contested by or on behalf of the defendants, who also contended that Rees, as such ship's husband, had no power to enter into agreement with the plaintiffs for payment of a sum in lieu of commission upon cancellation of the charter-party, which would bind the owners of the vessel, except with their express authority; that this was an act beyond the scope of the general authority given to him upon his appointment as ship's husband; that it amounted to a compromise of a claim which could not be effected without the special sanction of the owners; that the plaintiffs, in subsequently accepting Rees's promissory note for the 24*l.* 0*s.* 6*d.*, adopted him as the person liable to them, and therefore discharged the owners of the vessel, and that the transaction was a personal one between the plaintiffs and Rees; that Rees absconded in Nov. 1876, and, although the promissory note became due prior to that date, no claim was made against the owners of the ship until after Rees had absconded.

10. The County Court judge found as a fact that the defendant was part owner of the vessel at the date of the charter-party, and its cancellation; that Rees was appointed ship's husband, and was so at the date of the cancellation; that he entered into the charter-party; that the vessel did not go to Tobago; that the charter-party was cancelled by the plaintiffs at the request of Rees upon his agreeing to pay 24*l.* 0*s.* 6*d.* in lieu of commission in cash, which he failed to do, and afterwards gave the said promissory note, and the same was signed by him and not paid, and is still unpaid. But the judge held that, although Rees had, as ship's husband, authority to charter the said vessel, he was not empowered to pledge his owner's credit for the payment of a sum of money for the cancelling of the charter-party without their express sanction, that being a matter quite unusual and out of ordinary course, however advantageous the compromise effected might have been to the interest of all the owners, and as no special authority was proved to have been given, the plaintiffs were nonsuited.

The question for the opinion of the court is, whether, under the circumstances hereinbefore set forth, the plaintiffs are entitled to recover from the defendant part of the said sum of 24*l.* 0*s.* 6*d.*, so agreed to be paid for cancellation of the charter-party.

Anstie for the plaintiffs.—That a ship's husband has authority to bind the owners by effecting a charter-party is not doubted or denied, but the question here is, whether he has also authority to bind the owners by cancelling the charter-party, and paying money in lieu of commission, such arrangement being a benefit to the owners. There is very little authority on the subject, and none directly in point on this particular question; but the principles for which the plaintiffs contend are borne out in the cases that are to be found on the point. The case of *Barber* v. *Highley* (1 Mar. Law Cas. O. S. 383; 9 L. T. Rep. N. S. 228; 15 C. B. N. S. 27; 32 L. J. 270, C. P.) is the nearest point to the present; it was held there that a ship's husband was an agent of the owner to do what was necessary for the benefit of the ship, and therefore that he had authority to bind his co-owners by giving a bail-bond to free the vessel from arrest in a suit for collision; yet that was quite an unusual matter. [CLEASBY, B.—In that case the ship's husband was also managing owner.] No doubt he was, but the judgment does not rest on that. A part owner is not a copartner with his co-owners. What that case decided was, that, if it be necessary to enable the ship to continue her voyage and earn freight, that enables the ship's husband to give the bond and bind the owners. It is found in the case that the cancellation was accepted and acted on by the owners, and was for their benefit, and, having reaped the benefit of the cancellation, they ought not to be allowed to escape from bearing the burden of it. [KELLY, C.B.—Where and when was the bargain made?] It was at Amsterdam, and the probability is that there was no means of obtaining the consent of the owners in time, and if the ship's husband could not, under such circumstances, act for their benefit and so as to bind them, the result might be a considerable loss before the owners could be communicated with. The authority delegated to the ship's husband is for the advantage of the owners, his principals, and whether it is to make a contract or to cancel one, the principle, it is submitted, is identical. According to the contention of the defendants the charter-party is still subsisting, and has not been cancelled, as, if Rees had no authority to promise the compensation for its cancellation, then no cancellation has taken place. Rees had no possible reason, being no part owner, for making himself personally liable on the promissory note, and his giving it is no bar to an action by the plaintiffs against the principals: *Robinson* v. *Read* (9 B. & C. 449.) He cited also *Thompson* v. *Finden* (4 C. & P. 158), and *Whitwell* v. *Perrin* (4 C. B. N. S. 412), as authorities showing the power and authority of a ship's husband to bind his owners in matters connected with the ship and the interests of the owner.

A. T. Lawrence, for the defendant (respondent), *contrâ*.—The question is purely a legal one, viz., whether a ship's husband has by law power and authority, in that capacity merely, to bind the shipowners by his cancellation of the charter-party. I submit that he has not, and the non-production of any authority in favour of the plaintiffs' contention on the point is a strong confirmation of the contrary view, and in favour of the defendant's contention that such a proceeding is beyond the scope of his authority and employment. In *Campbell* v. *Stein* (6 Dow. App. Cas. 134) Lord Eldon held that a ship's husband had no authority to bind the shipowner to the costs of a lawsuit. That case, which is the nearest authority at all in point, will be found cited, with others, in Abbott on Shipping, 10th edit., pp. 79, 80. In Story on Agency, sects. 34 and 35, that learned author gives a summary of the authorities on the duty and power of a ship's husband, from which it appears that he has authority to direct all proper repairs and equipments and outfits for the ship, to make contracts for freighting or chartering, if that is her usual employment, and to do other acts necessary to dispatch her on her intended voyage. Now the making of charter-parties is usual, but the cancelling of them is, it is submitted, not usual; and indeed the case finds that it is *unusual*. 1 Bell's Commentaries on the Laws of Scotland, 7th edit., pp. 552, 553, a leading authority on the subject, is to the same effect. The principle of construction of a written appointment is to construe it strictly, and to allow an implied authority very reluctantly, and only to allow such authority as is necessary to the ordinary discharge of the duty. Here it was said to be unusual, and out of the ordinary course of business. The case of *Barker* v. *Highley* (*ubi sup.*) does not, it is submitted, apply. It is the exact converse of the present case. The judgment there given was put on the ground only of what had been done being absolutely necessary, &c. It is not found by the case that Rees professed or assumed to bind the defendant by the promissory note.

KELLY, C.B.—The question which comes before us for our decision in this case involves a point which is not only of considerable interest and importance to the shipping and maritime trade of this country, but is also an entirely new one. Text books of very high authority, and amongst them the learned work of Lord Tenterden on Shipping, have been brought to our notice, but in none of them has any decision or dictum of any judge or any authority whatever, been found for the proposition that a ship's husband has any authority beyond that of putting the ship into a proper condition for proceeding to sea and enabling it to prosecute its voyage; and in the absence of any authority in support of the power of the ship's husband which the learned counsel for the plaintiffs has consented for here, I should feel grave doubt and hesitation in laying down the rule for the first time, that any such power in fact exists. There is no doubt that the ship's husband, as laid down in the books on the subject, has authority and power to procure a charter-party and to make certain contracts for the benefit of the shipowners, but there it seems his authority ceases; and although it might be highly convenient and desirable, and especially in cases where the ship's husband is on the spot, and the shipowners are far away in another country, and so cannot promptly or easily be communicated with, that the ship's husband should have the power of cancelling a charter on the terms most advantageous and for the benefit of the shipowners that he may be able to procure, yet I cannot, in the present state of the law and absence of all authority, venture to take upon myself to say for the first time that such a power does exist. It is, I think, a matter for regret that there is no law or usage clearly defining the power and authority of persons in the capacity of ship's

husbands; but, as that is the case, I am unable to hold the defendant liable in the present instance, and therefore the judgment of the County Court judge in favour of the defendant must be affirmed.

Cleasby, B.—I am of the same opinion. It cannot, I think, be contended that, if the shipowners themselves had effected the charter-party, the ship's husband would have had authority to make such an agreement on their behalf as that which Rees made with the plaintiffs in this case for the cancellation of it; and, indeed, I very much doubt whether he had authority to cancel the charter-party at all. It may be taken for granted inasmuch as he was appointed ship's husband before the making of the charter-party, that he had authority to make it. The learned counsel for the defendant, in the course of his argument before us, referred us to sects. 34 and 35 of Story's treatise on Agency, in which are laid down the extent and nature of the several duties and authority of a ship's husband, in which certainly, as there stated, is not included an authority to cancel the contract between the charterer and the shipowner. Mr. Lawrence also read us a passage from Bell's Commentaries on the Laws of Scotland (*ubi sup.*) on the same subject, in which that well-known writer says: "His" (the ship's husband's) "powers, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed however: (1) that without special powers he cannot borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishing, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not with which he might have paid them. (2) That although he may, in the general case, levy the freight which is by the bill of lading payable on the delivery of the goods, it would seem that he will not have, and is not to be relied on as possessing, power to take bills for the freight and give up the possession and lien over the cargo, unless it had been so settled by charter-party, or unless he has special authority to give such indulgence. (3) That under general authority as ship's husband he has no power to insure or to bind the owners for premiums, this requiring a special authority." Thus it seems, according to the authority of Bell, the ship's husband has power to act under the usual conditions, and to do whatever is necessary or usual for working the ship: but all such usual acts are of an entirely different character from an act which puts an end to the contract.

It would have been very satisfactory to me if I could have seen the contract in this case, for it is not quite clear, from the statement in the case, whether the agreement to cancel was made between the plaintiffs and Rees in his own name and in his individual capacity, or between them and him as the agent of the shipowners. The arrangement was so exceptional in its character that I am rather inclined to think that the cancellation was accepted and the whole affair arranged on the authority and personal credit of Rees alone; and I am of opinion that he was not authorised to bind the shipowners by what he did in making that arrangement with the plaintiffs.

Judgment for the defendant affirmed.

Solicitors for the plaintiffs (apps.), *Thomas White* and *Son*, agents for *J. D. Pain* and *Son*, Newport, Monmouth.

Solicitors for the defendant (resp.), *Edmund Warriner*, agent for *Gibbs* and *Llewellyn*, Newport, Monmouth.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

April 4 and 5, 1878.

(Before Sir R. Phillimore.)

The Nelly Schneider.

Co-ownership — Sale of ship — Application of minority—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 8.

The High Court of Justice (*Admiralty Division*) *has power under the Admiralty Court Act* 1861, *s.* 8, *in a co-ownership action to order the sale of a ship on the application of a minority of owners, and will exercise such power where it appears that a sale is to the interest of the owners, but such power will always be exercised with great caution.*

This was an action brought by John Williams, John Swainson, and William Swainson, against the British vessel *Nelly Schneider*, as co-owners of that vessel, to have an account taken of the earnings and profits of the vessel, and to procure a sale thereof.

The plaintiff, John Williams, was owner of 9-64th shares in the said vessel, and each of the other plaintiffs was the owner of 1-64th share therein.

An appearance was entered in the action on behalf of the other owners of the vessel, of whom Joseph Fisher owned 48-64th shares.

In 1876 the *Nelly Schneider* was being built, and the plaintiff John Williams, a master mariner, applied to the defendant Joseph Fisher, who was acting and continued to act as managing owner of the vessel, to appoint him, Williams, master of the vessel. This the defendant Fisher promised to do, provided the plaintiff John Williams would purchase and become owner of 9-64th shares in the vessel, and would find purchasers for three other 64th shares therein. The plaintiff Williams agreed to the proposed terms, and he accordingly paid for and became the purchaser of 9-64th shares, which he continued to hold at the commencement of the action. The plaintiffs J. and W. Swainson, and one Isaac Rawlinson, became the owners of one share each, at the instigation of the plaintiff Williams, and Williams was duly appointed master of the *Nelly Schneider*. The plaintiffs J. and W. Swainson and J. Rawlinson became owners of the shares on the faith and understanding that Williams was to be master. The *Nelly Schneider* made several voyages under the command of Williams; but in Aug. 1877, on the return of the vessel from a foreign voyage, the defendant Fisher, having had some quarrel with the plaintiff Williams, suddenly dismissed Williams from his employment as master; the dismissal took place without the knowledge of the other owners, and under circumstances which would not justify a discharge without proper notice.

Williams thereupon commenced an action against the vessel to recover his wages, and disbursements and damages for wrongful dismissal; and at the same time Williams and the other two plaintiffs commenced this co-ownership action. The vessel was arrested, but, bail being given in the action and for safe return, she was released and departed on a voyage with another master in command. The statement of claim alleged that accounts were outstanding between the plaintiffs and Fisher as managing owner. It was proved that the plaintiffs did not approve of the employment of the vessel otherwise than under the command of Williams, and that they objected to his dismissal. Their claims as appearing in the statement of claim were as follow:

1. That in the event of the *Nelly Schneider* not being brought back to this country, pursuant to the bond given in this action that such bond shall be forfeited, and that all necessary relief thereon may be given to the plaintiffs.
2. That the defendant Joseph Fisher, the managing owner of the said vessel, and the other defendants may be ordered to bring her back to this country on completion of her present voyage, and that she may be sold by the marshal, and the proceeds of her sale be divided amongst her owners in the proportions in which they may be entitled thereto.
3. That all accounts outstanding and unsettled between the plaintiffs respectively and the defendant Joseph Fisher, as such managing owner, may be referred to the registrar to report thereon.
4. That the defendants and their respective shares in the proceeds of the sale of the *Nelly Schneider* may be condemned in any sum or sums of money which shall be reported to be due to the plaintiffs respectively.

At the hearing it appeared that the parties could not agree as to the management of the ship, the plaintiffs insisting upon, and the defendants (other than Rawlinson) objecting to, the appointment of the plaintiff Williams as master, and that the defendants declined to purchase the plaintiffs' shares at a valuation.

Butt, Q.C. and *Clarkson*, for the plaintiffs, submitted that some rule ought to be laid down in these co-ownership cases where a minority of owners are in hopeless disagreement with the majority. The court has power to direct a sale under the 8th section of the Admiralty Court Act 1861, and this is a case where that power should be exercised to dissolve the association, which cannot prosper in its present condition. The shares of the minority might be valued by the court, and the owners of the majority of the shares should have the option of taking them at the valued price within a fixed time, and in default the ship should be sold.

Milward, Q.C. and *Bucknill* (*W. G. F. Phillimore* with them) for the defendants, refused to consent to such an order.

Sir R. PHILLIMORE.—The court has under the 8th section of the Admiralty Act 1861 full power to direct a sale of the ship; but this is a power which must always be exercised with great caution at the instance of a minority of owners. But in this case I think that, considering the difficulty the parties must find under the circumstances in coming to terms, it will be greatly to their interest that some arrangement should be made which will sever their connection. The course suggested by counsel for the plaintiff does not seem to be an unreasonable course to adopt, and I shall make the following order: I order that a valuation of the shares now held by the plaintiffs in the vessel be made; that a copy of such valuation be filed in the registry, and that thereupon the defendants have the option of purchasing such shares at the amount fixed by the valuation. If the plaintiffs do not exercise this option within a fortnight, the ship must be apprised and sold by the marshal.

April 5.—*Bucknill*, for the defendants, stated that the defendants declined to avail themselves of the option of purchasing the plaintiffs' shares.

E. C. Clarkson, for the plaintiffs, asked that the vessel might be at once brought back to this country and sold.

Sir R. PHILLIMORE.—I cannot compel the defendants to bring the vessel home, but I grant the plaintiff's application as far as I can. The order for the appraisement and sale of the vessel will be put in force when the vessel comes back to England from her present voyage.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

Solicitors for the defendants, *Ingledew, Ince*, and *Greening*.

Nov. 21 *and* 22, 1878.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE TIRZAH.

Damage—Collision—Regulations for Preventing, Arts. 2, 3, 5—*Infringement—Light*—36 *&* 37 *Vict. c.* 85, *s.* 17.

If an infringement of the Regulations for Preventing Collisions at Sea may by possibility cause or contribute to a collision, the vessel infringing the regulations will be found to blame under the provisions of sect. 17 *of Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *notwithstanding that an infringement was justifiable, unless the actual infringement was necessary.*

A vessel moving her lights in bad weather from a place approved by the Board of Trade, and where, semble, they complied with the regulations as to visibility, to a place where they were obscured, to a certain extent, by sails, &c., on the ground that in the approved place they would be washed away, found to blame for a collision which might have been occasioned by their non-visibility, on the ground that, though it was justifiable to move them, they should have been moved to such a place, or such steps should have been taken, as to render them properly visible in the new place.

THIS was an action for damages sustained by the barque *Duke of Wellington* in a collision between that vessel and the brig *Tirzah*, about ten or twelve miles S.E. by E. of Orfordness, about midnight on the night of the 27th-28th Aug. 1878.

The *Duke of Wellington* was a barque of 794 tons register, and was on a voyage from South Shields to Carthagena, laden with a cargo of coal and coke, and manned by a crew of sixteen hands.

The *Tirzah* was a brig of 239 tons register, and was on a voyage from Archangel to London, laden with a cargo of oats, and manned by a crew of eight hands.

The night was clear, but dark, the wind about W.S.W., a strong breeze, and, according to those on board the *Tirzah*, there was a heavy sea running. The *Duke of Wellington* was close-hauled on the port tack, heading about N.W., and going about three and a half knots through the water, under all plain sail except foretopgallant

and mainsails. The *Tirzah* was close-hauled on the starboard tack, under topsails, courses, jib, and trysail, and making about one and a half knots an hour.

Those on board the *Duke of Wellington* observed the *Tirzah* three points on the starboard bow, about one-third of a mile off, but could see no lights till the *Tirzah* was quite close, when a red light was seen. The *Duke of Wellington* ported her helm, and let go the spanker sheet and lee main braces; but nevertheless before she had paid off sufficiently she with her port bow struck the port bow of the *Tirzah*. Those on board the *Tirzah* observed the green light of the *Duke of Wellington* three points on the *Tirzah's* port bow about a mile off. They kept their luff until close to the *Duke of Wellington*, and a collision was imminent, when, after hailing that vessel, their helm was put hard down to ease the blow. There was a good look-out on board both ships. The *Duke of Wellington's* lights were fixed forward of the greatest beam of the vessel. The *Tirzah* had two sets of stanchions for her lights, one set right aft and the other forward. It was proved that the surveying officer of the Board of Trade at Dublin had directed the lights to be removed from aft, where they had been carried before the inspection, and that they were usually carried forward, but in bad weather were moved aft to their original position, and that on the night of the collision they had been moved aft at 10 p.m. From that position they were not visible right ahead, nor on either bow from an angle variously estimated by the witnesses at from half a point to one and a half points on each bow.

The question was whether the fact of the lights being in such a position was, under the circumstances, sufficient to render the *Tirzah* liable for the damage arising from the collision within the meaning of sect. 17 of the Merchant Shipping Act.

The following enactments were those referred to:

Merchant Shipping Act 1862 (25 & 26 *Vict.* c. 63), *Table* (*C.*)

Regulations for Preventing Collisions at Sea—Rules concerning lights.

Art. 2.—The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

Art. 3.—Seagoing steamships when under weigh shall carry

(*a*) At the foremast head, &c.

(*b*) On the starboard side, &c.

(*c*) On the port side a red light so constructed as to show an uniform unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles

(*d*) The said green and red lights shall be fitted with the board screens projecting at least 3ft, forward from the light, so as to prevent these lights from being seen across the bow.

Art. 5.—Sailing vessels under weigh or being towed shall carry the same lights as steamships under weigh, with the exception of the white masthead lights, which they shall never carry.

The Merchant Shipping Act 1873 (36 & 37 *Vict.* c. 85), *s.* 17.

If in any case of collision it is proved to the court before which the case is tried that any of the regulations contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

The case was heard on Nov. 21 and 22, by Sir R. Phillimore, assisted by two of the elder brethren of the Trinity House as assessors.

Butt, Q.C. and Dr. *W. G. F. Phillimore* for plaintiffs, owners of the *Duke of Wellington*.—The position of these lights was such that we, approaching on her bow, could not see them, therefore the position misled us, and caused the collision. Two circumstances must combine to prevent the *Tirzah* being liable for this collision: (1) a necessity for carrying the lights aft; and (2) a necessity for carrying them aft in such a way as not to comply with the regulations. The object of the statute was to prevent the court having to decide on conflicting evidence whether in any particular case the infringement of the regulations did or did not cause or contribute to a collision. To bring the *Tirzah* under the edge of the statute it is only necessary to show that the infringement was not absolutely necessary, and that it may have caused or contributed to the collision. We have the strongest evidence on that point. The defendants themselves are obliged to admit that, with the ship leaning over as she was, the lee light, which is the one here in question, would be obscured by the mainsail for one and a half points on the bow; within that angle we could not see the light, and, not seeing it, we were justified in supposing either that the object we did see was a vessel going the same way as ourselves, and therefore no cause of immediate danger, or a vessel running free, and therefore, in the then existing state of the wind, a passed vessel, and not a source of danger at all; we were therefore justified, as a close-hauled vessel, in keeping our luff till we, at the last moment, discovered a state of things in which, though we did all that seamanship could suggest, the collision could not be avoided. What right or excuse had the *Tirzah* for carrying her lights in such a place? The Board of Trade at Dublin had pointed out that it was an improper place; and even if the weather was such as to prevent them being carried forward, yet the weather was not exceptionally bad weather, but such as vessels expect to meet, and therefore she ought to have adopted precautions either by having the staunchions aft turned out, or the mainsail hauled up, so as to show the lights ahead.

E. C. Clarkson (with him *Myburgh*) for defendants, owners of the *Tirzah*.—The court will first determine the facts, and then see if the statute applies. We with our lights burning see the *Duke of Wellington's* light three points on our bow; it is not contended that our light was obscured to that extent, and therefore, if the *Duke of Wellington* had had a proper look-out, our light would have been seen, and it was her duty as a port-tacked ship to get out of our way. The collision was caused by her want of look-out, and if she had no proper look-out, the visibility or invisibility of our light could not by any possibility cause or contribute to the collision:

The Englishman, 3 Asp. Mar. Law Cas. 506; L. Rep. 3 P. Div. 18; 37 L. T. Rep. N. S. 412.

Our lights only became obscured at about five-eighths of a point, that is, only very shortly before the collision, and when a collision was already inevitable for the want of look-out on board the

Duke of Wellington. Besides, if we had kept our lights forward in the place which the Board of Trade desired, we could not, under the existing circumstances of wind and sea, keep them alight at all, and therefore we were justified in moving them to a place where, at all events, they would burn safely. The old stanchions left in the place where the lights were originally placed were at once the best and only makeshift we could avail ourselves of.

Sir R. PHILLIMORE, after consultation with the Trinity Masters, said:—"This is a case of collision which happened between twelve and one o'clock in the morning of the 28th Aug., about ten miles from Orfordness. The direction of the wind was stated to be W. S. W., or W. by S., and the weather was clear but dark. It appears that there was a strong and heavy sea, and at the time the tide was ebb. The vessels that came into collision were the barque *Duke of Wellington* and the brig *Tirzah*. The *Duke of Wellington* was by far the larger ship, being 794 tons register, and the *Tirzah* only 239 tons register. The *Duke of Wellington* was bound from South Shields to Carthagena, with a crew of sixteen hands, and a cargo of coal and coke. Between twelve and one she says that she had all her plain sail except mainsail and foretopgallant sail, and was heading N.W., making three to four knots an hour. No question arises as to her lights, which were admitted to be proper. She says she saw a vessel without lights from a quarter to half a mile off, and about three points on her starboard bow, and that the vessel was watched; there is no doubt it was the *Tirzah*, but no lights could be seen. Suddenly they appeared close to the *Duke of Wellington*, who could not pay off enough in the time, and the *Tirzah* came into collision with her; the two vessels struck together on their port bows. Now the *Tirzah's* case is, that she was close-hauled on the starboard tack, and was under her topsails, courses, jib and trysail, proceeding, as she says, at the rate of about one and a half knots an hour, and that she saw the green light of the *Duke of Wellington* at a distance of about a mile, and about three points on her port bow. She was kept close-hauled by the wind, expecting the *Duke of Wellington* would keep out of the way, but the *Duke of Wellington* approached, and a collision took place.

There is no dispute on this part of the case that the *Duke of Wellington* was a port-tacked vessel, and the *Tirzah*, a starboard-tacked vessel; therefore it was the duty of the former to get out of the way. She was unable to discharge it, she says, on account of the insufficient state of the *Tirzah's* red light: and the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) has been invoked in her favour: that section is as follows: [His Lordship here read the section given above.] Now this section has undergone much discussion both in this court and before the Judicial Committee of the Privy Council, and the result of the case is to establish the law that, in any case where an infringement of the regulations could by any possibility have caused or affected the collision, the ship so infringing them is brought under the section to which I have referred.

Now in this case the *Tirzah* up to ten p.m. did carry her lights forward, and at ten o'clock at night they were removed aft, and, as I understand, close to the traffrail. One of the questions that I have put to the Elder Brethren of the Trinity House is, whether, having regard to the state of the weather, it was a justifiable act: and they are of opinion that it was, and in that I agree. They were, unfortunately, placed aft in such a position as unquestionably to infringe the regulations, to what extent is perhaps doubtful, but we think it must have been to the extent of a point or a point and a half.

The second question then arises whether, in this state of things, such an infringement of the rule could by possibility have affected this collision. That is evidently a question for the Elder Brethren, who have assisted me with their nautical skill; and, in their opinion, it must be answered in the affirmative that it could by possibility have affected the collision.

The main question then arises with regard to the other branch of the clause of the statute, namely, were there any circumstances which made a departure from the regulation necessary? It appears, on the evidence, that the officials of the Board of Trade at Dublin passed the lights, and that they were in the same condition previous to 1873 as they were on the occasion of the collision. Soon after the passing of the Merchant Shipping Act in that year (36 & 37 Vict. c. 85) the Board of Trade ordered the stanchions to be put forward, and the lights were carried forward, it appears, at that time. Now, it has been argued with considerable plausibility and acuteness that this vessel was constrained by the state of the weather to remove her lights from the position in which they had been, and in which they were placed by the direction of the Board of Trade, and that it was the best makeshift that could be adopted, and that if they were placed in their original position aft, it was as much as could be expected from the master of the ship. On the whole, I have arrived at the conclusion that it is not a sufficient excuse that this vessel was in such rough weather as to render it necessary that her lights should be removed from forward to aft. It seems that a fair and proper arrangement should be provided to make them comply with the regulations as to visibility, and such was not provided. I must, therefore, under the provisions of the statute, hold that the *Tirzah* is deemed to be in fault for this collision.

Solicitors for plaintiffs, owners of the *Duke of Wellington*, *Stokes, Saunders*, and *Stokes*.

Solicitors for defendants, owners of the *Tirzah*, *T. Cooper* and *Co.*

Tuesday, Dec. 3, 1878.

(Before Sir R. PHILLIMORE.)

THE MARIA.

Practice—Institution of suit—Default cause—Time—Writ of summons—Warrant of arrest—Adm. Court Rules 1871, *r.* 4—*Rules of the Supreme Court; Order I., r.* 1: *Order V., r.* 11; *Order IX., r.* 10.

In ordinary default causes in rem, the time at which the steps in the action may be taken date from the service of the writ of summons, and not, as before the Judicature Acts came into operation, from the service of the warrant of arrest.

THIS was a motion in a cause of towage and necessaries instituted against the vessel *Maria*.

The cause was instituted on the 25th Oct. 1878, and the writ of summons had been served on the ship by being nailed to the mast, in accordance with Order IX., r. 10. No appearance was entered on behalf of the owners or others interested, but no warrant of arrest (Order V., r. 11 a) was issued till the 14th Nov. 1878.

G. Bruce now moved the court *ex parte* to allow the plaintiff to file proofs and enter action for trial, notwithstanding that the time had not elapsed since the issue of the warrant, required by Admiralty Court Rules 1871, r. 4. (*a*) He argued that since the Judicature Acts the writ of summons was notice to all the world of the suit, and that therefore Admiralty Court Rules 1871, rule 4, must be read as if the expression "writ of summons" were used instead of "warrant of arrest;" the warrant of arrest is now only necessary to enable the vessel to be sold under the order of the court, and the writ of summons is now the commencement of Admiralty actions *in rem* as well as of all other actions (Order I., r. 1), and is in actions *in rem* served in the same way that the warrant of arrest formerly was (Order XI., r. 10).

Sir R. PHILLIMORE.—I shall grant the application in the present case, as I am of opinion that in a case like the present the service of the writ of summons by nailing it on the mast is sufficient intimation to all whom it may concern of the existence of the suit. But it must be borne in mind that the present application is in a cause by default, and therefore made *ex parte*, and I do not say that I should grant the application under other circumstances, as there are peculiarities in some cases where the proceedings are *in pœnam*, and the warrant of arrest may be a necessary preliminary to found jurisdiction. (*b*)

Solicitors for the plaintiff, *Flux* and *Co.*

Saturday, Dec. 21, 1878.

(Before Sir R. PHILLIMORE.)

THE SEAHAM.

*Practice—Trial by jury—Admiralty Division—Transfer—*38 *&* 39 *Vict. c.* 77, *s.* 11 (2) (3), *Order XXXVI., rr.* 3, 27.

An action assigned to the Admiralty Division, but which would not have been within the cognizance of the High Court of Admiralty before the Judicature Acts, transferred to another division on that ground.

Quœre, can an action be tried, and the issues of fact therein decided, by a jury, in the Admiralty Division of the High Court as well as in the Common Law Divisions?

THIS was a motion to transfer an action for "damage to cargo" from this division to the Queen's Bench Division of the High Court.

The *Seaham* was a British ship, and her owners were resident in Great Britain.

E. C. Clarkson, for the defendants, owners of the *Seaham*.—This is not a case within the Admiralty Court Act 1861, s. 6 (24 Vict. c. 10), and therefore not one over which the High Court of Admiralty would have had jurisdiction; therefore it has been wrongly assigned to this division: (Supreme Court of Judicature Act 1875, s. 11 (3), 38 & 39 Vict. c. 77). No doubt the court has power to retain it (Supreme Court of Judicature Act 1875, s. 11 (2), 38 & 39 Vict. c. 77), but it would be inconvenient, and besides we desire to try the case by jury; we have a right to demand trial by jury (Order XXXVI., rr. 3, 27.) [Sir R. PHILLIMORE.—Is there anything to prevent you trying the case with a jury in this division?] There is at all events no precedent for so doing, and the cases in the Chancery Division in which a jury is required are set down for trial in London or Westminster in the general list, and tried before one of the judges of the Common Law Divisions. I should therefore, later on, have to ask for directions how the trial was to take place, and the cause being improperly assigned here, I take the more direct and simple course of asking to transfer it bodily.

W. G. Phillimore.—Allowing that this case comes within the provisions of Order XXXVI., rr. 3, 27, and that the defendants have a right to try by jury, there is nothing to prevent the exercise of the right in this division, even if it should ultimately be necessary to try issues of fact with a jury, and to follow the Chancery precedent in such a case; there may well be issues of law which we prefer to have decided in this court.

Sir R. PHILLIMORE.—I shall grant the present application, as the cause has been wrongly assigned to this division, but not on the ground that I have no power to summon a jury. Costs to be costs in the cause.

Solicitors for plaintiff, *Stokes* and *Co.*

Solicitors for defendant, *Cooper* and *Co.*

Tuesday, March 5, 1878.

(Before Sir R. PHILLIMORE.)

THE JACOB LANDSTROM.

Practice—Salvage—Rival salvors—Consolidation—Tender.

The court has power to order the consolidation of salvage suits in all cases, but it will not usually exercise the power contrary to the wish of the various plaintiffs; but if the plaintiffs institute and prosecute several suits without necessity, they will be condemned in costs.

When there are separate suits instituted in respect of services rendered to a vessel and her crew by rival salvors, and the defendant is unable to estimate the respective values of two several services, he will be allowed to make a single tender in respect of the whole services rendered.

THIS was a motion in a cause of salvage by the defendants, owners of the *Jacob Landstrom*, to consolidate two salvage suits which had been brought against that vessel, or in the alternative to be allowed to make a single tender in respect

(*a*) See *The Polymede* (3 Asp. Mar. Law Cas. 124; 34 L. T. Rep. N. S. 367; L. Rep. 1 P. Div. 121) as to the effect of the Judicature Acts and Orders under it on the Act and rules previously in force.

(*b*) The time for taking proceedings in Admiralty actions may always be abridged by order of court or a judge under Order LVII., r. 7; but in default causes there is a difficulty as to the time of the service of the notice of motion to abridge the time, though, looking to Order XIX., r. 6, Order LIII. rr. 3, 7, and *Morton* v. *Miller* (L. Rep. Ch. Div. 516), *Digmond* v. *Croft* (34 L.T. Rep. N.S. 786; L. Rep. 3 Ch. Div. 512), and *Gardiner* v. *Hardy* (W. N. 1876, p. 185), it would probably be considered sufficient if they were filed in the Admiralty Registry.

of both suits. The notice served on the plaintiffs in Action 1878, K. No. 5, was as follows:

We, Stokes, Saunders, and Stokes, solicitors for the defendants in this cause, give notice that we shall by counsel, on the 5th March 1878, move the judge in court to order that this action be consolidated with action 1877, O. No. 379, or that in the event of either of the plaintiffs objecting thereto the defendants may make a tender in court in this action of a sum that they may deem sufficient to satisfy the claims for salvage in both actions, notwithstanding the actions may not be consolidated.

A notice was served on the plaintiffs in action 1877, O. No. 379, in the same terms excepting that "Action 1878, K. No. 5" was substituted for "Action 1877, O. No. 379."

March 5.—*Stubbs* for the defendants.—The court has power to order the consolidation of the suits; but if it should be of opinion that the interests of the salvors are so diverse as not to be conveniently disposed of in the same suit, it will not on that account subject us to the inconvenience of making separate tenders in each suit. We admit that we are liable to pay some salvage, and desire to tender; but if the plaintiffs' claims are so difficult to adjust *inter se*, that they are compelled to keep their actions separate, how can we, before the trial of the question, say in what proportions their services or alleged services should be rewarded?

W. G. Phillimore, for plaintiffs in Action 1877, O. No. 379.—The consolidation of suits is a matter in the discretion of the court, and it has been already decided in the registry not to allow it, and this court will not interfere on appeal with a matter of discretion. There is no precedent for a tender being made common to two separate actions, and such a proceeding would occasion greater inconvenience than it is alleged that it would prevent. Suppose one set of salvors consider the amount sufficient and accept it, they will be compelled to fight the question of amount at their own risk against the other set which consider it insufficient, apart altogether from the question of apportionment. The defendants' servants did not abandon the ship, and their mate has been examined; therefore, all the circumstances of the salvage and the relative value of the services rendered by each set of salvors are in their knowledge, and they cannot be within the personal knowledge of both sets of salvors. They have had the benefit and should bear the burden, not we who rendered the service. The questions to be tried are separate, and we are entitled to a separate judgment in each, and therefore to a separate tender for each.

Nelson, for the plaintiffs in Action 1878, K No. 5, also objected both to the consolidation and to a joint tender, but claimed if the consolidation was ordered that he should have the conduct of the cause, as he was the first salvor in the field.

Sir R. PHILLIMORE.—The first question that comes before the court is as to the power of consolidation. It is hardly necessary to say that it has always been considered a special power of this court to order actions to be consolidated both in cases of wages and other suits. The practice is laid down by Dr. Lushington as follows (*The William Hutt*, 1 Lush. 27; 1 L. T. Rep. N.S. 448): "According to my knowledge the universal practice of the court has been to consolidate actions where the decision of each action depends on precisely the same facts; and in salvage suits the court has gone further, consolidating actions where there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter, as in a case of collisions by all the several owners of cargo in the vessel run down, and the court could afford no relief, having no power to order the evidence in one action to be taken as evidence in "another." I perceive also, that in one case (*The Melpomene*, 1 Asp. Mar. Law Cas. 515; L. Rep. 4 A. & E. 129), decided in July 1873, I ordered two causes to be consolidated where the application was made by the plaintiffs and resisted by the defendants. Nevertheless, the practice of the court for many years has been not to compel a consideration where the different plaintiffs object to it and maintain that their interests are diverse. In such cases the court has not ordered consolidation, but has always held it to be in its power to condemn the party refusing to consolidate in costs. I do not therefore order a consolidation of these actions. There remains the further question whether it is not competent to the owner of the salved property to make one single joint tender in both separate actions. On the whole I am of opinion that it is competent for him to do so. It is quite clear that there are some cases in which it would be impossible for him to make separate tenders. For example, take the case of a vessel absolutely derelict and two salvors setting up separate claims, it would be impossible for the owner to know what the several services rendered were, but he would know the value of the vessel and her cargo and freight, and therefore might estimate what the value of the services in the aggregate was. In such a case it would be unjust to call upon the owners of property to make separate tenders, and I am of opinion that the present case falls within the same category. There is a salvage of the crew and a separate salvage of the vessel. The owner may estimate the whole value of the service rendered to his property at a certain sum and tender it in court, and if the salvors refuse it they do so at the risk of costs. I order a single tender for the whole services rendered to the ship, the defendants to elect if they choose in which action it is to be paid in.

Solicitors for plaintiffs in Action O. No. 397 (1877), *Lowless* and *Co.*

Solicitors for the plaintiffs in Action K. No. 5 (1878), *Tatham* and *Co.*

Solicitors for defendants in both actions, *Stokes, Saunders*, and *Stokes.*

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Nov. 6 *and* 7, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, O'HAGAN, and SELBORNE.)

BAYLEY AND OTHERS *v.* CHADWICK.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Commission—Sale of ship—Evidence for jury.

The appellants were auctioneers. The respondent put a ship into their hands for sale, and it was agreed that if it was not sold by auction, but if a subsequent sale were effected to any person led to

make an offer "in consequence of the appellant's mention or publication for auction purposes," they were to be entitled to a commission.

The ship was not sold by auction, but afterwards P., having been present at a conversation which led him to believe that S. would purchase the ship, wrote to the appellants, "noting that they had the ship in their hands," to enquire the price, etc., P. then communicated with S., who ultimately became the purchaser, but not through the agency of P.

Held (reversing the judgment of the court below), that there was evidence to go to the jury that the sale was effected in consequence of the appellants' mention or publication, within the meaning of the agreement, and that they were entitled to their commission.

THIS was an appeal from a judgment of the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.) reported in 3 Asp. Mar. Law Cas. 543; 37 L. T. Rep. N. S. 593, reversing a judgment of the Common Pleas Division (Lord Coleridge, C.J. and Denman, J.) reported in 3 Asp. Mar. Law Cas. 453; 36 L. T. Rep. N. S. 740.

The action was brought for commission upon the sale of a ship. The right to the commission depended upon a letter written by the respondent, the vendor, to the appellants, who were auctioneers, in these words:

In case the ship is not sold by auction, she is forthwith to revert to the custody of the owners for private sale, but in case a subsequent sale be effected to any person, or firm, introduced by you, or led to make such offer in consequence of your mention or publication for auction purposes, you to be entitled to the same one per cent. commission on such sale.

The ship was not sold by auction, but was afterwards purchased by a person of the name of Sugden, who was first introduced to the appellants by a man of the name of Pearson, who acted for some time as his agent in the matter, and the sole question was whether there was evidence that he had first heard that the ship was for sale, "in consequence of" the appellants "mention or publication for auction purposes," within the meaning of the contract. The case was tried before Lord Coleridge, C.J., when the jury found a verdict for the plaintiffs. A rule was obtained in the Common Pleas Division for a new trial on the ground of misdirection and also on the ground that the verdict was against the weight of evidence. The rule was discharged, whereupon the defendant appealed to the Court of Appeal, who held that there was no evidence to go to the jury in support of the plaintiffs' claim. The plaintiffs then appealed to the House of Lords.

Benjamin, Q.C, *Murphy*, Q.C, and *Edwyn Jones* appeared for the appellants.

Herschell, Q.C. and *R. T. Reid* for the respondent.

Their LORDSHIPS were unanimously of opinion that there was no question of law in the case, and that upon the facts set out above there was ample evidence to go to the jury in support of the plaintiffs' claim.

Judgment of the Court of Appeal reversed with costs; judgment of the Common Pleas Division restored.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitor for respondent, *H. T. Chambers.*

Thursday, Nov. 14, 1878.

(Before the LORD CHANCELLOR (Cairns), Lords PENZANCE, O'HAGAN, and SELBORNE.)

FISHER *v.* SMITH.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance broker — Sub-agent — Policy — Lien — Monthly payments.

Where a shipowner employs a broker to effect insurances, and, there being no underwriters at the place of employment, the broker engages another broker elsewhere to effect the insurances, and such latter broker pays the premiums, he has a lien on the policies for such premiums as against the shipowner.

Settlement of accounts between the two brokers once a month, the sub-agent meanwhile retaining the policies, is not inconsistent with such a lien, even though the first broker has been paid by the shipowner.

Crawshay *v.* Homfray (4 *Barn. & Ald.* 50) *distinguished*).

THIS was an appeal from a judgment of the Court of Appeal (Cockburn, C.J., James, Bramwell, and Brett, L.JJ.), reported in 3 Asp. Mar. Law Cas. 492: 37 L. T. Rep. N.S. 18, reversing a judgment of the Exchequer Division (Kelly, C.B., and Cleasby, B.), reported in 3 Asp. Mar. Law Cas. 211; 34 L. T. Rep. N. S. 912, in favour of the plaintiff upon a special case.

The action was an action of detinue, brought to recover a policy of insurance effected by the defendant, an insurance broker at Liverpool, as sub-agent for a broker of the name of Skinner, who had been employed by the plaintiff to effect the policy for him. The defendant claimed to have a lien on the policy for the amount of premiums paid by him, but the plaintiff, who had paid Skinner the amount of the premiums, claimed to have the policy given up to him. It was admitted that the plaintiff knew that Skinner had employed the defendant as his sub-agent; but it was said that the course of business between the parties, by which the amounts due were settled monthly, being a giving of credit, discharged the lien.

A special case was stated, which is set out at length in the reports in the Courts below.

Watkin Williams, Q.C., and *T. S. Pritchard* appeared for the appellant.

The arguments urged by them appear sufficiently from the judgments of their Lordships.

H. Matthews, Q.C., and *Maclachan*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellant their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, I do not think your Lordships entertain any doubt as to the propriety of the decision of the Court of Appeal in this case.

There are substantially three questions in the case, which have been argued by the learned counsel for the appellant. In the first place, was there in the respondent, from the nature of the transaction, a lien? Secondly, was that lien superseded by any contract or course of business inconsistent with it? Thirdly, was it

discharged by any payment which was a payment to the respondent?

As to the question whether this is a case in which a lien originally would arise in the respondent, I think there can be no doubt he is the person who effected the policies of insurance; he either paid the premiums or became liable for them, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, for his labour and care, and his money expended, to a lien in the nature of holding possession of the policies, and he would be entitled to that lien against every person, against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' bar. But was there any contract or course of dealing in the case which superseded that lien, which, ordinarily speaking, would have arisen? As to that, the argument has been that the lien was superseded, whether it was a lien of the respondent or of the intermediary, Skinner; but I will take it as a lien of the respondent. Now, the course of dealing is a question of fact, and is to be ascertained from the statements in the case, with the power which your Lordships have, and which the court below had, to draw whatever may be the inferences of fact that you think a jury would, or ought to have, drawn. The course of dealing was this: the respondent, Smith, effected in the course of the month a number of insurances for Skinner. At the end of the month, or within the first ten days of the succeeding month, he furnished him with an account of all that he had expended, and his commission; and he expected to receive payment in cash on the 10th of the following month for what he had so expended. It is said that that was a giving of credit, and that it was inconsistent with maintaining a lien, and that it superseded any right of lien which might otherwise have existed. I could quite understand a course of business of that kind, with a slight addition, superseding the lien. In the case of *Crawshay* v. *Homfray* (4 Barn. & Ald. 50) there was an additional element in the course of business. There a wharfinger was in the habit of receiving goods, upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months, or every year, for all his dues; and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the respondent not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case would be like that I have cited. But instead of that being so here, your Lordships have exactly the opposite state of facts found in this case; because not only is there no statement that it was the habit for the policies to be delivered up at the end of the month, and not only is the case one in which you are dealing with a kind of article, namely policies of insurance, as to which there is no immediate necessity for delivering them up as soon as they are effected, but in addition to that you have a precise statement, inserted apparently for this very purpose, that it was not the usual practice for the respondent to part with the original stamped policies to Skinner until the premiums were received from him. What does that mean but this, that the habit of business between the parties was that the respondent insisted upon, and held firmly, his lien? And no instance can be given of the opposite. The conclusion, of course, as a matter of fact, upon that is that the course of business was not any superseding of the lien, but was a course of business by which the premiums were settled month by month, the lien notwithstanding being maintained until payment. That answers the second question.

Then is there anything which has discharged the lien by payment? The moment your Lordships find that the lien was a lien of the respondent there is no pretence for saying that there was any payment to him, because such payment as has been made was payment to Skinner the intermediary; and the learned counsel for the appellants very properly said that he could not contend that Skinner was the agent of the respondent to receive payment.

That exhausts the whole of the case, and, under these circumstances, I submit to your Lordships that the appeal must be dismissed with costs.

Lord PENZANCE.—My Lords, I have been quite unable throughout to appreciate any considerable difficulty in this case. The appellant Fisher lived at Barrow-in-Furness, and he was minded to open a policy of insurance upon some goods belonging to him. He employed a local agent named Skinner to effect that policy. Skinner employed the respondent, as a sub-agent of Fisher, to effect the policy. Thereupon he effected a policy, and kept it in his hands, as I believe is the universal practice of brokers effecting insurances. The result of that transaction, as it seems to me, would be to make Smith, the respondent, the sub-agent of Fisher. Fisher knew that he had been employed for the purpose of effecting the policy, and Smith knew that he was effecting the policy not for Skinner but for Fisher. It was therefore a perfectly well-understood transaction. Under these circumstances it appears to me that the ordinary rule of law that a lien would arise in favour of the broker who held in his hands the policy could not but be applicable to this case. It is precisely the same as if there had been no intermediate agent at all, and as if Fisher had written direct to Smith to ask him to open a policy for him. Having opened that policy, and having got possession of it, he was not liable to give it up to his principal until he had received the premium which he had either paid or become liable to pay in respect of it. It appears to me that up to this point, and looked at in this way, the case does not admit of argument.

But then it is said, conceding that there would have been originally, from the nature of the transaction, a lien in Smith as against Fisher, and as against everybody, yet, if you look at the case, you will find that a bargain was made by Smith which was inconsistent with his having any such lien. Paragraph 12 of the case says: "The course of business was for the defendant to effect the policy with the underwriters, and procure and deliver to Skinner copies of the policies." Therefore the course of business as there stated was not to effect a policy and hand it over to Skinner, but to hand over to Skinner

a copy of it—"and also to send to Skinner a debit note of the premiums paid, and at the commencement of each month to make out and deliver to Skinner an account debiting him with the money due in respect of the premiums paid on the several insurances effected for him during the month then preceding, and on the 10th of each month the account of premiums paid in the preceding month was paid." That is to say, the course of business was that when he had effected a policy he kept it in his own hands, he forwarded a copy of it to Skinner, and he debited Skinner for it in the general account of all the moneys that were due between them, which general account was paid at the end of the month, or at latest on the 10th day of the following month. Then the case goes on: "It was not the usual practice of the defendant to part with the original stamped policies to Skinner until the premiums were received from him." Now reading that as a statement of the way in which the defendant and Skinner carried on business, I am wholly at a loss to understand how that was inconsistent with the idea of the defendant retaining the policy, and retaining a lien. It is true that it shows that the payment was, according to the common understanding between them, ordinarily postponed for a month, or until the 10th of the following month, but that postponement of the payment was not coupled with the giving up of the thing in the meantime. Undoubtedly a lien may be lost in cases where the party agrees to give up the thing, making a bargain at the same time for payment on a future day. If the agreement is that the thing is to be surrendered, and that the payment is to be postponed, that is inconsistent with a lien. But there is nothing inconsistent with a lien in saying, "I will take payment for convenience sake at the end of the month, and I will keep the policy in my hands in the meantime; if a loss should occur in the meantime, and you want the policy, then you must pay the premium; but, subject to that event occurring, the premium need not be paid till the end of the month." It seems to me that this is the natural consequence and effect of the sort of agreement, as it is called, or rather the course of business which is here set up, and if the matter be viewed in that aspect, of course the ground taken by the appellant entirely fails.

As regards the remaining proposition which was argued, namely, that though there was once a lien, yet that lien has been discharged, I have nothing to add to what has fallen from my noble and learned friend on the woolsack.

I am, therefore, of opinion that the judgment of the court below should be affirmed.

Lord O'HAGAN.—My Lords, I am quite of the same opinion.

There were two points argued in this case. On the first point, as to the existence of a lien, the matter stands in this way: It is found that the appellant Fisher, employed an intermediary to do his work, but the person who effected the insurance, who paid the money for the making of it, and got the policy into his hands, was the defendant. And that was with the full knowledge and assent of the plaintiff himself, because, in paragraph 5 of the case, it is found that, although Skinner was the person directly employed, "the plaintiff had been informed before receiving the covering note that the policies which Skinner was authorised to effect, as above stated, had been effected through the defendant at Liverpool." I do not say that that makes any great difference in the case, or that it would have been necessary for the case of the plaintiff that that should have been found; but it is a fact that what was done by the defendant here was done with the full knowledge and authority of Fisher, and in that way he became the authorised maker of this particular insurance.

Then it is said that the lien does not exist because there is an antagonism between the contract made by the parties and the existence of a lien. I do not think I can say any more on that subject than has been said. It seems to me plain that the principle of antagonism between a contract and the existence of a lien does not apply to this case. The principle would have applied if in this case there had been a contract that, on the making of the insurance, the policy should be given up immediately and absolutely; then the lien could not have existed without interfering with the contract between the parties. But that is not the ordinary bargain, and it is not found to be the bargain which existed in this case, because the bargain, on the contrary, was that the policy should remain with the person who had made it and paid for it, and that he should hold it until his debt should be discharged. Therefore, I think, upon the first branch of the argument there is nothing further to be considered; as to the second branch, I shall only say one word.

If there was a lien, the question is, how was that lien discharged? If Smith, having done this work, was entitled to be paid for it, how has he been paid? He has not been paid at all; *ex concessis*, he never was paid. It was attempted to show that the payment which Fisher undoubtedly made to Skinner was a payment to Smith, the defendant; but how is that made out in any sort of way? It is said that, according to the course of business, he recognised a payment to Skinner as a payment to himself. He recognised nothing of the kind in the course of business. The course of business found to have existed in the face of this case was a course of business which led to the payment to Skinner by a monthly bill, and then a payment by Skinner to his sub-agent Smith; and why Smith should be bound to stop in the middle of that course of business so far as it harmed him, and never to regard the same course of business so far as it helped him, I cannot at all understand. I put the question myself to the learned counsel, whether or no there was anything in the case that would entitle him to contend that the intermediary had been constituted an agent to receive payment for the sub-agent, and the answer was that there was nothing of the kind. There is not a particle of evidence in the case, or finding upon the case, that any such acceptance was ever authorised by Smith to the intermediary; and if not I cannot at all comprehend how the payment to the intermediary can be held to have been a payment to the sub-agent. If that was no payment to him, and if he had a lien, the lien is there still undischarged in justice and in law. I observe that in the court below a statement of the law was referred to which I think I may very fairly and properly submit to your Lordships, as covering

as the learned judge (Brett, L.J., at 3 Asp. Mar. Law Cas. 496; 37 L. T. Rep. N. S. 22) says who cites it, the whole of this case. It is from 2 Phillips on Insurance, sect. 1909. Your Lordships will observe how very fully it touches all parts of this case: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it, and retains the policy in his hands, has a lien upon it for his commission and the premium, until the same are paid to him or he is supplied with funds for the payment, whether his immediate employer is the assured himself, or an intermediate agent; and in the latter case whether the intermediate agency was known or not to the sub-agent claiming the lien." Here there was an intermediate agent, here there was a sub-agent, and here the knowledge of the whole transaction was in the minds of all the parties. It appears to me quite impossible to contend that under those circumstances this lien does not exist as fully now as it ever existed at any period of the transaction.

On the whole, I have no doubt that the judgment of the court below was right, and that the appeal should be dismissed.

Lord SELBORNE.—My Lords, I have but a few words to add to what has been already said. As to the cases of *Crawshay* v. *Homfray* (*ubi sup.*) and *Kirchner* v. *Venus* (12 Moo. P. C. 361), I understand their principle to be this, that a lien cannot be claimed so as to intercept the performance of the actual contract between the parties, whether that contract is express or is to be inferred from a certain course of dealing. If the contract is to deliver goods at a certain time, or to deliver them whenever demanded, it would be inconsistent with that contract to refuse to deliver them, the proper time having arrived, upon the ground of any lien for a price, which by agreement was not then payable. Here no such contract has been found by the special case; for if, on the one hand, there was a course of dealing according to which payment of the premiums was usually made to the broker by monthly settlements with his principal, it is also found, on the other hand, that it was not the course of dealing between the parties (for which purpose I identify Fisher with Skinner) that the policies should be delivered to the principal until the premiums were actually paid to the broker. The true result is, in my opinion, that payment of the premiums was postponed till the monthly settlement only, when possession of the policies was not in the meantime demanded; but that if the policies were sooner demanded, they were then to be delivered up to the principal upon payment of the premiums, and not otherwise.

Judgment of the court below affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Chester, Urquhart, Mayhew,* and *Holden,* agents for *R. Bradshaw,* Barrow-in-Furness.

Solicitors for the respondent, *Sharpe, Parkers, Pritchard,* and *Sharpe,* agents for *Gill* and *Archer,* Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. PEAT, Esq., Barrister-at-Law.

Thursday, Feb. 20, 1879.

(Before JAMES, BRETT, and COTTON, L.JJ.)

Ex parte COOPER; *Re* MCLAREN.

Stoppage in transitu—End of transitus—Constructive delivery — Delivery of part of cargo — Master's lien for unpaid freight.

Where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the transitus is not at an end so long as the carrier continues to hold the goods as a carrier, and it is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold for the consignee not as carrier but as his agent.

The same principle applies to goods placed in the possession of a warehouseman or wharfinger.

A cargo of miscellaneous iron castings was shipped at Glasgow on the 30th July, by a Scotch firm of manufacturers on board a vessel chartered by them, and consigned to M., a merchant in London, the bill of lading being made out in favour of M. or his assignees, he or they paying freight. M. was managing partner of the Scotch firm, and carried on business in London on his own account.

On the 7th Aug. the ship arrived in the port of London, and on the same day a portion of the cargo was delivered on board a barge belonging to M. On the 8th Aug. the Scotch firm gave notice to the master to stop the unloading of the ship. At that time part only of the freight had been paid. M. had not paid for the goods. On the 19th Aug. M. filed a liquidation petition, and on the 21st Sept. a sequestration was issued against the Scotch firm in the Scotch court:

Held, that the delivery of a part did not amount to a constructive delivery of the whole of the cargo, as, the whole of the freight not having been paid when the part was delivered, it could not be supposed that the master of the ship intended to give up his lien on the cargo for unpaid freight; that the stoppage in transitu was therefore in time, and the trustee in the Scotch sequestration was entitled to the part of the cargo not actually delivered before the stoppage.

Slubey *v.* Heyward (2 *H. Bl.* 504) *and* Hammond *v.* Anderson (1 *B. & P. N. R.* 69) *distinguished.*

THIS was an appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

The facts of the case were briefly as follows:

Andrew McLaren carried on business as an iron merchant in London on his own account. He also traded at Alloa, in Scotland, in partnership with Richard Andrews, under the firm of the Albion Iron Company. Andrews was only a sleeping partner, McLaren having the management of the business.

On the 30th July 1878 a cargo of 114 tons of miscellaneous iron castings, such as ovens, wheels, troughs, grates, &c., were shipped by the Albion Iron Company on board a vessel called the

Shamrock, at Glasgow, and consigned to McLaren in London, the bill of lading being made out in favour of McLaren or his assignees, "he or they paying freight."

On the 7th Aug. 1878 the ship arrived in the port of London, and on the same day about thirty tons of the goods were placed on board a barge belonging to McLaren.

On the 8th Aug. McLaren, who was then in Scotland, and who was aware that both he himself and his Scotch firm were on the verge of insolvency, sent a telegram to his manager in London: "If commenced to unload ship, stop proceedings; if not, do not begin until I return." Upon receipt of this telegram the unloading was suspended.

On the 12th Aug. McLaren returned to London and saw the captain of the ship, and arranged with him to stop the delivery.

Part of the freight was paid on the 7th Aug., and another part was paid on the 15th Aug.

The goods had not been paid for by McLaren.

On the 19th Aug. McLaren filed a liquidation petition in London, and on the 21st Sept. his Scotch firm presented a sequestration petition in the Scotch court, and a sequestration was issued on the same day.

The balance of the freight was paid on the 23rd Aug. by the receiver in the liquidation, and the remainder of the cargo was then landed and placed *in medio*.

The cargo was claimed by the trustee in the English liquidation, and also by the trustee in the Scotch sequestration, the question being whether McLaren's separate creditors or the creditors of his Scotch firm were to get the benefit of it.

The registrar having decided in favour of the trustee in the Scotch sequestration, the trustee in the English liquidation appealed.

Before the appeal came on for hearing the Scotch trustee abandoned his claim to the thirty tons which had been unloaded before the 8th Aug.

Joseph Brown, Q.C. and *Stern* for the appellant.—The delivery of a part of the cargo on the 7th Aug. amounted to a constructive delivery of the whole; and thus the *transitus* was at an end before the notice to stop was given:

Slubey v. *Heyward*, 2 H. Bl. 504;
Hammond v. *Anderson*, 1 B. & P. N. R. 69;
Lickbarrow v. *Mason*, 1 Sm. Lead. Cas. 7th edit. 756;
Hanson v. *Meyer*, 6 East, 614;
Tanner v. *Scovell*, 14 M. & W. 28.

If it is a question of intention, as stated in Benjamin on Sales, 2nd edit., p. 663. The intention at the time of the partial delivery must be regarded, and there can be no doubt that at that time the intention was to deliver the whole cargo. [COTTON, L.J.—The only case altogether in your favour is *Jones* v. *Jones*, 8 M. & W. 431.] This is not like *Dixon* v. *Yates* (5 B. & Ad. 313-341), where Parke, J., said, "If part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole." Here there was no such intention, and the partial delivery was an inchoate delivery of the whole, which would have been completed but for the telegram. The onus of proving an intention to separate a part from the whole lies on the person seeking to stop *in transitu*. In *Betts* v. *Gibbons* (2 Ad. & E. 73). Taunton, J., in answer to counsel who maintained that a delivery of part amounts to a delivery of the whole only when circumstances show that it is meant as such, said, "No; on the contrary, a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant." McLaren in stopping the delivery was giving a fraudulent preference to the creditors of his Scotch firm. They also cited

Simmonds v. *Swift*, 5 B. & C. 857;
Miles v. *Gorton*, 2 Cr. & M. 504;
Allan v. *Gripper*, 2 Cr. & J. 218.
Bolton v. *Lancashire and Yorkshire Railway Company*, 13 L. T. Rep. N. S. 764; L. Rep. 1 C. P. 431.

Benjamin, Q.C. and *R. T. Reid*, for the respondent, were not called upon.

JAMES, L.J.—I think that the decision of the learned registrar in this case ought to be affirmed.

I do not know that it is necessary to lay down absolutely a general principle as regards those cases of *Slubey* v. *Heyward* (2 H. Bl. 504) and *Hammond* v. *Anderson* (1 B. & P. N. R. 69), namely, as to the circumstances under which a delivery of part is to be considered a delivery of the whole, so as to put an end to the vendor's right of stoppage *in transitu*. The simple question here is whether, if the vendor receives notice of the vendee's insolvency, and at once takes steps, going to the port as fast as he can, and finds that the captain has delivered part of the goods, he has a right to stop the delivery of the rest. No such case, as far as I have heard, has ever occurred. The cases which have occurred have been cases in which there has been a change of the relationship between the carriers of the warehousemen and the vendee, and such a change of relationship as to make the carrier or the warehouseman the actual holder of the goods for the vendee. In the case of *Bolton* v. *Lancashire and Yorkshire Railway Company* (13 L. T. Rep. N. S. 764, 767; L. Rep. 1 C. P. 431, 440), Willes, J. says this: "Then, as to the alleged delivery of part of the goods, and the effect of that upon the vendor's right to stop the rest: there have been different expressions of opinion at various times as to whether the delivery of a portion of the goods, the subject of an entire contract, operates as a constructive delivery of the whole, so as to put an end to the right of stopping *in transitu*. It was supposed to have been thrown out by Taunton, J., that a delivery of part operated as a constructive delivery of the whole; but that doctrine has since been called in question and dissented from; and it is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole." Now, in this case, the fact seems to be really quite clear. There could be nothing like a constructive delivery by the captain of the whole or a constructive acceptance of the whole by the vendee. What the effect might have been if the whole freight had been paid so that the captain had no lien whatever that he could have exercised on behalf of the owners, and the delivery had begun—what difference that would make it is not necessary now to say. It appears to me quite clear that, as there was not actual payment of the whole of the freight, there could not be a constructive delivery of the whole of the goods, because the captain must be assumed not to have delivered the whole until he had received the whole of the freight, and therefore, if the captain had not con-

structively delivered the whole, it would be impossible to say that the vendee had constructively accepted a delivery which was never constructively made.

I am of opinion, therefore, that in this case there was not such a constructive delivery by the captain, and such a constructive acceptance of that delivery by the vendee as would amount to an acceptance of the whole; that is to say, such an acceptance as to prevent the vendee from refusing to take, or to prevent the vendor from exercising his right of stoppage *in transitu*, the vendee having become insolvent. I do not think it makes any difference that McLaren was partner in the Scotch firm.

BRETT, L.J.—I am of opinion that there was in this case a valid stoppage *in transitu* of the goods by the vendor as against the insolvent vendee at the time when McLaren directed the captain to stop the delivery. In my opinion the goods were then in the hands of the shipowner as carrier, and the *transitus* was not at an end.

The only ground upon which it is urged that the *transitus* was at an end is, that there had at that time been a part delivery of the cargo. It seems to me that a part delivery of the cargo or of the bulk of the goods is not *primâ facie* a delivery of the whole, and that those who rely on the part delivery as a constructive delivery of the whole are bound to show that the part delivery was made under such circumstances as to make it a constructive delivery of the whole. Now here it is first objected that McLaren, as a member both of the London house and of the Scotch firm, was doing wrong in stopping the delivery, so as to give the Scotch firm an opportunity of stopping *in transitu*, that he was thereby making a fraudulent preference; but it was admitted by Mr. Brown that that depended upon whether the *transitus* was at an end, whether the delivery in law was complete. Therefore, unless the delivery was complete, there was nothing wrong in McLaren (knowing that his London house was insolvent) stopping the delivery so as to give the Scotch firm the opportunity of exercising their rights as unpaid vendors. The Scotch firm had the right to stop *in transitu* under the circumstances of this case, unless the *transitus* was over. We therefore come down, or are driven down, to the only point in this case, that is, whether the *transitus* was over.

Now, the goods were shipped by the Scotch firm. They were placed on board ship to be carried to London, and there delivered. At the time therefore of the delivery on board the goods were held by the captain as the carrier on behalf of the Scotch firm. They were brought to London. There is a part delivery. There had been freight paid, and, to my mind, the captain was bound to deliver, unless ordered to the contrary, up to the extent of the prepaid freight; but the moment he had delivered sufficient to satisfy the prepaid freight, he had his lien upon the rest of the cargo for the unpaid freight. Then the captain, holding the goods as carrier, delivers a part; but is it to be said, or can it be properly said that, when he delivered a part, he intended to deliver the whole? If he did intend to deliver the whole, he intended to give up his lien for his freight. The inference is directly the contrary. As a matter of fact he could not have intended to deliver the whole, and therefore when he delivered part he did not intend to deliver the whole, but on the contrary, he intended to keep back the remainder, or part of the remainder, in order to secure his lien for the freight. In the same way it does not seem to me that from the mere fact of the consignee, McLaren's servant, having received a part, he knowing that he could not receive the rest without paying the freight, and there being no evidence that he offered freight for the rest, it can be said that the proper inference is that he intended to take the delivery of part as the delivery of the whole. It is a mere ordinary case of taking the delivery of a cargo in successive deliveries. If that be so, the captain will hold the undelivered part of the cargo as the carrier, and in that case the *transitus* is not over. If so, the Scotch firm was entitled to stop *in transitu*.

With regard to the cases of *Slubey* v. *Heyward* and *Hammond* v. *Anderson* (*ubi sup.*), it seems to me that the ground of decision was that in one case the captain of the ship had altered his position from that of a mere carrier, and had undertaken, with the consent of the assignees of the bill of lading, to hold the whole of the cargo for them, and, in the other case, in the same way, the wharfinger, who for a time had held for the persons who put the goods into his hands, altered his position, and he, with the consent of the person to whom the goods were transferred, had agreed to hold them, no longer for the person who had put them into his hands, but for the other side. In both cases there was an attornment, and unless something equivalent to an attornment is shown on the part of the carrier, so that he has altered his position from that of a carrier, and holds the goods in another capacity, it seems to me that the *transitus* could not be at an end, and, so long as the carrier holds the goods as carrier, the mere fact of delivery of part does not prevent the unpaid vendor from stopping the remainder *in transitu*. It seems to me that any other doctrine would be of the greatest possible danger in mercantile transactions.

I may say that this case goes even further than a mere stoppage *in transitu*, because, in my mind, the agreement of the vendor and the vendee, both of whom were *sui juris*, intended a cessation of the delivery of the goods.

COTTON, L.J.—Whether this case is one of stoppage *in transitu* or delivery of the whole of the goods, the only question is whether or no there had been a delivery to McLaren in London; that is to say, whether he had actual or constructive possession of that portion of the cargo which remained in the ship, because, as to the rest, I understand it is not disputed.

Now, in my opinion, there is no ground for the contention that from the very first the captain was the agent for McLaren in London; that is to say, that when these goods were put on board the ship they came into the possession of McLaren of London. That being so, these goods, which were actually on board the ship, remained in the possession of the person who occupied the position of having to carry the goods and to deliver them to McLaren in London. Was there such a delivery? Actually there was none; but it was said that there was a constructive delivery, and therefore constructive

possession by McLaren. Why? Because it is said, and truly, that there was actual delivery to him in London of portions of the cargo. Now the case might be different possibly if the whole of the cargo had been one entire machine, because, if a person is allowed to take possession of one piece of a machine, it is possession of the whole. It may possibly be—but I do not decide it, for it stands in a very different position from the present case—that he has got possession of the entirety of which he has taken away an essential part. But here we have a cargo of a number of different things capable of being estimated separately as to their value, and in fact estimated in the bills of lading as to the particular value of each. Does a delivery of a portion of these articles, which are in their nature entirely separate one from the other, constitute constructive delivery of the whole? In my opinion, on principle it does not. It is only a delivery of that which is put over the ship's side and into the hands of the consignee. The captain has a lien for his freight on the remainder, without in any way having given them up. But it is said that the decisions and authorities are against that conclusion, and certainly no decision has been quoted which decides this case in favour of the appellant. *Tanner* v. *Scovell* (14 M. & W. 28) was said to be a case most in his favour; but it really was no such thing. It was only a decision that, where a consignee took part intending to deal with it separate from the rest of the cargo, under those circumstances taking part was not taking the whole. But Mr. Brown, I think, put his argument, not in words, but in substance, thus: that where there was no evidence it must be presumed that taking the part was taking the whole. In my opinion that proposition is wrong in principle; but has it been so decided? In *Tanner* v. *Scovell* the learned judge who delivered the judgment of the court (Pollock, C.B.) (14 M. & W. at page 37) says this: "It will be found that the only two cases, as far as I have looked, which bear the semblance of an authority that a mere part delivery is sufficient to put an end to the right to stoppage *in transitu* are *Slubey* v. *Heywood* and *Hammond* v. *Anderson*. In the case of *Binney* v. *Poyntz* (4 B. & Ad. 571), part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In *Jones* v. *Jones* (8 M. & W. 431), on the other hand, this court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo with the intention of obtaining possession of the whole for the purposes of the trust, and therefore that such taking possession of part did put an end to the transit; but it was fully admitted in that case, that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu* . . . . . If the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more; the right of lien and the right of stoppage *in transitu* on the remainder still continue." Now the judgment in *Slubey* v. *Heyward* does not say on what special ground the case was decided, but only the circumstances of the case so decided. In *Hammond* v. *Anderson* there had in point of fact been an actual weighing by the purchaser of the entirety of the cargo. How can a man weigh a thing that is not in his possession? That entirely puts an end to any general proposition in favour of the appellant being deduced from these two cases. Then the case of *Jones* v. *Jones*, which has been referred to, looks a little more like a case which would have maintained the general proposition. But, it was decided upon the documents in that case, and the court came to the conclusion as a matter of fact that there was an intention to take the whole when part only was actually taken out; and, that being so, that case is an authority that where a man taking part shows an intention, acquiesced in by the carrier, to receive and take possession of the whole, that is a constructive possession of the whole by the acquiescence of both parties. It does not in any way support the proposition that a mere delivery of a part of the cargo, such as in the present case, can be looked upon as a constructive delivery of the whole, or to putting the consignee in constructive possession so as to defeat the lien, and also defeat the right to stop *in transitu*, or the right of the consignor if he desires under the circumstances to put an end to the contract.

James, L.J.—I think that having had the advantage of hearing the judgments of my learned brothers, I may say that our decision, upon which we are unanimous, will be expressed thus: That where goods are placed in the possession of a carrier to be carried for the vendor to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as carrier, and is not at an end until the carrier, by agreement between himself and the consignee, agrees to hold the goods for the consignee, not as carrier, but as his agent. And of course the same principle will apply to a warehouseman or wharfinger.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Linklater, Hackwood, Addison*, and *Brown*.

Solicitors for the respondent, *West, King* and *Co.*

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Friday, Nov. 29, 1878.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Griffiths and others *v.* Bramley-Moore and others.

Marine insurance—Charter-party—Freight—Deductions for sea-damage—Insurance against loss of freight—Underwriters' liability.

A charter-party provided for payment of freight at a specified rate, and contained a clause that, "If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." Plaintiffs, the charterers, effected an insurance "To cover only the one-third loss of freight in consequence of sea-damage as per charter-party." A portion of the cargo became sea-damaged, and one-third of the freight payable in respect of that portion was deducted by plaintiffs from the whole freight.

Held (affirming the judgment of Denman, J.), that the policy sufficiently described the subject-matter insured, which was the one-third loss in consequence of sea-damage, and not the whole freight;

and that plaintiffs were entitled to recover from each underwriter such proportion of the loss of freight as the amount of his subscription bore to the whole sum subscribed.

Appeal of defendants from a judgment of Denman J. on a trial with a special jury at Guildhall.

The action was to recover from the several defendants, who were underwriters, sums alleged to be due from each under a policy of insurance upon freight.

The statement of claim alleged that the plaintiffs, who were shipowners, agreed by charter-party that one of their ships should carry and deliver a cargo of rice, and "that the charterers should pay freight on true delivery of cargo, after the rate of 3*l.* 7*s.* 6*d.* per ton," subject to certain deductions. The charter-party also contained a provision as follows;

If any portion of the cargo be delivered sea-damaged, the freight on such sea-damaged portion to be two-thirds of the above rate, except only in case the vessel shall have been stranded.

The plaintiffs also entered into a policy of insurance, at the foot of which was the following clause:

To cover only one-third loss of freight in consequence of sea-damage, as per charter-party, unless the ship be stranded, sunk, or burnt.

The defendants' names and the amount of their respective subscriptions were written under this clause, and the consideration was expressed in the policy to be 10*s.* per cent.

The cargo was carried to London, and there discharged, but during the continuance of the risk a portion of the cargo was sea-damaged, and the plaintiffs thereby lost one-third of the freight on that portion. The total freight on the cargo was 3817*l.* 16*s.* 3*d.*, and one-third of the total freight was 1290*l.* 12*s.* 1*d.*, of which 1200*l.* formed the subject of insurance under the policy.

The one-third of the freight lost by the plaintiffs on the sea-damaged portion of the cargo amounted to 293*l.* 15*s.* 7*d.* The amount therefore due or payable under the policy was 273*l.* 13*s.* 8*d.*

By reason of the premises the plaintiffs alleged that they had become entitled under the policy to recover from the defendants so much of 273*l* 13*s.* 8*d.* as was proportionate to the sums for which the defendants respectively subscribed the policy.

The plaintiffs claimed the specific amounts so calculated to be due from each defendant and interest thereon.

The defence, so far as material, was that, assuming the total freight to have been 3817*l.* 16*s.* 3*d.* and the amount lost to have been 293*l.* 15*s.* 7*d.*, the plaintiffs were entitled under the policy to the proportion of the loss which the amount insured bore to the whole freight and no more, and that the defendants before action tendered the same, and, on the plaintiffs' refusal to accept it, paid it into court.

By paragraph 5 it was alleged in the alternative that, at the time of effecting the policy, it was represented by the plaintiffs to the defendants, and expressly agreed between them, that the policy should apply to cover the whole of the freight, and that any claim should be calculated on the whole amount of freight, and not on one-third thereof, and that the defendants executed the policy on the faith of such representation, and that the plaintiffs were endeavouring, contrary to their representations and to good faith, to avail themselves of a mistake in the form of the policy.

Issue was taken on this defence.

At the trial the only question left to the jury was the issue raised by paragraph 5, and the jury found for the plaintiffs on this issue, and negatived the defendants' allegations in paragraph 5.

Denman, J. thereupon ordered judgment to be entered for plaintiffs for the full amount of their claim.

The defendants appealed.

Cohen, Q.C. and *J. C. Mathew* for defendants.—The whole freight is insured, as is shown by the low rate of premium; the premium being calculated on the view that each underwriter's liability is determined, not by the proportion which his subscription bears to the amount of the loss, but by the proportion which his subscription bears to the total amount insured. It is an insurance of the whole freight, and the plaintiffs are entitled only to recover under the policy such a proportion of the loss as the amount insured bears to the whole freight. An underwriter, when he subscribes a policy, never agrees to pay on a proportion of loss, but always on a proportion of the assured's liability. The insurance here is against the contingency that the whole freight may be reduced under the charter-party by one third. The underwriter compares the amount of his subscription with the assured's interest:

Hendricks v. *Australasian Insurance Company*, 2 Asp. Mar. Law Cas. 44; L. Rep 9 C. P. 460.

Secondly, if the subject-matter of the insurance was not the total freight, the parties were never *ad idem* as to the subject-matter. There is a patent ambiguity, the subject-matter not being sufficiently described, and therefore no contract:

Raffles v. *Whichelhaus*, 2 H. & C. 906; 33 L. J. 160, Ex.

Holl, Q.C. and *Witt*, for plaintiffs, were not required to argue.

Bramwell, L.J.—I think this is as plain a case as could well be. It is possible, however, that there may be some understanding among underwriters which would cause them to put a construction upon this policy different to that which I am about to put. I think it is plain that the plaintiffs had freight coming to them which might come at one or other of two rates, If the cargo arrived safely, they would get one sum on the whole freight; if it arrived sea-damaged, they would suffer a deduction of one-third in respect of so much of the cargo as was sea-damaged. The plaintiffs being desirous of guarding against that loss, they insure for the one-third value of the freight. It is the same thing as if they said, "We will insure to the amount of 6*s.* 8*d.* out of every pound coming to us as freight." [The words of the policy are plain enough, "to cover only the one-third loss of freight, as per charter-party;" and the charter-party explains what those words mean. Mr. Mathew argues that this is an insurance to cover the whole freight, and although the utmost loss can only be one third, yet he says that the plaintiffs must insure the whole in order to cover it. He says, also, that this proposition is not an unreasonable one, because the underwriter, in consideration of the shipowner insuring the whole freight, takes one-third only of the premium. That seems a roundabout way of doing it. However, no such

contract has been made out. This appeal must be dismissed.

Brett, L.J.—The first point taken is, that there is no description of the subject-matter insured, because the description is not in the usual place in the policy. Is it a true proposition to say that, because the sentence is not in its usual place in the policy, therefore this is not a true description of the subject-matter? I cannot think it is so. In truth, this is the only description of the subject-matter insured, and if so, what is that subject-matter? It is not freight other than freight under the charter-party, because no other freight was under risk. It is shown to be freight under the charter-party by the reference to the charter-party in the description of the subject-matter insured. It is said there is no insurance of loss, but the words are, "to cover one-third loss of freight in consequence of sea-damage." That refers one to the charter-party to find out what was the subject-matter of insurance, and one finds that freight under the charter-party is to be payable on true delivery of cargo, at so much per ton. But then there is a further particular clause in the charter-party, that if a portion of the cargo is delivered sea-damaged one-third of the freight on such portion is to be deducted. If, then, there is sea-damage, there is a loss upon the sea-damaged portion to the amount of one-third freight. Looking at the policy, the subject-matter of insurance is described to be the one-third loss which accrues on the charter-party under, and by virtue of, the above clause. The policy refers only to particular loss caused by sea-damage, and that is the subject-matter of insurance. Then what is the true construction of the whole policy? When once the subject-matter is made out, every part of the policy is to be applied that has reference to that subject-matter. It is said that some parts of the policy could not be applied to such a subject-matter, and therefore that it is not the subject-matter. That suggestion is answered by applying the rule of construction I have just mentioned. This and similar policies are of a peculiar nature, and though the subject-matter of insurance is accurately defined, the quantity of it is not ascertained until the loss has occurred. It seems to me that the only loss that could be recovered under the policy is a total loss. If there is a total loss, then the insurer is liable to the full amount of his subscription. I think that he is so liable in the present case. The ordinary manner of calculating such a loss ought to be applied, and I am of opinion that the plaintiffs are entitled to recover the amount of it.

Cotton, L.J.—The questions are, whether there is a sufficient description of this subject-matter insured, whether that subject-matter is the total loss sustained, or whether the underwriters have a limited liability in respect of another subject-matter. Now I have no doubt on the construction of the charter-party. It is clear that, if the cargo arrives safely, the whole freight would be payable, but if any part arrives sea-damaged, then there is to be a deduction, in respect of that part, of one-third freight. I find that there is in the policy a reference to the subject-matter insured, which is to be the difference between the full freight and the freight payable if the cargo arrives sea-damaged. The words "to cover only the one-third loss of freight in consequence of sea-damage, as per charter-party," are not an inapt description of the subject-matter insured. I am of opinion that our judgment should be for the plaintiffs.

Judgment affirmed.

Solicitors for plaintiffs, *Pritchard* and *Son*.

Solicitors for the defendants, *Walton, Bubb*, and *Walton*.

Nov. 18, 19, *and Dec.* 10, 1878.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Fowler *v.* Knoop.

Shipping—Charter-party—Bill of lading—Consignee of goods—Implied contract to take delivery within a reasonable time—Bills of Lading Act 1855 (18 & 19 *Vict. c.* 111) *s.* 1.

G. and Co. chartered plaintiff's ship to load a cargo at Iquique, and proceed to a port for orders to discharge in a safe port in the United Kingdom. The charter-party stipulated that the vessel should deliver the whole of her cargo as fast as the custom of the port of discharge would allow. G. and Co. (the charterers) shipped the cargo at Iquique, and consigned it to defendant, to secure an advance and for sale. The bill of lading stated that the cargo was to be delivered to defendant or his assigns, "he or they paying freight for the said goods as per charter-party." Whilst the ship was on her voyage defendant sold the cargo, and after intermediate sales, upon the ship's arrival at the port of discharge, the cargo was delivered to the ultimate purchasers upon orders signed by the defendant, who retained without indorsing it to any of the purchasers the bill of lading in his own hands. In an action for damages for detention of the ship at the port of discharge, the jury negatived the existence of any custom in that port as to unloading.

Held (affirming the judgment of Field, J.), that the contract, both in the charter-party and the bill of lading, was that the cargo should be discharged within a reasonable time; that defendant was a consignee of the goods within the meaning of the Bill of Lading Act 1855, *sect.* 1, *and therefore that plaintiff was entitled to maintain this action.*

Appeal from a judgment of Field, J., after a trial with a special jury at Guildhall, during the Trinity Sittings 1877.

The action was to recover damages against the defendant, as consignee named in the bill of lading of a cargo of nitrate of soda, shipped on board the ship *Claudine*, for the detention of the vessel at the port of discharge.

The plaintiff was the owner of the vessel *Claudine*. By charter-party entered into at Valparaiso on the 11th Sept. 1875, J. Gildmeister and Co. chartered the *Claudine* to load a cargo of nitrate of soda at the port of Iquique, and proceed to a port for orders to discharge in a safe port in the United Kingdom. The charter-party contained the following stipulations:

Bills of lading to be signed by the master, weight and quality unknown, all on board to be delivered, and that the vessel should, in such discharge port as ordered, deliver the whole of her cargo as fast as the custom of the port will allow.

The cargo was shipped on the 19th Nov. and consigned to defendant, who was then carrying on business in London under the firm of William Berkefield and Co. The bill of lading was as follows:

Shipped in good order and condition by J. Gildmeister and Co., on board the British barque *Claudine*, whereof E. Jamieson is master, now lying at the port of Iquique, and bound for Queenstown or Falmouth for orders—5290 bags nitrate of soda, weighing, &c., and are to be delivered in the like good order and condition at the port of her final destination (the act of God, fire, and all other dangers and accidents of the seas, rivers, and navigation excepted), unto Messrs. Wm. Berkefield and Co., London, or to their assigns, he or they paying freight for the said goods, as per charter-party and average accustomed. In witness, &c. Dated at Iquique Nov. 19, 1875.

Messrs. Gildmeister and Co. drew a bill of exchange for 5000*l.* upon the defendant on account of the cargo, and forwarded to him the bill of lading and a copy of the charter-party. The defendant accepted and paid the bill of exchange, and agreed to sell the cargo to the London Banking Association at a price per ton delivered *ex* ship. The London Banking Association contracted to sell it to Bath and Sons upon the same terms, and the latter firm also upon the same terms agreed to sell it to Jas. Gibbs and Co. The defendant kept the bill of lading in his own hands, and did not indorse it to any of the purchasers of the cargo. The vessel was ordered to Plymouth to discharge, and she was there and ready to discharge her cargo on April 8, 1876. The cargo was delivered to Jas. Gibbs and Co. upon orders signed by the defendant, and the discharge (which the plaintiff contended was not performed within a reasonable time) was completed on April 27.

At the trial, the defendant's counsel at the close of the plaintiff's case, submitted that there was no liability on the part of the defendant to the plaintiff to take delivery of the cargo within a reasonable or any other time. Field, J. reserved this point for further consideration, and left certain questions to the jury upon which they found: First, that there was no such custom of the port of Plymouth as to take delivery of cargoes of nitrate of soda at the rate of forty tons per day as alleged by the defendant; secondly, that the delivery of the cargo was not taken within a reasonable time, and that seventy tons per day was reasonable.

It was agreed that, if the defendant was liable, the plaintiff was entitled to recover for seven days, detention at 7*l.* 10*s*, per day.

The question of liability was argued on Dec. 1, 1877. Judgment being reversed, was subsequently delivered as follows:—

May 6, 1878.—Field, J.—The question in this case is, whether the defendant is liable for not taking delivery at Plymouth, within a reasonable time, of a cargo of nitrate of soda, which was shipped on board the *Claudine*, at Iquique, by J. Gildmeister and Co., under a charter-party, whereby it was stipulated that the vessel should deliver the whole of her cargo as fast as the custom of the port would allow, and in respect of which a bill of lading, stating that the cargo was shipped by J. Gildmeister and Co., who were the same persons as the charterers, and was to be delivered unto the defendant or his assigns, he or they paying freight for the said goods as per charter-party, was signed by the master. The defendant advanced to Gildmeister and Co. 5000*l.* on account of the cargo, which was consigned to him to secure the advance and for sale, and it was admitted on the argument that he was a consignee named in the bill of lading to whom the property in the cargo passed. Whilst the cargo was afloat the defendant sold it, and after several intermediate sales the ultimate purchasers were James Gibbs and Co. The defendant did not, however, indorse or part with the bill of lading, and the cargo was delivered to Messrs. James Gibbs and Co. by his orders. He therefore remained subject to any liability which attached to him as the consignee named in the bill of lading, and it becomes unnecessary to consider the point adverted to by the Lord Chief Baron in *Lewis* v. *M'Kee* (L. Rep. 4 Exch. 58; 38 L. J. 62, Ex.; 3 Mar. Law Cas. O. S. 427), whether the doctrine of *Smurthwaite* v. *Wilkins* (1 Mar. Law Cas. O. S. 198, 244; 11 C. B. N. S. 842), that the right of the consignor to sue under the Bills of Lading Act passes to the indorsee with the indorsement, applies to the liability of the consignee, so as to divest his liability in the event of a transfer by him.

Upon the argument it was contended on the part of the plaintiff that it is an implied term of the contract, contained in the bill of lading, that the consignee shall take delivery of the goods within a reasonable time; and that by virtue of the Bills of Lading Act 1855 the defendant, to whom the property in the goods passed by reason of the consignment, became liable to do so.

On the part of the defendant it was contended, first, that the bill of lading did not contain any contract to take delivery within a reasonable time, or at any time; and secondly, that, as there was an express contract in the charter-party with reference to the discharge of the cargo, no other contract on the part of the shippers who were the charterers, could be implied in the bill of lading, as between the shippers and the shipowner; and that therefore no liability passed from the shippers to the consignee, under the Bills of Lading Act; or, in other words, that the only liability to take delivery was under the charter-party, to which the defendant was not a party.

Upon the first question, which I answer without reference to the charter-party, I am of opinion that there is a contract in the bill of lading by the consignee to take delivery. It is true that in one sense there is no express contract to that effect in words, the only express stipulation being that the cargo is to be delivered to the defendant or his assigns, he or they paying freight as per charter-party—the only term of the charter-party which is incorporated in the bill. But delivery by one person to another is not an act which can be performed by one of them only. In order to effect a delivery, one party must give, and the other must take delivery; it is a composite act requiring a readiness and willingness in both parties to the delivery. It is as much the act of the person who takes as of the one who gives delivery—of the merchant as the shipowner. See the judgment delivered by Blackburn, J. in *Ford* v. *Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. at p. 132; 38 L. J. 216, Q. B., at p. 55: 3 Mar. Law Cas. O. S. 190, 468.) I think that the obligation of the shipowner to deliver, which is expressed in the bill of lading, imports an obligation to take delivery, and that a contract to take delivery is to be implied in the bill of lading. It is clear that the consignee on tendering freight is entitled to delivery; it would be, I think, unreasonable to hold that the ship-

owner has not a relative right to have the cargo taken and to sue the consignee for not taking it. To hold otherwise would compel the owner to resort to the charterer, who may be, and often as in this case is, a stranger living in a distant part of the world, and to deprive him of what, in comparison, is the simple and natural resort of the person who has taken delivery of his cargo.

Then within what time is delivery to be taken? I think that in this, as in all other contracts where anything is to be done, and there is no express stipulation as to the time within which it is to be done, a reasonable time is to be implied, which, in the present case, is found by the jury against the defendant.

I also think that the liability to take delivery became vested in the defendant by virtue of the 1st Section of the Bills of Lading Act 1855, whereby it is enacted that: "Every consignee of goods named in a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." It was argued by Mr. Butt that, as there was an express contract in the charter-party as to the delivery of the cargo, and as the charterers were the shippers of the cargo mentioned in the bill of lading, there was no contract between the shipper and the shipowner contained in the bill of lading as to taking delivery, and no new contract was to be implied. This appears to me to misread the statute. The statute does not say that the contract between the shipper and the shipowner is to be transferred, but that the liability of the consignee in respect of the goods is to be the same as if the contract contained in the bill of lading had been made with the consignee himself. What is the object of taking a bill of lading when there is a charter-party? The object of a bill of lading is to enable the holder to sell, or otherwise deal with the cargo, and to transfer the right to the cargo upon the terms contained in the bill of lading, free from all rights and liabilities under the charter-party, except so far as any term in it is incorporated in the bill of lading. It is to be observed that, whilst on the one hand it is clear that as between the parties to the charter-party and the bill of lading, so long as they are the parties whose rights and liabilities have to be determined, the terms of the charter-party dominate; on the other it is equally clear that when the bill of lading is in the hands of an indorsee, only those terms of the charter-party which are expressly incorporated bind the latter; and if there be a different rate of freight provided for, nothing can be clearer than that the indorsee is liable to the bill of lading, and not to the charter freight. In the present case, freight is the only term of the charter-party which is expressly incorporated in the bill of lading; and I have to say what is the term of the contract contained in the bill of lading which is to govern the rate and time of discharge. If the effect of the reference in the bill of lading to the charter-party had incorporated the terms in the charter-party in reference to the mode of discharging, the consequences would be the same; for the jury have found that there was no special custom to take the contract out of the ordinary one of reasonable time, and that the delivery was not taken within that time; but if, as I hold, the contract upon which the defendant is liable is that contained in the bill of lading, then the same result follows.

My judgment is, that the contract contained in the bill of lading was to take delivery of the cargo in a reasonable time, according to the custom of the port of discharge; and that the defendant is subject to this liability, not because it was the contract entered into between the plaintiff and the shipper, but because it is the contract contained in the bill of lading. I therefore give judgment for the plaintiff for 52*l.* 10*s.* and costs, and I think that he should also have the costs of the introduction of the different purchasers as third parties.

The defendant appealed from this judgment.

Butt, Q.C., and *J. C. Mathew*, for defendant, cited and referred to.

Smurthwaite v. *Wilkins*, 5 L. T. Rep. N. S. (39 O.S.) 842; 11 C. B. N. S. 842; 1 Mar. Law Cas. O. S. 198, 244;
Ford v. *Cotesworth*, 19 L. T. Rep. N. S. 634; L. Rep. 5 Q.B. 132; and 38 L. J. 55, Q.B.; 3 Mar. Law O.S. 190, 468.
Maclachlan on Shipping p. 373.

Cohen, Q.C., and *Wood Hill*, for plaintiff, referred to.

Domett v. *Beckwith*, 5 B. & Ad. 521;
Hill v. *Idle*, 4 Camp. 327;
Fraser v. *The Telegraph Company*, 1 Asp. Mar. Law Cas. 421; 27 L. T. Rep. N. S. 373; L. Rep. 7 Q.B. 566;

The arguments fully appear from the judgments of Field, J. and the Court of Appeal.

Cur. adv. vult.

Dec. 10.—The following judgment of the Court was delivered by

Bramwell L.J.—In this case the defendant contended that, as there was a charter-party besides the bill of lading, and as the terms of the charter-party provided that the unloading should be according to the custom of the port, the bill of lading and the contract contained in or evidenced by it is not the governing contract, but that it must be read in connection with the charter-party. It was said that the contract between the defendant as consignee of the goods, if he was so, and the shipowner, must be collected from the two documents and the other circumstances of the case. This the plaintiff denied. We think it is not necessary for us to give an opinion as to this, because the plaintiff contended that, even if the charter-party and the bill of lading were to be read together, the same contract would be collected from them as shown by the bill of lading alone, without the charter-party. Field, J., in the court below, took this view, and said that, in his opinion, the charter-party did not alter the contract, which was to be collected from the bill of lading alone. We agree with the view of Field J. If there had been no charter-party, the contract would be in the bill of lading, and the law would imply a contract to unload within a reasonable time, or, which is the same thing, with due diligence. The charter-party makes no difference whatever; it provides that the unloading shall be according to the custom of the port. There was no custom of the port, unless it was to unload within a reasonable time. So that, assuming that

the defendant's objection is well founded, and that you must look at the two documents together, the obligation is to unload within a reasonable time. We agree with Field, J., that that obligation is the same as under the charter-party, and therefore that the plaintiff is entitled to our judgment. There is another point which we also decide in plaintiff's favour. It was said that the defendant was not the consignee of the goods, and a holder of them for value within the meaning of the Bills of Lading Act, because, before the bill of lading was made, he had secured to him an interest in the property within the Act. I doubt whether that is true in fact, because the bill of lading was made at a time when he was the beneficial owner of the goods. But, if the argument was well founded on fact, I am of opinion that the case is within the statute. The defendant retained the bill of lading in the sense of being the owner of it. He did not indorse it over to any of the purchasers, but retained it in his own hands with all the rights and obligations appertaining to the owner of a bill of lading, and he gave delivery orders to the vendee for the goods. Under these circumstances, I am of opinion that the defendant is liable, for the reason, that there must be some one to satisfy the description in Bills of Lading Act; either the original consignee or his assignee of the bill of lading. In the present case, James Gibbs and Co. were not the one or the other, and it seems to follow that the defendant was.

Appeal dismissed.

Solicitors for plaintiff, *Stibbard, Gibson,* and *Co.*
Solicitors for defendant, *W. A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by J. A. Foote and A. H. Bittleston, Esqrs., Barristers-at-Law.

Dec. 13, 1878, *and March* 14, 1879.

(Before Lopes, J.)

Maritime Marine Insurance Company (Limited) *v.* Fire Re-Insurance Corporation (Limited).

Marine insurance—Re-insurance against fire—Usage—Declaration of risks.

The plaintiffs, a marine insurance company entered into an agreement with the defendants, a fire re-insurance company, that the defendants should upon certain agreed terms re-insure the plaintiffs against loss by fire only by all coal-laden ships which should be insured by the plaintiffs under their policies between certain ports, so long as the agreement remained in force; and successive policies to cover the risks insured against by ships as might be declared were accordingly subscribed and issued by the defendants to the plaintiffs. It was admitted that in the case of open policies, on ships to be declared, there was a usage of merchants and underwriters that such policy attached to the goods as soon as and in the order in which they were shipped, in which order the assured were bound to declare them; and, in case of mistake, that the assured should be bound to rectify the declaration, which was something done after loss.

Held, that the admitted usage with regard to marine insurances applied, although the re-insurance with the defendants was a re-insurance against fire only; it being a contract of fire insurance in respect of a marine risk.

Further consideration.

The action was tried at the Liverpool Summer Assizes 1878, and the jury being discharged without a verdict, all questions in the action were left to the decision of the learned judge.

The plaintiffs were a marine insurance company, who had agreed to re-insure themselves with the defendants against all loss or damage by fire only, in respect of such coal-laden ships as should be insured by the plaintiffs under their policies while the agreement was in force; and the action was brought to recover in respect of such an alleged loss. The facts are fully set out in the judgment.

C. Russell, Q.C. and *Myburgh* for the plaintiffs.—It is admitted that the usage stated in *Stephens* v. *Australian Insurance Company* (1 Asp. Mar. Law, Cas. 458; 27 L. T. Rep. N. S. 585; L. Rep. 8. C. P. 18) exists as to marine insurance generally. The risk which the plaintiffs undertake is a marine risk, it being simply an insurance of ships at and between certain specified ports. Part of this risk—*i.e.*, so much as relates to fire—they have re-insured with the defendants. The risk undertaken by the defendants is consequently also a marine risk, it being an insurance against fire in the case of ships at sea, and the admitted usage therefore applies to the present case. It follows that the policy attached to the ships insured by the plaintiffs as soon as the risk of the plaintiffs began; and their laches in not declaring the *Hampden* does not disentitle them to recover, since the declaration can be amended or supplied after the loss. It is admitted that there was no bad faith.

Herschell, Q.C. and *Wheeler* for the defendants.—The insurance with the defendants was a fire insurance; and the usage does not apply to such cases. The policy did not attach until the declaration in each case was made; and that was not done here until after the loss. It is not contended that the plaintiffs acted in bad faith, but their negligence in not declaring must disentitle them to recover To hold otherwise would be to open the door to fraud:

1 Parson on Insurance, 519, 520.

March 14.—Lopes, J. delivered the following judgment:—This case came before me for trial last Liverpool Summer Assizes. The jury were discharged by consent without a verdict, and all questions were left to my decision.

The plaintiffs are a marine insurance company, carrying on business at Liverpool, and defendants are a fire re-insurance corporation. In Nov. 1876 it was agreed between the plaintiffs and defendants that the defendants should, upon certain agreed terms, re-insure the plaintiffs against loss by fire, to the extent of not more than 1000*l.* by any one vessel, upon all coal-laden ships which should be insured by the plaintiffs under their policies, at and from certain agreed ports to certain other agreed ports. In accordance with such agreement the defendants subscribed and issued to the plaintiffs a policy dated 28th Feb. 1877, whereby the defendants, in consideration of 250*l.*, undertook to guarantee or re-insure the plaintiffs against loss or damage by fire and the consequences thereof, to the extent of 50,000*l.*, by the ships and vessels, as

might be declared, at and from certain ports therein mentioned to destination, the said policy to be subject to the same clauses and conditions (as far as they relate to the fire risks only) as the original policy or policies, and would pay as might be paid thereon. In the said policy it was provided that the arrangement was to be in force for one year, from the 1st Oct. 1876, and was to include only such vessels as were coal-laden. It was also provided that the said policy was to be supplemented by further policies on like terms, should the amount thereof not prove sufficient for the year's transactions. Declarations were made on the 19th Feb. and on the 29th June, but such declarations were far in excess of the said policy. On the 9th July defendants subscribed and issued a second policy for 50,000*l.*, similar in its terms in every respect to the former policy. On the 7th June the plaintiffs insured a coal-laden ship called the *Hampden* on a voyage between the prescribed ports. The *Hampden* was lost on the 18th Sept., and the loss was posted at Lloyd's on the 24th Oct. Further declarations were made on the 10th Aug., and were in excess of the second policy. The *Hampden* was not declared either on the 29th June nor on the 10th Aug. On the 24th Oct. the plaintiffs applied to the defendants for a covering slip, which was sent to them by the defendants; and on the 25th Oct. a third policy was subscribed and issued by defendants in the same terms in all respects as the two former policies. On the 2nd Nov. the plaintiffs declared the *Hampden*, and claimed for a loss. At this time, and when the third policy was effected, the plaintiffs knew of the loss of the *Hampden*.

It was admitted at the trial, and on the argument, that the plaintiffs had taken a risk of a coal cargo in respect of the *Hampden*, and that there was a loss which would be covered by the policy of re-insurance, if the plaintiffs were not debarred from attributing it to one of the said policies by reason of delay in declaring the risk. It was also undisputed that, taking the risks in chronological order, the *Hampden* did not come under either of the first two policies, which were by previous risks exhausted when the plaintiffs took the risk on the *Hampden*, but must rank under the third policy (if under any), which was effected on the 25th Oct. It was also undisputed that the plaintiffs' manager had been most negligent in not declaring the *Hampden*, but the defendants admitted that there was no want of good faith on his part nor on the part of the plaintiff company.

It was also admitted that a usage in fact existed such as that in the case of *Stephens* v. *Australian Insurance Company* (1 Asp. Mar. Law Cas. 458; 27 L. T. Rep. N. S. 585; L. Rep. 8 C. P. 18), to the effect that in the case of open policies, on ships to be declared, there is a usage of merchants and underwriters that this policy attaches to the goods as soon as, and in the order in which, they are shipped, in which order the assured is bound to declare them; and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration, which is sometimes done after loss. The defendants, however, contended that they not being a marine insurance company, the usage did not attach. As this case depends mainly upon whether this custom applies or not, it is necessary to decide that question. I think it does.

The argument is, that the usage does not attach, because the plaintiffs are insured against marine risks, and the defendants are re-insurers against fire. It is conceded, however, that it is within the powers of the defendant company to re-insure against loss by fire in case of ships at sea. The plaintiffs here insure against perils by sea generally, and in order to ease their liability they re-insure their risks in respect of coal-laden vessels, for a limited amount in each case, and in respect of fire only, and between specified ports, with the defendants. The contract with the defendants is a contract of fire insurance, no doubt; but it is a contract of fire insurance in respect of a marine risk. The defendants when they entered into that contract, were doing the trade or business of marine insurance. The plaintiffs, in the course of their business, undertook certain marine risks; the defendants, for their own benefit, take upon themselves to indemnify the plaintiffs against one of those marine risks, being a risk against fire. It was a marine risk in the hands of the plaintiffs, and did not become less so when undertaken by the defendants. When the defendants contracted with the plaintiffs, they contracted with them according to the usage of the particular trade or business to which the contract related. It related to the trade or business of marine insurance. I think, therefore, the usage in *Stephens* v. *The Australian Insurance Company* applies.

This being my view, it is not neccessary for me to determine how the case would stand if this usage did not attach. I will only say that it appears to me that, if the usage did not attach, this contract could not be regarded as an ordinary open policy on ship or ships to be hereafter declared. Having regard to the terms of the contract between the parties, I should be inclined to think that there is no necessity, except as a matter of convenience (as showing when one policy was exhausted and another had become necessary), that there should be any declaration, but that the policy attached when the risk was incurred.

It was urged by Mr. Wheeler on the part of the defendants that the negligence of the plaintiffs' manager was such that it afforded facilities for fraud, and consequently disentitled the plaintiffs from recovering, and a passage from Parsons on Insurance was relied on. I am not prepared to hold that there was such negligence, nor can I find an authority for Mr. Wheeler's contention. I am of opinion that the plaintiffs, having acted in good faith, are not debarred from recovering by the delay in making a declaration on the *Hampden*.

Judgment for the plaintiffs for 1000*l. with costs.*

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.*, for *Bateson* and *Co.*, Liverpool.

Solicitors for the defendants, *Learoyd, Learoyd,* and *Pearce.*

Friday, Feb. 28, 1879.

(Before Lord COLERIDGE, C.J., and DENMAN, J.)

GADNEY (app.) *v.* ROUGH (resp.).

Thames navigation—Construction of conservators' bye-laws—Vessels towed by steam—"Six vessels and no more. . . in a single line"—Bye-laws of July 1877, *Nos.* 2, 3, 4.

No. 4 *of the Bye-laws of the Thames Conservators July* 1877, *is as follows: "Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels shall not exceed fifty feet.*

Held, that the towing of eight barges by a steam-tug, the first four being in a single line, and the last four two abreast, but lashed closely together, was an infringement of the bye-law.

SPECIAL CASE.

This is a case stated for the opinion of this honourable court, by John Paget, Esq., sitting magistrate at the Hammersmith police court, under and by virtue of the statute made and passed in the twenty-first year of the reign of Her Majesty Queen Victoria (cap. 43), being an Act to improve the administration of the law so far as respects summary proceedings before justices of the peace.

1. The appellant in this case is the master of the steam-tug *Vixen*, belonging to the Thames Steam-tug and Lighterage Company (Limited), and he resides at Ealing-lane, and the respondent is a river-keeper of the Conservators of the River Thames, duly appointed under and by virtue of the Thames Conservancy Acts (1857 and 1864).

2. The appellant was summoned by the respondent for an alleged breach of the 4th bye-law, duly made in pursuance of the Thames Conservancy Acts, and the Thames Navigation Acts, and allowed by Order in Council dated the 11th July 1877.

The following is a copy of the summons:

Metropolitan Police District, to wit.—Hammersmith police court. To George Gadney, master of the steam-tug *Vixen*.

Whereas complaint this day has been made before the undersigned, one of the magistrates of the police courts of the metropolis, sitting at the police court, Hammersmith, in the county of Middlesex, and within the metropolitan police court, by George John Rough, for that you, on the 28th June, A.D. 1878, on the river Thames, in the parish of Fulham, in the county of Middlesex, and within the said district, did, being the master of a steam-tug called the *Vixen*, tow by steam more than six vessels at one time, contrary to the 4th bye-law of the Conservators of the River Thames, dated 11th July 1877.

These are therefore to command you, in Her Majesty's name, to be and appear on Monday next, at eleven o'clock in the forenoon, at the police court aforesaid, before me, or before such other magistrate of the said police courts as may then be there, to answer to the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 15th day of July, in the year of our Lord one thousand eight hundred and seventy-eight, at the police court aforesaid.

JOHN PAGET. (L.S.)

3. The summons was heard before me on the 22nd July 1878, and on the hearing it was admitted that on the 28th June 1878 the steam-tug *Vixen*, belonging to the said Steam-tug and Lighterage Company (Limited), and in charge of the appellant, a duly licensed waterman, as master, was towing eight barges astern of the said tug down the river, in the manner as shown in the sketch annexed hereto and marked A., but above and to the westward of the Albert Bridge at Chelsea, the barges at the time being all lashed firmly together.

4. On the 5th Feb. 1872 an Order in Council allowed certain bye-laws, one of which, No. 14, was as follows:

All vessels navigating the river between London Bridge and Bugsby's Hole shall singly and separately pass along the same except vessels in tow of steam-tugs, skiffs, wherries, or ships' boats fastened together or towed at the stern of any vessel and vessels not exceeding six in number, two only abreast and towed by steam.

5. The following are the bye-laws allowed by Order in Council on the 11th July 1877.

(1.) Bye-law No. 14 of the bye-laws for 1872, for the regulation of the navigation of the river Thames, allowed by order of Her Majesty in Council on the 5th Feb. 1872, shall after these present bye-laws shall have been allowed by order of Her Majesty in Council be, and the same is hereby repealed, and in lieu thereof,

(2.) All vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier, shall be navigated singly and separately, except small boats fastened together, or towed alongside or astern of other vessels except vessels towed by steam.

(3.) Vessels towed by steam shall be placed two abreast if more than four in number, and not more than six shall be towed together at one time.

(4.) Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels so towed shall not exceed fifty feet.

(7.) Any person committing any breach of, or in any way infringing any of these bye-laws shall be liable to a penalty of and shall forfeit a sum not exceeding five pounds, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts 1857 and 1864.

6. It was admitted that Bugsby's Hole is to the east of Albert Bridge, and that before and except the bye-laws in question there was no bye-law or provision preventing vessels being towed as the masters pleased to the westward of Albert Bridge. It was also admitted that from the Albert Bridge at Chelsea westward to Putney Bridge there is no tow path or other means of towing save by steam.

7. It was contended on behalf of the appellant that the 2nd and 3rd bye-laws were to be read together, and that the 3rd did not apply in any way to the 4th; that, therefore, there was no breach of the 4th bye law so long as not more than six vessels were towed in one line, and that there was no restriction as to there being a double line nor as to the number to be towed, and that it was an open question whether the 4th bye-law had affected vessels towed by steam, inasmuch as steam was not mentioned; and further that, as prior to the 11th July 1877 there had been no bye-laws affecting the navigation of vessels to the westward of London Bridge, the bye-law should state specially that it was intended to apply to steam, otherwise there could be no conviction, as it was void from uncertainty, and in support of this contention the appellant relied upon the decision of the Court of Appeal on the 4th May 1878 in a case stated by Mr. Bridge between the same parties as in the present case.

8. It was contended on behalf of the respondent that, even if the 3rd bye-law does not apply in any way to the 4th, there would nevertheless be a breach of the 4th bye-law if more than six vessels were towed together at one time in a single line or otherwise, and as there is no tow path between the Albert Bridge at Chelsea westward to Putney Bridge, or means of towing save by steam, there

is no uncertainty in the said bye-law so as to render it void.

9. I was of opinion that, under the facts hereinbefore stated and admitted, the appellant had been guilty of an offence under the said 4th bye-law, and I convicted him accordingly, and sentenced him to pay a fine of 5*s.*, and 2*s.* for costs in that behalf.

The appellant having applied to me to state a case for the opinion of the Court of Appeal, I state this case in compliance with such application.

10. The question for the opinion of the court is whether I was right in convicting under the above circumstances.

11. If the court should be of opinion in the affirmative, the said conviction is to be affirmed, and the appellant is to pay to the respondent the costs of the said appeal; but if the court should be of a contrary opinion, the said conviction is to be quashed, and the summons dismissed, and the respondent is to pay to the appellant the costs of the said appeal. JOHN PAGET.

In a sketch annexed to the case, and marked "A." a steam-tug was represented as towing eight barges, the first four being in a single line, and the last four two abreast, but lashed closely together.

Webster, Q.C. for the appellant.—We have been already summoned under the 3rd bye-law for the same offence, and the Queen's Bench Division quashed the conviction, The judgments in that case are not reported, but they are conclusive of this case. The 2nd and 3rd bye-laws apply only to the river between Albert Bridge and Charlton Pier; the 4th bye-law applies only to the river above Charlton Pier. The Queen's Bench Division pointed out that that must be so, because otherwise there would be inconsistent laws for the same part of the river. It must be borne in mind that at the time they are legislating for the river westward of Albert Bridge, they have before them the legislation for the river eastward of Albert Bridge. It is submitted that the 4th bye-law applies only to the length of the tail. The vice that the bye-law was aimed at was not the towing of more than six barges—if it had been, the bye-law might easily have said so—but the towing of more than six barges *in a line*. The 3rd bye-law, which deals with the river eastward of Albert Bridge, does expressly limit the number that may be towed together at one time.

Grantham, Q.C. for the respondent.—The 2nd bye-law provides for all vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier. The 4th bye-law provides for vessels above and to the westward of Albert Bridge at Chelsea. The 3rd bye-law is only an exception as to vessels towed by steam, applicable to both the 2nd and 4th. That is the construction of these bye-laws that it is submitted is the correct one, although the Queen's Bench Division construed them differently. But, assuming the decision of the Queen's Bench Division to be right, and reading the 3rd bye-law as not applying to the west of Albert Bridge, the 4th bye-law, rightly construed, prevents more than six vessels being towed at one time. If not so construed, then, provided they are not in a single line, any number may be towed at the same time, which cannot have been intended.

Webster, Q.C. in reply.—As to the argument *ab inconvenienti*, there is a practical limit to the number of vessels that can be towed abreast.

Lord COLERIDGE, C.J.—I think this decision should be affirmed. There is a good deal to be said for the view Mr. Webster has presented as to the construction of these rules. What this 4th bye-law was intended to do I have, of course, no means of knowing; but I think, according to its true construction, it was intended to apply to all vessels being towed above Albert Bridge, whether by steam or otherwise. I was struck by Mr. Grantham's argument that the 2nd and 4th bye-laws should be first read together, excluding the 3rd. The 2nd says, "All vessels navigating the river between the Albert Bridge at Chelsea and Charlton Pier shall be navigated singly and separately, except small boats fastened together, or towed alongside or astern of other vessels, except vessels towed by steam." The 4th says, "Above and to the westward of Albert Bridge at Chelsea six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels so towed shall not exceed fifty feet." Then he says the 3rd should be read as an exception engrafted on both of them, viz., that when vessels are towed by steam, they shall be placed two abreast, if more than four in number, and not more than six shall be towed together at one time. Now it is not material to decide in the present case whether the 3rd and 4th bye-laws are to be read together. If they are, then no more than six barges can be towed together at one time by steam, and if more than four then they must be two abreast, both above and below Albert Bridge. If they are not, then that applies only below Albert Bridge, and, above Albert Bridge six vessels and no more may be towed together in a single line at one time, by steam or otherwise. According to either view, in my opinion, it is equally prohibited to tow eight barges by steam above Albert Bridge. According to the last-mentioned construction of the rules, which is that contended for by the appellant, the provision is that "six vessels and no more may be towed together," and in this case more than six vessels were being towed. It is said that the words that follow "in a single line" are the governing words, and that more than six may be towed provided they are not in a single line. But I think that to adopt that view would be to defeat the intention of the clause. If that was what was meant, the clause should have run: "If vessels are towed in a single line, not more than six shall be towed together at one time." If that is what was meant, it is not what has been said. The 4th bye-law further says that the distance between any two of the vessels "so towed" shall not exceed fifty feet. Now, if the fifty feet here mentioned applies only longitudinally, as it clearly does, the bye-law obviously contemplates as the only possible distance between any two of the vessels towed in accordance with its provisions a longitudinal distance; that is, that there shall only be a single line of such vessels. I am therefore of opinion that this conviction was right, and should be affirmed.

DENMAN, J.—I am of the same opinion. I am inclined to think that the 3rd bye-law does not apply to the westward of Chelsea Bridge, if it were necessary to come to any decision on that

point in this case. I think so for this reason, that the 2nd bye-law concludes with the words "except vessels towed by steam," and then the 3rd bye-law takes up the words, and begins "vessels towed by steam shall," &c., as if the 3rd bye-law was intended merely as supplementary of the 2nd. That appears to have been the decision of the Queen's Bench Division when the matter was before them. But it is not necessary for us to consider that question now. The 4th bye-law is applicable to vessels above Albert Bridge. There is an unfortunate looseness in the language in which part of the clause is expressed. I think, however, that "six vessels and no more in a single line" must mean six vessels in a string. It is, perhaps, open to argument that this was a *casus omissus*, there being no express provision as to vessels towed by steam, and that the bye-law does not apply to such a case. It is contended that it was not proved here that there were more than six vessels in a single line. I think the bye-law is intended to apply to all cases where there are more than six vessels, whether towed by steam or not. The construction suggested by my Lord seems to me to be the reasonable one, viz., that "six vessels and no more may be towed together." If we construed the bye-law otherwise it would be productive of great inconvenience. Then come the words "in a single line;" but I think those words do not alter the restriction conveyed in the former ones, but impose an additional obligation. That is a way in which this bye-law may be read, and I think, therefore, ought to be read. The magistrate has so read it, and I am consequently of opinion that the conviction should be affirmed.

Webster, Q.C. asked for leave to appeal, which was refused.

Solicitors for the appellant, *J. A.* and *H. E. Farnfield.*

Solicitor for the conservators, *J. F. Elmslie.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

Jan. 31, *Feb.* 1, 3, 5, *and* 11, 1879.

THE MARATHON.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

Damage to cargo—Parties—Indorsee of bill of lading—Seaworthiness—Peculiar construction of ship — Stowage — Dunnage—Trinity Masters—Evidence of, as to report—18 *&* 19 *Vict. c.* 111, *s.* 2—24 *Vict. c.* 10, *s.* 6.

The ordinary warranty as to seaworthiness in a bill of lading is a warranty that the ship is seaworthy at the time, and reasonably likely to continue seaworthy on the voyage specified. If from special circumstances in her construction she requires special appliances to preserve the cargo from sea damage, the owner is bound to provide those appliances, and will be liable for damage to cargo arising from the want of them.

Steele *v.* State Line Steamship Company (3 *Asp. Mar. Law Cas.* 516; 3 *App. Cas.* 72; 37 *L. T. Rep. N. S.* 333) *followed.*

Where Trinity Masters are desired to inspect and report to the court, their report is not necessarily confined to those matters on which evidence has been given, but may include any circumstance in their opinion affecting the merits of the case.

An indorsee of a bill of lading has a right to sue for damage to the cargo arising from a breach of the contract contained in the bill of lading under the Bills of Lading Act 1856 (18 *&* 19 *Vict. c.* 111), *and in the case of a foreign vessel to take proceedings in rem under the Admiralty Court Act* 1861 (24 *Vict.* 10), *though at the time of the institution of the suit he has sold the cargo.*

THIS was an action for damage to cargo. The original plaintiffs in the cause were D. and W. Murray, who were indorsees of the bills of lading of the cargo. At the trial, on the application of the plaintiffs, Holmes, who had purchased the cargo from the original plaintiffs as a damaged cargo before action brought, was added as a plaintiff.

The cargo, consisting of chopped and ground bark, was shipped at Adelaide on board the American ship *Marathon* by H. Wilkie and Co., the vessel being chartered by her master on behalf of the owners to H. Wilkie and Co. The charter-party guaranteed "that the vessel was classed A 1½," and contained the following stipulations, that

Being tight, staunch, and strong, with masts and rigging in good order, and every way well fitted and equipped for the voyage, and so to be maintained by the owners or their agents while under this charter, should load a full and complete cargo of ground bark in bags, with sufficient loose chopped bark for broken stowage amongst ground bark only . . . . and being so laden and dunnaged in accordance with Lloyd's rules, shall proceed to Falmouth or Cork for orders to proceed to any one safe port in the United Kingdom, and there discharge . . . . as ordered by the charterers or their agents . . . . The cargo to be stowed at ship's expense; dunnage to be provided by the ship, and laid to the satisfaction of the charterers . . . . The captain to sign bills of lading for cargo as presented at any rate of freight required by charterers or their agents . . . . The ship guarantees to pass survey to the Adelaide Underwriters' Association, and to produce their surveyor's certificate of survey to the charterers or their agents before giving notice of being ready to load.

The captain signed two sets of bills of lading, of which the material parts of the first are as follows:

Shipped in good order and condition by H. Wilkie and Co., on board the good ship *Marathon* . . . . bound for a port in the United Kingdom, calling at Cork or Falmouth for orders as per charter-party, 2774 bags ground bark, and 384 bags chopped bark (used as broken stowage), being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations hereinafter mentioned) in the like good order and condition . . . . to order or to his or their assigns . . . . The following are the exceptions and stipulations referred to . . . . neglect or default of the pilots, masters, or crew in the navigation of the ship and all and every the dangers and accidents of the seas or rivers and navigation of whatever nature or kind are excepted. The ship is not liable for . . . . loss or damage arising from vermin, heat, sweat, leakage, breakage, rust or decay of contents or packages unless occasioned by improper stowage . . . . weight, quantity, and contents unknown. . . . . Several bags stained.

The second set were in precisely the same words, only differing as to the quantities and marks of the bark shipped, and the concluding clause was "Weight, quality and contents unknown." It appeared that there were peculiarities in the construction of the ship, she having a main deck which had been caulked some years previously, and that the upper deck had been in part laid some time after the ship was built, and

at a different level from the original deck, there being a vertical bulkhead at the point of junction; the extremities of the vessel having originally been occupied by deck houses, and that there were no scuppers in the main deck. Bark was stowed between decks without any dunnage, a certain amount of loose chopped bark being used to fill up between the bags. The lower hold was dunnaged in the bottom and wings, but the dunnage was not brought up to the main deck, so that the upper tiers of bags rested against the lodging knees in the lower hold. The level of the lower deck was only between one and two feet from the water when the ship was laden and lying on an even keel.

The ship left Adelaide on the 7th May, met with heavy weather in the early part of the voyage, arrived at Cork on 3rd Oct., left that place on the 11th Oct., and arrived at Hull on 23rd Oct. The cargo, on discharge, was found much damaged by sea water.

On the arrival of the ship at Cork, Messrs. Murray, who were the holders of the bills of lading, sold the cargo to Messrs. Holmes. Messrs. Holmes, on ascertaining the condition of the cargo, refused to take the delivery of it. The contract of sale was thereupon cancelled, and a new contract entered into on 14th Nov., by which Messrs. Holmes agreed to take it at 6*l.* per ton for sound, and 3*l.* per ton for damaged bark.

The writ was issued by Messrs. Murray on 20th Nov. 1878.

The case was heard on 31st Jan. and 1st, 3rd, and 5th Feb. A great deal of evidence was produced, both as to the construction of the ship and the stowage of the cargo, and it was proved that Messrs. Murray were agents and consignees of Messrs. Wilkie, and that Messrs. Wilkie had drawn on them against this cargo.

After the close of the evidence it was desired by the court that the Trinity Masters should inspect the construction of the ship, and accordingly the argument was deferred. The Trinity Masters made a report to the court as follows:

Trinity House, 8th Feb. 1879.

We have carefully compared the evidence in the case of the American barque *Marathon*, and we have come to the conclusion that the lower hold appears to have been fairly dunnaged; but altogether wanting in the 'tween decks, in which there should have been scuppers. She is a badly fastened ship, leaking much in her topsides, waterway seams, deck, and *generally*, which, when she strained in bad weather, admitted *large quantities* of water, which, falling on the upper part of the lodging knees, poured over them into the hold beyond the inner surface of the dunnage, damaging the cargo.

In bad weather the pumps appear to have been properly attended to; but nothing could remedy the want of proper and adequate fastening.

Much water must also have found its way between decks from the bulkhead in the break, when she pitched heavily, and, as the master stated, shipped large quantities of water forward. As a proof how much she strained, the oakum about the stem, bows, and also under the counter, had worked out as stated by the seaman of the *Marathon*, who thrust his knife right into one of the seams.

This could not have happened had she been properly fastened.

Feb. 11.—*Butt*, Q.C. and *E. C. Clarkson* for the plaintiffs.—The ship was improperly constructed to carry this particular cargo stowed in the way it was stowed:

Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163; 1 Q.B. Div. 377; 34 L. T. Rep. N..S 677;

Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72; 36 L. T. Rep. N. S. 333.

The exception of "negligent navigation" in the bill of lading does not include "bad stowage." The effect of inserting the exception may be to shift the onus of proof as to how the damage arose:

The Helene, Br. & Lush. 429; L. Rep. 1 P. C. 231; 14 L. T. Rep. N. S. 873; 2 Mar. Law Cas. O. S. 390;

Czeck v. *General Steam Navigation Company*, L.Rep. 3 C. P. 14; 17 L. T. Rep. N. S. 246; 3 Mar. Law Cas. O. S. 5

We have satisfied that onus of proof independently of the report of the Trinity Masters, and have shown that the ship was herself defective when she was warranted seaworthy, and also that the cargo was improperly stowed. What the amount of damage is which we have sustained by reason of these defects and negligence, is for the registrar and merchants.

Webster, Q.C., and Dr. *W. G. F. Phillimore*.—The only issue in the case is, whether the damage was sustained in consequence of the ship not being properly dunnaged, or by the construction of the ship, so far as the plaintiffs can avail themselves of any peculiarity in it. As to the report of the Trinity Masters, the plaintiffs cannot help their case by that. It was not the case they have attempted to prove, that the fastenings of the ship were weak, they had themselves examined the ship and made no complaint of the fastenings. The report of the Trinity Masters should have been confined to the matters pleaded and in issue, and the court will only decide the case on the evidence which has been given, and the report of the Trinity Masters, so far as it affects that evidence. But apart altogether from this question, the plaintiffs here have no right of action. Murray is merely an intermediate indorsee of the bills of lading, and, having parted with the cargo by sale to Holmes on the 14th Nov., had divested himself of any such property in the bills of lading or goods as might give him a right to sue under the Bills of Lading Act or Admiralty Court Act, before the action was commenced on the 20th Nov. The other plaintiff, Holmes, bought the cargo as a damaged cargo, and therefore, having knowledge and notice of the damage, is not in any way damnified by the fact of the cargo being damaged. Wilkie, the shipper, is the only person who can really recover from the shipowner. Before the passing of the Admiralty Court Act 1861 (24 Vict. c. 10) Wilkie was the only person who could have sued at all. Murray's right is only under the statute, and therefore only as owner or agent of the owner of the cargo:

The St. Cloud, Br. & L. 4; 8 L. T. Rep. N. S. 54; 1 Mar. Law Cas. O. S. 309.

A bare assignee cannot sue; but here the plaintiffs are neither assignees, consignees, nor owners within the meaning of the Act. Wilkie, the shipper, cannot be joined as a plaintiff without his consent (Sup. Court of Jud. Act 1875, Order XVI., rule 13). The property had passed to Holmes before the action was brought, by the transfer to him of the documents of title:

The North of England Pure Oil Cake Company v. *The Archangel Marine Insurance Company*, 2 Asp. Mar. Law Cas. 571; L. Rep. 10 Q. B. 249; 32 L. T. Rep. N.S. 561.

Holmes cannot sue as trustee for Murray; the case

does not come under the exception to the genera rules in *Powles* v. *Innes* (11 M. & W. 10).

Butt, Q.C. and *E. C. Clarkson* in reply.—A right of action having once vested in Murray, it cannot be vested except by a release under seal or something in accord and satisfaction. Murray had a cause of action under the Bills of Lading Act and Admiralty Court Act vested in him on the 4th Nov., and the fact that he sold the cargo for what he could get for it before the 20th Nov. does not divest him of it. Indeed, if the goods were perishable, it would be his bounden duty to sell, so as not to increase the damage to the cargo. One accepting a bill of exchange against goods has sufficient property in the goods to allow him to sue under the Bill of Lading Act (18 & 19 Vict. c. 111), and the Admiralty Court Act (24 Vict. c. 10):

The Figlia Maggiori, L. Rep. 2 A. & E. 1086; 18 L. T. Rep. N. S. 532; 3 Mar. Law Cas. O. S. 97.

The property in the goods had not passed from Murray at the time the action was brought. It is clear that, if the contract had been for the sale of a "cargo" simply, the property in a particular cargo would not have passed, and the fact that the sale was of the "cargo *ex Marathon*," is not of itself sufficient to pass the property in this particular cargo. "Where anything remains to be done to the goods for the purpose of ascertaining the price, as by . . . testing the goods, where the price is to depend on the . . . quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted:" (Blackburn on Sales, pp. 151, 152; Benjamin on Sales, pp. 235, 236.) The plaintiff Murray has two distinct causes of action; one for the breach of contract to deliver in good order and condition, and the other for negligence in the stowage by which he has suffered damage.

Sir R. PHILLIMORE.—I consider the objections to this action being brought by the present plaintiffs invalid, on both the grounds which have been argued.

After further consultation with the Trinity Masters, his Lordship delivered the following judgment on the merits of the case:—

Sir R. PHILLIMORE.—This case has occupied the attention of the court for some days, and I have had an ample opportunity of consulting from time to time the Elder Brethren and ascertaining their opinions upon the subjects discussed before them, and also their reasons for the conclusion at which they have arrived.

Now, in all cases of this kind, the question is whether the damage to the cargo was caused by one of the excepted perils in the charter-party and bills of lading, or by the want of proper appliances on board the carrying ship. The law which is applicable to this subject is perspicuously stated by the Lord Chancellor in the case of *Steele* v. *The State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72; 37 L. T. Rep. N. S. 333), and I think I cannot do better than read it: "It is an engagement to carry and to deliver at a certain port in this kingdom the wheat so shipped. What is the meaning of the contract created by those words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation, and an engagement—a contract—by the shipowner that the ship on which the wheat is placed is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By 'seaworthy,' my Lords, I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic. My Lords, if there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract."

The decks of the vessel in this case appear to have been of a peculiar formation, and in this respect the vessel seems to have undergone an alteration from her original structure. The cargo consisted of ground bark and chopped bark; a portion of the latter was used as dunnage. As to this I shall say a word presently. Part of this cargo was of a porous kind, and, when saturated with water, caused the ship to float so much deeper. The sweat and the steam would have been the natural consequences of the heating of the cargo, and I must take it to have been put on board in good order. It arrived in an extremely bad condition. The voyage, beginning on May 7 at Adelaide, ended on Oct. 3, at Cork, occupying, therefore 149 days. The weather was extremely tempestuous, almost a succession of gales, until she came under the influence of the trade winds. The upper works leaked continuously, admitting large quantities of water. In the 'tween decks there was no dunnage. In the lower hold the dunnage was in quantity sufficient, but being composed of chopped bark, was bad for the purpose, acting as a sponge, conveying the water to the cargo. The Elder Brethren are decidedly of opinion that there should have been scuppers in the 'tween decks, and that the want of them was one of the causes of the damage to the cargo in the lower hold. I must here express my entire agreement with that, and also with the observation of the learned counsel who spoke last, that it was not competent to the carriers of this cargo to use any portion of it as dunnage. The Trinity Masters further drew my attention to what they consider a great defect in the ship, the want of proper fastenings in the deck—that is, as I understand, a sufficient number of bolts to hold the planking to the timbers. The vessel, leaking much in her topsides, admitted large quantities of water, which, falling on the upper part of the lodging knees, poured over them into the hold beyond the inner surface of the dunnage, and greatly damaged the cargo. In bad weather the pumps appear to have been properly attended to, but the Trinity Masters point out to me that this could not have remedied the want of proper and adequate fastenings. They further observe that much water must have also found its way between decks from the bulkhead in the break when she pitched heavily, and, as the master stated, shipped large quantities of water forward. They allege, as a proof how much she strained, that the oakum about the stem and bows, and

also under the counter, had worked out, as stated by the seaman of the *Marathon*, who thrust his knife into one of the seams.

On the whole, I am of opinion that it is proved that the damage was occasioned by the want of proper appliances on board the carrying vessel, especially the want of proper scuppers, and the imperfect and improper dunnage, as well as the inadequate fastenings.

I must, therefore, refer to the registrar, assisted by merchants, to inquire into the report as to the amount of damage caused by the matters I have referred to, and I give judgment for the plaintiffs.

Solicitors for plaintiffs, *Hollams, Son* and *Coward.*

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *A. M. Jackson.*

(Before Sir R. PHILLIMORE.)

Tuesday, March 4, 1879.

THE ENDORA.

Bottomry—Practice—Costs—Damages—Arrest.

Where the holder of a bottomry bond arrests the vessel and freight on which the bond is secured before the bond is due, and the bond is paid at or before maturity, the shipowner is entitled to the costs occasioned by the proceeding, but not, in the absence of malice or gross negligence on the part of the bondholder to damages.

THIS was a motion in an action of bottomry. The bottomry bond on ship and freight was payable seven days after the arrival of the ship in the port of London. The plaintiffs instituted the action, and arrested the ship on Feb. 25, 1879 the ship having arrived on Feb. 22. The bond was paid within seven days from Feb. 22.

March 1.—*Clarkson* moved the court to release the vessel without bail, and to condemn the plaintiffs in costs and damages.

Myburgh, for the plaintiffs consented to the release of the vessel on the amount of the bond and interest being paid, and the rest of the motion was ordered to stand over.

Clarkson, for the defendants, now moved the court for costs and damages, for the unlawful arrest of the ship. There was no excuse for the arrest; the bond was not due, and till it became due there was no cause of action. In fact, there never was a cause of action, as the money was tendered before it had arisen; the arrest was not merely premature, but altogether illegal.

Myburgh for the plaintiffs.—Under the circumstances we were justified in taking the steps we did. Before the arrival of the ship we had written to ask if the bond would be paid, and received no reply. Our bond was on ship and freight only; if therefore the vessel was not arrested the cargo would be discharged and the freight received by the ship, and our security diminished by that amount. The bond was for a large sum, and the ship by itself might not have realised enough to pay it:

The Jane, 1 Dodson 461, 464;
The San José Primeiro, Prit. Dig. 513.

There was no malice or gross negligence in the arrest such as to entitle the defendant to damages:

The Strathnaver, 3 Asp. Mar. Law Cas. 313; 1 App. Cases 58; 34 L. T. Rep. N. S. 148;
The Evangelismos, Swa. 376; 12 Moo. P. C. 352.

Sir ROBERT PHILLIMORE.—I do not think the circumstances are such as to entitle the defendants to damages, but they are clearly entitled to the costs of the suit.

Solicitors for the plaintiffs, *Hollams, Son*, and *Coward.*

Solicitors for the defendants, *Lowless* and *Co.*

Tuesday, March 11, 1879.

THE CECILIE.

Bottomry—Maritime risk—Payment due on arrival of ship.

An instrument by which a captain binds his ship to pay a sum of money for goods supplied within "six days after my arrival," means after the ship's arrival, and is an instrument of bottomry.

THIS was an action of bottomry brought against the Danish vessel *Cecilie* to recover sums of 134*l.* 5*s.* 8*d.* and 131*l.* 11*s.* 10*d.*, to pay for yellow metal and provisions supplied at Hamburg, the payment whereof was secured by two instruments in the following form:

I the undersigned, captain of the Danish vessel named the *Cecilie*, hereby acknowledge for myself and my heirs, the duplicate being valid as a single acknowledgment, that I am indebted to Mr. Rith Rodewalt for yellow metal delivered to (provisions and equipment of) the said vessel for the prosecution of her voyage from Hamburg and Africa and back to London, in the sum of 2684 marks and 50pf. (2739 marks and 35 pf.) wherefore I pledge my ship and appurtenances, and bind myself to pay the above sum within six days after my arrival in London, or wheresoever I may put in, said payment to be prompt and uncontested, according to the law of exchange in all parts.—Hamburgh, July 13, 1878. (Signed) N. S. THOGERSEN, Master of the schooner *Cecilie.*

These documents were indorsed by Mr. Rodewalt to Elliott's Metal Company (Limited), who now sued as indorsees. Certain persons who had supplied necessaries to the ship, other than the above, disputed the payment on the ground that the said instruments were not bottomry bonds, as they showed no maritime risk, and therefore gave no priority to the plaintiff.

Butt, Q.C. and *Hodgson* for the plaintiff.—In *Simonds* v. *Hodgson* (3 B. & A. 50), which was an action on a policy of insurance on bottomry, the words on the instrument of bottomry were, "I bind myself, my ship, her apparel, tackle, &c., as well as her present freight and cargo, consisting, &c., to pay to B. the above-mentioned sum, with 12 per cent. bottomry, premium, &c., and I do hereby bind myself, the said schooner, brig, &c., to full and complete payment of the said sum, with all charges thereon, in eight days after my arrival at the afore-mentioned port of London; and I do hereby make liable the said vessel, her freight, and cargo whether she do or do not arrive at the above-mentioned port of London;" and Lord Tenterden, delivering the said judgment of the Exchequer Chamber, held that the words "eight days after my arrival" means after the ship's arrival, and that such words show that the lender takes on himself the risk of the voyage. The only difference between that case and this is that here there is no bottomry premium mentioned; but that is not essential; the assumption of the risk is all that is necessary:

The Elpis, 27 L. T. Rep. N. S. 664; 1 Asp. Mar. Law Cas. 472.

Clarkson for the interveners.—The bond was

given at the commencement of the voyage and not during the voyage for its necessities; this, and the fact of there being no maritime premium are strong evidence of the instrument not being intended to be a bottomry bond.

Sir R. PHILLIMORE.—I am satisfied that these are bottomry bonds, and I pronounce for their validity. They will bear 4 per cent. interest from the date of their becoming due.

Solicitors for the plaintiff, *Harrisons*.

Solicitors for the interveners, *Thomas Cooper* and *Co.*

Tuesday, March 11, 1879.

THE CONFIDENCE; THE SUSAN ELIZABETH.

County Court Admiralty appeal—Mode of hearing—No notes of evidence—Witnesses on appeal.

In an Admiralty appeal from a County Court, under the County Courts Admiralty Jurisdiction Act 1868, *where there are no shorthand writer's notes of evidence, and no notes taken by the judge of the County Court available for the purpose of appeal, the High Court (Admiralty Division) will order the appeal to be heard on vivâ voce evidence.*

THIS was an appeal from the County Court at Portsmouth in cross actions of collision brought respectively by the owners of the *Susan Elizabeth* against the *Confidence*, and by the owners of the *Confidence* against the *Susan Elizabeth*. The actions were tried together at Portsmouth on 12th Dec. 1878, and judgment given for the owners of the *Susan Elizabeth* in both actions; and the owners of the *Confidence* appealed under the County Court Admiralty Jurisdiction Act 1868, sect. 26. At the hearing there was no shorthand writer, and in order to bring the evidence before the High Court on appeal the appellants applied to the County Court judge for a copy of his notes of the evidence. The County Court judge refused to supply such copy upon the grounds that he was not aware that he was bound to do so, that he had not been asked by counsel at the hearing to take any note of any points, and that the notes he had taken were only short notes, and not of any use for the purposes of appeal. At the hearing the County Court judge was asked by counsel for the appellants to state his reasons for his judgment, but he declined to do so.

The case now came before the High Court on motion to direct the mode of hearing the appeal.

J. P. Aspinall, for the appellants, having stated the above facts, asked that the case should be reheard on appeal by means of *vivâ voce* evidence. By the General Orders made in 1869, under the County Court Admiralty Jurisdiction Act 1868, there is provision made (rule 32) for the evidence of witnesses being taken down by a shorthand writer, and the transcript has always hitherto been used on appeal. This rule, however, has been omitted in the Consolidated County Court Orders and Rules 1875, and consequently there is now no provision by means of which the parties can bring the evidence before the Appeal Court except the judge's notes, which, according to the judge's statement, would be useless. The only mode of hearing the appeal is therefore to rehear the evidence.

E. C. Clarkson, for the respondents, contended that the judge's notes ought to be procured before any order as to hearing witnesses was made.

Sir R. PHILLIMORE.—I shall order the appeal to be heard on *vivâ voce* evidence, but the parties are at liberty to procure the judge's notes if they can; and, if on their being procured it appears they are of any use for the purposes of appeal, the respondents can apply again to the court to make such use of the notes as they can, or to set aside this order.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitors for the respondents, *Lowless* and *Co.*

Jan. 27 *and* 29, 1879.

THE CONSTITUTION.

Jurisdiction—Foreign vessel of war—Maritime lien—Ex-territoriality—Salvage.

The High Court of Justice, Admiralty Division, will not allow a warrant to issue for the arrest of a foreign vessel of war, or of private property on board of her and of which the Government to which she belongs have the care, at the suit of salvors.

THIS was a motion on behalf of the owner, master, and crew of the steam-tug *Admiral* for two warrants of arrest to issue against the U.S. vessel *Constitution*, and against the cargo laden on board of her.

The *Constitution*, whilst on a voyage from Havre to New York, and having on board a large quantity of empty cases, and also of goods returned from the Exhibition at Paris, got ashore on Bollard Point, near Swanage, and whilst in that position salvage services were rendered to her by the steam-tug *Admiral* and other vessels.

Jan. 27.—Dr. *Phillimore* applied to the court that warrants of arrest should be issued against the ship and cargo, as the plaintiffs were unable to obtain proper remuneration for their services, and the vessel was about to leave the country.

Sir R. PHILLIMORE.—As a question of jurisdiction is raised, I shall certainly not grant the application till the question has been argued; but I will give leave to serve short notice of motion, so that the question may be argued on Wednesday next, the notice to be served on the vessel and American Consul, but not personally on the captain, and I think a letter should be also sent to the American Ambassador stating that the application will be made.

Jan. 29.—The question of jurisdiction came on for argument on the following motion:

Between the Owners, Master, and Crew of the steam-tug Admiral (plaintiffs), and the ship or vessel Constitution, her cargo and freight (defendant).

Constitution.

We, Clarkson, Son, and Greenwell, solicitors for the plaintiffs in this cause, give notice that we shall by counsel at 10.30 o'clock in the forenoon of the 29th Jan. 1879, move the judge in court to order a warrant to issue for the arrest of the vessel and for a further warrant to arrest her cargo and if necessary to unliver the same, to answer the claim of the plaintiffs for salvage services rendered to the *Constitution* her cargo and freight; and further take notice that leave has been given by the court to serve short notice of this motion.

Dated the 27th Jan. 1879.

CLARKSON, SON, AND GREENWELL.

On behalf of the plaintiffs the following affidavit of the owner of the *Admiral* was read:

1. I am the owner of the steam tug *Admiral* and one of the plaintiffs in this action.

2. On the 17th Jan. inst. I received a telegram from Lieut. Viry, Swanage station, to the following effect: "American frigate *Constitution* ashore on Bollard Point. Send strongest tug immediately, two if possible." I thereupon despatched my tug *Admiral* to the assistance of the vessel *Constitution*, and she rendered important and efficient salvage services to the ship *Constitution* and her cargo, and was instrumental in getting her off the ground.

3. After the several services were completed, I, on the 21st Jan. inst. received the following letter from the consular agent at Portsmouth:

"United States of America Consular Agency,
Portsmouth, 20th Jan. 1879.

"Mr. George Drover,

"Sir,—If you have any claim to present against the U.S. frigate *Constitution* please put it in writing and bring it to my office as early as possible to-morrow forenoon. If you cannot come, forward it to me by return of post. The ship sails soon.—Yours respectfully,

"C. E. M'CHEANE, United States Consular Agent."

In reply to this letter I, on the 21st inst., sent the following telegram: "Impossible my coming to Portsmouth. I claim one thousand five hundred pounds services rendered by my tug *Admiral*. You, no doubt, are aware my tug was the means of towing *Constitution* off. *Malta* and the three other tugs could not move the ship, but when we commenced towing ship immediately came off. Please wire reply immediately as I leave shortly for London."

4. Afterwards, on the 23rd inst., I received a sum of 200*l*. in recognition of the services rendered by the said tug, accompanied by the following letter:

"United States of America Consular Agency,
Portsmouth.

"Mr. George Drover,

"Sir,—I am instructed by the captain of the U.S. frigate *Constitution*, on behalf of the United States Government, to forward to you a cheque for 200*l*., in recognition of the services rendered to that vessel upon the occasion of her stranding on Bollard Point by your tug *Admiral*, and by the master and crew of that tug. I shall be obliged to you to settle with the master and crew accordingly.

"It may prevent some misconception on your part if I inform you the value of the *Constitution* and cargo, principally empty cases and machinery, on board her does not exceed 12,000*l*. My government are happy that the services, with the important co-operation of H.B.M. tug *Malta*, were rapidly and easily successful.—I am, sir, your obedient servant,

"C. E. M'CHEANE, U.S. Consular Agent.

"Please acknowledge this in course."

5. Such sum of 200*l*. is entirely inadequate and insufficient compensation for the services rendered, and on the 25th inst. I returned the said sum to the consular agent, accompanied by the following letter:

"M'Cheane, Esq. "25th Jan. 1879.
"*Constitution*.

"Sir,—Herewith please find cheque received to-day for 200*l*. I cannot think of accepting so small a sum. I am willing to refer the matter to the Admiralty Court. If you wish to communicate with me, please address letter to care of Clarkson, Son, and Greenwell, 24, Carter-lane, Doctors' Commons, London. I shall be there Monday morning ten o'clock.—Yours truly, GEORGE DROVER."

6. The frigate *Constitution* had on board her at the time of the services a valuable cargo, consisting principally of machinery belonging to private individuals, exhibitors at the Paris Exhibition, and was on a voyage from Havre to New York. I am informed and believe that the value of the vessel *Constitution* and her cargo amount to considerably over 12,000.

7. On the 28th Jan. inst. I received a further letter from the American Consulate to the following effect: "Your favour of the 25th inst., returning the cheque for 200*l*., has been received. This award for the services of your tug *Admiral* to the *Constitution* was made advisedly, and is considered by competent and disinterested experts as ample and liberal, and my information is that it is final. Cheque will remain at my office till noon of the 15th Feb. next, when, you having failed to call for it, its amount will be forwarded by me to the United States Navy Department."

8. The said vessel *Constitution* and the cargo on board her are now lying off Portsmouth, and will leave immediately for New York. That applications have been made by my solicitors to the American Legation, and I am unable to obtain sufficient compensation for the services of the said tug without the aid and process of this honourable court.

The notice of motion was served, as directed by the judge, on the ship and the American Consul, and a copy of it sent to the American Embassy, accompanied by the following letter:

24, Carter-lane, Doctors' Commons, E.C.
The American frigate *Constitution* 27th Jan. 1779.

Your Excellency,—Our clients, the owners, master and crew of the steam-tug *Admiral*, of Cowes, Isle of Wight, lately rendered very valuable salvage services to the American frigate *Constitution*, which was ashore at Bollard Point.

Application for remuneration for such services was made to the American Consul at Portsmouth, and he forwarded a sum of 200*l*. to the owners of the tug. This sum is quite insufficient to compensate for the services rendered, and was returned to the consul. The *Constitution* had on board a valuable cargo, consisting of machinery, the property of the exhibitors at the Paris Exhibition. We this morning moved the judge of the Admiralty Division for leave to arrest the *Constitution* and her cargo, and an order was made that the motion should be adjourned till Wednesday, in the meantime notice of the motion to be served on the vessel and American Consul. In accordance with the judge's request, we beg to give your Excellency notice of the application to be made, and inclose a copy of the notice of motion.—We are your Excellency's obedient servants,

CLARKSON, SON, and GREENWELL.

The Envoy Extraordinary and Minister Plenipotentiary for the United States of America.

The defendants' solicitors produced the following letter:

Legation of the United States,
London, 28th Jan. 1879.

Messrs. Thomas Cooper and Co.,
Solicitors, &c.

Gentlemen,—The accompanying notice marked A., having been left at this Legation with the janitor after the office was closed last evening, I shall be obliged to you to instruct counsel to be present in court to-morrow morning to inform the Right Honourable the Judge of the Admiralty Court that the ship against which the warrant has been applied for by the owners, master, and crew of the steam-tug *Admiral* is the United States national ship of war *Constitution*, regularly commissioned by the Government of the United States, and that the *Constitution* at the time of the alleged salvage services was engaged in the national service of the United States for public purposes, and in pursuance of a special Act of Congress passed in that behalf. You will please also instruct counsel to inform the judge that the so-called cargo consists of property of which the United States Government has for public purposes charged itself with the care and protection. Under these circumstances I, as the representative of the United States, cannot recognise that the High Court of Justice has any jurisdiction whatever in the case.—I am respectfully yours,

JOHN WALSH.

Counsel will be good enough to inform the learned judge that application should have been made to the Marquis of Salisbury, Secretary for Foreign Affairs, had time permitted it.

Milward, Q.C. and Dr. *Phillimore*, for the plaintiffs, owners, master, and crew of the *Admiral*.

E. C. Clarkson for the American Minister.

The *Admiralty Advocate* (Dr. Deane, Q.C.), with him the *Attorney-General*, for the Crown.

Milward, Q.C.—This application is of a twofold

nature: (1) to arrest the ship herself; (2) to arrest the cargo laden on board of her, and, if necessary, to unliver it. In ordinary cases, the warrant to arrest a ship and cargo for salvage services rendered to her would issue as a matter of course. We have come to the court to ask its leave; but there is nothing to induce it to withhold that leave. There is a precedent for the arrest of a vessel under similar circumstances in the time of Lord Stowell: (*The Prins Frederik*, 2 Dods, 451). There is no dispute as to the fact that, as sworn in the affidavit, there was a distinct request to the salvors in this case to come and render assistance to a vessel ashore on the coast of England. What is there, then, to shut the doors of this court to the salvors when they take the ordinary legal means of securing a due compensation for their services? The vessel, it is true, belongs to a foreign Government, but she was not at the time the services were rendered engaged in the public service of that Government, but in carrying a cargo the property of various private individuals. [Sir R. PHILLIMORE.—It is, I understand, admitted that the vessel herself is a vessel in the war service of the United States Government, and that the cargo sought to be arrested is now on board her.] Yes: but that is precisely the case of *The Prins Frederik* (*ubi sup.*), except that there the cargo seems to have been laden on Government account.

E. C. Clarkson, on behalf of the American Government, asked permission to read the letter of instructions from the American Ambassador to Messrs. Thomas Cooper and Co., given above, and was permitted to do so.

The *Admiralty Advocate*, on behalf of the Crown, informed the court that a communication had been received by the Foreign-office as to the application now before the court, and that he was instructed to inform the court that the Government recognised the public character of the *Constitution*, and, whilst submitting to any course which the court might consider it its duty to pursue, to protest against any exercise of its jurisdiction against this ship. [Sir R. PHILLIMORE.—Under these circumstances, the onus lies on the salvors to show that they are entitled to arrest the ship.]

Milward, Q.C.—The exemption of vessels of war of foreign states from civil process is only granted to them by the comity of nations in consequence of the public service they are engaged in. This is no more a public service than that of any other vessel hired to bring goods from France to America for private citizens. [Sir R. PHILLIMORE.—It will be convenient to keep distinct the question of arrest of the ship from that of the cargo.] As far as possible; but the cargo being on board the ship in question cannot be absolutely dissevered. The American Embassy does not deny that the property in the cargo is in private owners; it only alleges that it has the care of it. In *The Prins Frederik* (*ubi sup.*) it actually belonged to the Government (2 Dod. 465), and yet the warrant of arrest was actually issued and executed (p. 451). If access to this court is refused to the salvors, they have no means of obtaining justice. The exemption of foreign vessels of war is only an exemption from ordinary civil process. It does not apply to causes *in rem*; there the maritime lien attaches *jure gentium* at once, either *ex quasi contractu* or *ex quasi delicto*, whatever be the character of the vessel:

The Charkich, 1 Asp. Mar. Law Cas. 581; L. Rep. 4 Adm. & Ecc. 59, 93, 96 28 L. T. Rep. N. S. 513; *The Exchange*, 7 Cranchf U.S. Sup. Court Rep. 116.

It is true that the last case was one where the question arose as to prize property; but that is *à fortiori* in favour of the salvors here, as prize property is the property of the Crown or Government; here the property in the goods is private.

Dr. *Phillimore*, on the same side, adopted as a portion of his argument the following extract from the opinions of Attorney-Generals of United States, vol. I., p. 54, as quoted in the Report of the Royal Commission on Fugitive Slaves, p. 84: "The question again arose . . . . whether judicial process could be lawfully served on board a public ship of war belonging to his Britannic Majesty lying alongside a wharf in the city of New York and within the territorial jurisdiction of the state of New York; and the opinion of the Attorney-General, Charles Lee, was taken on the subject. After quoting passages from Vattel and Martens, he then proceeds: 'According to the general rule established by these citations, every ship, even a public ship of war of a foreign nation, at anchor within the harbour of New York, is within the territory of the state of New York and subject to a service of judicial process; if an exemption from this rule is claimed by a foreign ship of war, it is incumbent on such ship to set forth and maintain clearly and satisfactorily its right to the exemption, or it must be deemed within the general rule. The officers and crew of a public ship of war being admitted into the United States are entitled to be treated with hospitality and kindness; but that does not in reason require that the ship should be exempt from judicial process; and more especially when they are bound by every kind of obligation to act in conformity to the laws of the country which affords them and their ships its sovereign protection whilst within its jurisdiction. It is expressly provided by article 23 of the Treaty of London that the ships of war of each of the contending parties shall at all times be hospitably received in the ports of the other, their officers and crews paying respect to the laws and government of the country. This is conceived to be declaratory of the usage of nations; and here it may be observed that hospitality which includes protection is to be enjoyed upon condition that the laws and government of the country are respected. To disobey judicial process authorised by law, or to resist it on board the ship, is inconsistent with a due respect to the laws and government of the country. The article further stipulates that the officers shall be treated with that respect which is due to the commission which they bear; and if any insult shall be offered to them by any of the inhabitants, all offenders in that respect shall be punished as disturbers of the peace and amity of the two countries." [Sir R. PHILLIMORE. — That is an opinion written, I think, in the year 1799. It is questionable how far the same would have been written in 1879; besides it relates rather to the liberty of the subject than to civil actions against the property.] Yes, but it shows at all events that the ex-territoriality enjoyed by a foreign vessel of war is not absolute: (Report of Royal Commission on Fugitive Slaves, p. 33.) It was the opinion of Chancellor Kent that civil and criminal process might be served on board the ship, though not on the ship itself (Kent's Comm. on Amer. Law, ed

1851, p. 157, note *e*); but if it may be served on any private property on board and therefore on the cargo, the court has certainly jurisdiction to inquire into the property in goods on board:

The Santissima, Trinidad, 7 Wheaton (Amer.) Rep. 273.

If this motion is refused, foreign vessels of war will themselves be the chief sufferers, as, if a claimant has no right to enforce his claim against them by law, he will be loathe to render assistance when they stand in need of it. [Sir R. PHILLIMORE,—It is not proper to suppose that any Government will act otherwise than equitably towards those who render services to its ships.] In this very case we contend that what they propose to give us is altogether inadequate, and we are anxious to have the opinion of the court on the merits.

E. C. Clarkson for the American Minister.—The Government is desirous of showing all courtesy to the court, and has therefore instructed me to appear and argue the case. It cannot admit that the court has any right to entertain a suit, or to issue a warrant against this ship. Had the ship in any way been divested of its character as a public ship of war, and had it been engaged in ordinary trading operations, it would have been liable to arrest for one of the reasons for which the vessel belonging to the Khedive as appears in *The Charkieh* (*ubi sup.*) was held liable to process; but it has not done so. It is not possible to distinguish the case of the vessel itself, and of the cargo on board of her. The ex-territoriality of the ship must be violated to enable the officer of the court to get at the cargo. (*The Exchange, ubi sup.*) Supposing the captain of that American man of war ordered the removal of the officer of the court as a trespasser *molliter manu*; what power would any court have to interfere? The goods are in the possession of the Government, and cannot be arrested without dispossessing the Government. If the salvors consider that the liberal award they have received is not sufficient, they can invoke the services of the Foreign-office.

The *Admiralty Advocate* (Dr. Deane, Q.C.), for the Crown. In a case of this description it may almost be doubtful if the Government have not a right of prohibition, as so unusual a proceeding as the arrest of a foreign vessel of war might occasion serious danger to the relations of amity existing between the countries. Whilst countries are at peace it is an implied condition of the peace that their ships of war should be free from civil process in one another's countries. The *Charkieh* (*ubi sup.*) is not in point, she was not a public ship of war, but a trader, and not the property of a sovereign prince.

Milward, Q.C. in reply.

Cur. adv. vult.

Jan. 29.—Sir R. PHILLIMORE.—On Monday last an application was made to this court to allow a warrant of a peculiar character to issue and to be served upon a ship of war belonging to an independent state in amity with Her Majesty. The court directed the case to stand over, and suggested that it would be proper that notice should be given to his Excellency the Minister of the United States in this country, and also to the Secretary of State for Foreign Affairs. The court has had reason to congratulate itself that it took that step, because the result has been that I have had the advantage of having the opinion of counsel on behalf of the United States Government, and also the opinions of the law officers of the Crown.

Now, it is admitted—and indeed it could not be denied—that, if I were to exercise the jurisdiction prayed in this case, I should be doing that for which there is no legal ground or precedent. It is clear upon all the authorities, which are to be found in the case of *The Charkieh* (L. Rep. 4 A. & E. 59; 1 Asp. Mar. Law Cas. 581; 28 L. T. Rep. N. S. 513), that there is no doubt as to the general proposition that ships of war belonging to another nation with whom this country is at peace are exempt from the civil jurisdiction of the country. I have listened in vain for any peculiar circumstances to take this case out of the general proposition.

It has happened to me more than once since I have had the honour of sitting in this chair to have been requested by foreign states to sit as arbitrator, and to make an award in certain cases—one of collision and two of salvage, I think. If such an application had been made to the court in this case, I would gladly have undertaken the duty sought to be imposed upon me; but such is not the case.

I have now to consider whether there is any authority for the proposition that, when a foreign state refuses to waive the privilege which it has, it is competent to this court nevertheless to treat it as an individual, and serve civil process on its property. I am clearly of opinion that it would be very wrong and improper in me to assent to the request on the part of the owner of the steam-tug. I see no distinction in this case between refusing the warrant prayed for against the ship and that against the cargo, and I refuse it equally in both cases. I think it unnecessary to go into the cases cited, because they are distinguishable from the present, inasmuch as the important point decided in *The Charkieh* (*ubi sup.*) was that the Khedive of Egypt was not an independent sovereign, and also that the ship had been treated as a vessel of commerce and not of war. There was another point to which notice has been drawn, but it was not necessary for the decision of that case, and the points decided in that case are those which I have mentioned. I state these facts to show that that case is materially different from the case now before the court.

It has been alleged that great hardship will ensue from the decision of the court, inasmuch as it would expose ships to great difficulty in future, if necessity should arise for salvage services to be rendered to them. To that I must answer that it would be improper to suppose that any foreign Government would not remunerate the services of salvors, taking proper means to ascertain what those services were. I have no reason to suppose that such would not be the case. Be that as it may, I have to discharge my duty, which is to say, in the absence of precedent and principle I cannot feel warranted in allowing the process to issue.

I cannot consent that any warrant shall issue from this court, and I must dismiss the motion with costs.

Solicitors for the salvors, *Clarkson, Son*, and *Greenwell*.

Solicitors for the American Minister, *Thomas Cooper* and *Co.*

Solicitor for the Crown, the *Solicitor for the Treasury.*

Feb. 4, 18, *and* 26, *and March* 15, 1879.

THE PARLEMENT BELGE.

Jurisdiction — Collision — Arrest — International law — Constitutional law — Ex-territoriality — Mail packet — Government vessel — Foreign sovereign State — Crown and subject — Treaty-making power.

A vessel belonging to or chartered by a foreign Government, and regularly employed for the purposes of carrying mails and passengers and some cargo, is not entitled to the privileges of a man-of-war as to ex-territoriality; but is liable to an action for damage done by her to the vessel of a British subject, and to arrest if the suit is in rem.

The Crown of this country has not power, by treaty with a foreign Government, to give to vessels of, or employed by, that Government other than vessels of war the privilege of freedom from civil process extended by international law to vessel of war. (a)

Where the Crown appears to protest against the jurisdiction of the court being exercised against a vessel belonging to a foreign power, it has the same right of reply as in cases where it appears on its own behalf.

THIS was a motion in a cause of damage by collision. The action was brought *in rem* against the *Parlement Belge* to recover damages for a collision under circumstances set out below. No warrant of arrest was issued, and no appearance was entered by any person on behalf of the *Parlement Belge*, and the time required for proceeding by default having elapsed, the case came before the court on the following motion:

IN THE HIGH COURT OF JUSTICE, ADMIRALTY DIVISION.

Between owners of steam tug *Daring* (plaintiffs) and the owners of the steamship or vessel *Parlement Belge* and her freight (defendants).

Ship *Parlement Belge.*

We, L. and Company, solicitors for the plaintiffs in this cause, give notice that we shall by counsel on the 4th Feb. 1879 move the judge in court to direct that judgment with costs may be entered for the plaintiffs in respect of damages sustained by their tug *Daring*, through collision with the steamship *Parlement Belge*; that the accounts and vouchers relating to such damage may be referred to the registrar and merchants to report thereon, and that a warrant may issue for the arrest of the said steamship *Parlement Belge.* LOWLESS AND CO.

Dated 25th Jan. 1879.

The facts of the case, as set out in the statement of claim, and verified by affidavit, and for the purposes of the argument undisputed, were that

At about 4.30 p.m. on 14th Feb. 1878, the steam tug *Daring*, of 109 tons gross register . . . brought up to an anchor in Dover Bay, within the port and harbour of Dover, in a safe and proper berth, about half a mile east of Dover pier.

2. In the course of the evening a fog began to rise from off the shore, about 10.30 p.m. the wind was to the S. and W., and the weather nearly a calm, the fog still continuing. The tide was ebb; the *Daring* was riding in the same place, having her anchor regulation light clearly exhibited, and burning brightly; her fog bell rung at proper intervals, and a good look-out kept on board her.

3. In these circumstances, the paddle steamship, *Parlement Belge*, was seen and heard by those on board the *Daring*, when a short distance off, approaching rapidly towards her from the direction of the harbour, and although the fog bell of the *Daring* was loudly rung, and her captain hailed the *Parlement Belge* to stop, she came on and ran her stern right into the starboard side of the *Daring*, cutting into her about 14 feet, and doing her a great deal of damage.

4. The collision was caused by the bad navigation and negligence of those on board the *Parlement Belge.* The collision was not caused or contributed to by the plaintiffs, or by any of those on board the *Daring.*

5. A writ *in rem* in this action was duly served on the *Parlement Belge* on the 26th Feb. 1878, and no appearance has been entered in this action.

6. The *Parlement Belge* is a Belgian vessel, and was and is now employed in the service of carrying the mails between Dover and Ostend and Belgium.

7. Before and since the time of the collision in question she was engaged in carrying, besides the mails, passengers and merchandise, and in earning passage money and freight. The plaintiffs are unable to discover whether the *Parlement Belge* was at the time of the collision, or is now, the property of His Majesty the King of the Belgians, or whether she was only chartered for the purpose by His Majesty, or by some officer or officers of His Majesty's Government. They have caused application to be made to the Government of His Majesty to give them compensation for the damage done to them, but have been unable to obtain such compensation.

The plaintiffs claim as follows:

(1.) Judgment against the *Parlement Belge*, her tackle, apparel, and furniture, for the damage occasioned to the plaintiffs by the collision, and for the costs of this action.

(2.) A warrant to arrest the *Parlement Belge*, her tackle, apparel and furniture, and if necessary, a sale thereof.

(3.) Such further and other relief in the premises as the nature of the case may require.

Filed 4th Jan. 1879.

Feb. 4, 1879.—Dr. *W. G. F. Phillimore.*—A writ *in rem* was served in the ordinary way (Rules of Sup. Ct., Order IX., r. 10), but no warrant of arrest was issued (Order IX., r. 9). No appearance being entered in the time limited, a statement of claim was filed, and the ordinary steps in a cause by default taken (Adm. Rules 1871, r. 4; L. Rep. 3 A. & E. 514; and *The Polymede*, 3 Asp. Mar. Law. Cas. 124; 1 P. Div. 121; 34 L. T. Rep. N. S. 367). I have an affidavit by the master of the *Daring* verifying the statement of claim; therefore, in an ordinary case, I should be entitled to judgment (Adm. Rules 1871, r. 5; L. R. 3 A. & E. 614). But there are peculiar circumstances in this case. It will be seen by the statement of claim that the *Parlement Belge*, the vessel which ran down the *Daring* whilst at anchor in Dover

(a) The proposition of law here laid down may have serious consequences. Applied to other circumstances it might put it in the power of a subject to involve this country in war with a foreign state without the Crown having any means of restraining him in spite of its treaty obligations. Again, the decision involves the proposition that our courts of law have power to decide whether a treaty is or is not binding upon British subjects, or, in other words, whether the Crown was acting within its rights in making any particular treaty. If our courts have such a revising power, it is extraordinary that no traces of the exercise of any such power should exist in our records. The only case which at all resembles the present, and which was not cited on the argument, is *Weymberg* v. *Touch* (Hil. Term, 20 & 21 Car. 2, 1 Cases in Chan. 123). In this case, an action having been brought by a British subject against a Dane to recover the price of goods sold in Denmark, the Dane applied to Chancery to restrain the action on the ground that, by a treaty between the Kings of England and Denmark, it was stipulated that any sums paid by subjects to either sovereign should be taken as paid to the creditor, and the debtor should be discharged, and that the Dane had paid the King of Denmark under compulsion; the British subject demurred to the bill in Chancery, but was ordered to answer the bill.—ED.

Bay, is a vessel employed by the Belgians in the mail service between Ostend and Dover, and by the correspondence which has passed, it appears that an exemption from the ordinary process of the court is claimed for her under the provisions of a convention. The most important articles of that Convention are Articles 6 and 10 (*ubi sup.*). The affidavit of Eugene Carden (*ubi sup.*) shows clearly that the *Parlement Belge* was carrying cargo at the time, and by so doing, in violation of Art. 10, she has waived the privileges, if she ever was in a position to claim them, of Art. 6. A vessel of war, by carrying cargo for purposes of trade, would waive her privilege of ex-territoriality (*The Charkieh*, 2 Asp. Mar. Law Cas. 121; L. Rep. 4 A. & E. pp. 99, 100; 28 L. T. Rep. N. S. 513); *à fortiori*, a vessel which only claims the privilege conditionally on not carrying cargo: (*The Exchange* 7 Cranch, U. S. Sup. Ct. 116.) This right of action and of process is a common law right, of which the plaintiffs cannot be ousted by anything except the common law or a statute; this special Convention, even if valid at all, cannot affect the rights of a subject, because the Crown puts a construction upon it which the Convention will not bear. In the recent case of *The Stadt Flushing* (not reported) it was proved that the vessel was a mail packet, and under contract with the Government to proceed at a certain rate of speed, but that did not prevent the plaintiffs from recovering from her for damage resulting from a collision occasioned by the *Stadt Flushing* proceeding at a high rate of speed in a fog.

The *Admiralty Advocate* (Dr. Deane, Q.C.), for the Crown, was stopped.

Sir R. PHILLIMORE.—The question is one of such great importance, that I think it would be more convenient to have it raised and solemnly argued on some form of pleading, which will enable it the more easily to be taken to a Court of Appeal. I shall direct the motion to stand over for a fortnight to give time to the Crown to consider if it will appear and intervene in any way.

Feb. 18.—The *Admiralty Advocate* (Dr. Deane, Q.C.) informed the court that the Crown proposed to appear, but that, through inadvertence or misunderstanding, no pleadings had as yet been put in. The motion was thereupon directed to stand over further for a week, and on the 24th Feb. the following "Information and Protest" of the Attorney-General was filed:

The Attorney-General, under protest on behalf of Her Majesty the Queen, gives the court to understand and be informed as follows:

1. Before, and at the time of the alleged collision, and thenceforward till the present time, the *Parlement Belge* was one of the mail packets running between Ostend and Dover, and one of the packets mentioned in Article VI. of the Convention of Feb. 17, 1876, hereinafter referred to.

2. During the period hereinbefore mentioned, and at all material times, the said packets were and are the property of His Majesty the King of the Belgians, and in his possession, control, and employ, as reigning sovereign of the State of Belgium, and have been and still are public vessels of the Government and Sovereign State of Belgium, carrying his said Majesty's royal pennon, and were and are being navigated and employed by and in possession of such Government and not otherwise.

3. The said packets were and are officered by officers of the royal Belgian navy holding commissions from His Majesty the King of the Belgians, and in the pay and service of his Government. The said officers are appointed by and are under the control and orders of the Belgian Minister of Public Works.

4. During the period hereinbefore mentioned, and at all material times, a Convention, dated Feb. 17, 1876, has been and is in force between Her Majesty the Queen and His Majesty the King of the Belgians, to a copy of which in the French and English languages the defendants crave leave to refer as if the said convention were duly set forth at length herein.

5. During the period hereinbefore mentioned, and at all material times, the *Parlement Belge* was carrying the public mails, under the said Convention, between and from the royal post offices of Great Britain and Belgium.

6. The Attorney-General, under protest, says that this honourable court has no jurisdiction to entertain this suit, and that the plaintiffs cannot prosecute the same therein.

7. The Attorney-General, under protest as aforesaid, gives the court to understand and be informed herein, that he does not admit the matters alleged in any of the paragraphs of the statement of claim to be true.

Wherefore the Attorney-General, on behalf of Her Majesty the Queen, prays the court to stay all proceedings in this action, and to dismiss the motion of the plaintiffs with costs to the Attorney-General, on behalf of Her Majesty, of and incident to this application and action.

(Signed) JOHN HOLKER.

The Convention (*a*) referred to is as follows:

Convention between Her Majesty and the King of the Belgians, regulating the Communications by Post between the British and Belgian Dominions.

Signed at London, February 17, 1876.

[Ratifications exchanged at London, March 24, 1876].

Her Majesty the Queen of the United Kingdom of Great Britian and Ireland, and His Majesty the King of the Belgians, being desirous of strengthening the friendly relations which unite the two countries, and wishing to regulate by special arrangement (forming a sequel to the General Postal Treaty concluded at Berne on the 9th of October 1874) the postal relations between their respective offices, have named as their Plenipotentiaries for this purpose, that is to say: Her Majesty the Queen of the United Kingdom of Great Britian and Ireland, the Right Honourable Edward Henry Stanley, Earl of Derby, Baron Stanley of Bickerstaff, a Peer and a Baronet of England, a Member of Her Britannic Majesty's Most Honourable Privy Council, Her Majesty's Principal Secretary of State for Foreign Affairs, &c., &c., and the Right Honourable John James Robert Manners (commonly called Lord John Manners), a Member of Her Majesty's Most Honourable Privy Council, a Member of Parliament, Her Majesty's Postmaster-General; and His Majesty the King of the Belgians, Baron Henry Solvyné, Grand Officer of the Order of Leopold, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Belgians to Her Britannic Majesty, &c., &c. Who, after having reciprocally communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.—There shall be between the Post-offices of Great Britian and Belgium a periodical and regular exchange of correspondence of every kind in international service as in transit.

ARTICLE II.—The exchange of correspondence between the two offices shall be carried out through the following Post-offices:—On the part of Great Britian: 1. Dover, 2. London. On the part of Belgium: 1. Ostend (local office). 2. The offices travelling between Brussels and Ostend. 3. The office travelling between Brussels and Tournai. 4. The office travelling between Ghent and Mouseron. The two offices may, if they think proper, agree to name other offices for the exchange of correspondence.

ARTICLE III.—The mails between Great Britain and Belgium shall be conveyed by means of special packets running between Ostend and Dover. Each office shall have the right to employ subsidiarily, and so far as it shall be of any advantage on the score of speed, the route *viâ* France, and the French packets from Calais to Dover for the conveyance of its correspondence in closed bags to

(*a*) The Convention was signed in both the English and French languages; and wherever the expressions or idioms seem to differ in the two languages, the French expression is given in the text within brackets.—ED.

the other office. With regard to the mails conveyed on account of other offices, it will be the duty of the despatching office to indicate the route to be followed.

ARTICLE IV.—The Post-offices of Great Britain and of Belgium shall fix by a mutual agreement, the time for the departure of the packets from Ostend and Dover and they shall regulate this service in connection with the railway trains, so as to insure with the greatest possible speed the transmission of mails for international as well as for transit service.

ARTICLE V.—The Belgian Government shall continue to perform, at its own expense, the double daily service for the conveyance of the mails from Ostend to Dover and *vice versâ* (a service which must be performed at least six days in the week, the service on Sunday being optional).

ARTICLE VI.—The packets employed for the conveyance of the correspondence between Ostend and Dover shall be steamboats of sufficient power and size for the service in which they are to be employed. They shall be vessels belonging to Government, or freighted by order of Government. (Ce seront des bâtiments appartenant à l'Etat ou frétés pour le compte de l'Etat.) These vessels shall be considered, and treated in the port of Dover and in all other British ports at which they may accidentally touch, as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed, demand. They shall be exempted in those ports, as well on their entrance as on their departure, from all tonnage, navigation, and port dues, excepting however the vessels freighted by order of Government (pour le compte de l'Etat), which must pay such dues in those ports where they are levied on behalf of corporations, private companies, or private individuals. They shall not be diverted from their especial duty—that is to say, the conveyance of the mails—by any authority whatever, or be liable to seizure, detention, embargo, or arrêt de Prince. (Ils ne pourront être détournés de leur destination spéciale, c'est à dire du transport des dépêches, par quelque autorité que ce soit, ni être sujets à saisie arrêt, embargo, ou arrêt de Prince.)

ARTICLE VII.—The captains of the Belgian packets shall receive from the agents appointed for the service of exchange, the mails at Ostend and at Dover, the bags being closed and sealed. The number of these bags and the time of their delivery shall be entered on a way bill, which the captains or the officers intrusted under their orders with the care of the mails, shall deliver on their arrival to the office for which they are destined. They shall bring back to the despatching office a certificate of the punctual delivery of the mails, delivered to them by the agent who shall have received them.

ARTICLE VIII.—Unless prevented by causes over which they have no control, the captains of the packets engaged in carrying the mails between Ostend and Dover shall proceed directly to their destination. If in consequence of stress of weather or damage, they should be compelled to alter their course, and to put into any other port than Ostend or Dover, they must justify such deviation in the manner that their respective offices shall deem advisable. Whenever a packet conveying mails shall be compelled to put into any other than its destined port, the captain shall immediately deliver the mails to the local post-office, or forward them towards their destination, under the charge of an officer of the vessel.

ARTICLE IX.—The boats which shall be necessary for taking on board or landing the mails, or for assisting the steam packets upon their arrival or departure, shall be provided, both at Dover and Ostend, by the Belgian Government, and at its expense.

ARTICLE X.—The mail packets shall be at liberty to take on board or land at Dover, as well as at other British ports where they may be obliged to put in, any passengers of whatever nation they may be, with their wearing-apparel and luggage, and also with their horses and carriages, on condition that the captains of the said packets shall conform to the regulations of the United Kingdom concerning the arrival and departure of travellers. They shall be prohibited from conveying goods or merchandise on freight, with the exception, however, of postal packets and small parcels, the weight of which shall be limited by mutual agreement between the two offices. (Ils ne pourront transporter aucune marchandise à titre de fret, à l'exception toutefois des colis postaux et des articles de messagerie dont le poids sera limité de commun accord entre les deux Administrations.)

ARTICLE XI.—The expenses which may be incurred for signals of every kind, and for the burning of Bengal lights upon the pier for the use of the steam packets, shall be borne both at Dover and at Ostend by the Belgian Government.

ARTICLE XII.—The captains of the packets specially engaged in the conveyance of the respective mails of the two offices are forbidden to take charge of any letter not included in their mail bags, with the exception, however, of Government despatches. They must take care that no letters are conveyed illegally by their crews or passengers, and must give information in the proper quarter of any breach of the laws which may be committed in that respect.

ARTICLE XIII.—In case of war between the two nations, the mail packets shall continue their navigation without impediment or molestation, until a notification is made on the part of either of the two Governments that the service is to be discontinued, in which case they shall be permitted to return freely, and under special protection, to the port in Belgium where they were fitted out.

ARTICLE XIV.—The British Government engages to pay annually to the Belgian Government, in consideration of the advantages which it derives from the double daily packet service between Ostend and Dover, viz.: 1. For the night service, the sum of four thousand pounds sterling; and 2. For the day service the sum of five hundred pounds sterling. These sums shall be paid quarterly to the Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Belgians at the Court of Her Britannic Majesty. It is understood that the British Government shall be at liberty to terminate such payment on giving to the Belgian Government a notice of at least six months; and that even without such notice, the payment of either or both of the above-mentioned sums shall be lawfully discontinued at any time that the Belgian Government should cease to perform either a portion or the whole of the service.

ARTICLE XV.—The two Governments engage to cause to be conveyed, by the means which the respective post-offices employ for their own business, the closed mails which one of the offices may wish to exchange, through the medium of the other office, with countries which are not parties to the General Postal Union. The one of the two offices on whose account this conveyance shall take place, shall pay to the office performing this service, in consideration of the distance traversed beyond the limits of the union, rates which shall be determined by mutual agreement between them, and which shall not exceed the rates to be determined for the despatch of correspondence in open mails, in conformity with Article XI. of the Treaty of Berne, of the 9th Oct. 1874.

ARTICLE XVI.—In order to secure the whole of the receipts upon the correspondence passing between the two countries, the British and Belgian Governments engage to prevent by every possible means the said correspondence being sent by any other way than by their respective posts.

ARTICLE XVII.—The post-offices of Great Britain and Belgium shall determine by mutual agreement, in accordance with the conditions laid down in the Treaty of Berne of the 9th Oct. 1874, the matters of detail connected with the execution of the present Convention, as well as all other arrangements deemed necessary for regulating the postal regulations between the two countries.

ARTICLE XVIII.—The present Convention which abrogates and takes the place of all previous postal arrangements concluded between Great Britain and Belgium, with the exception of those relating to post-office money-orders, shall come into force immediately after the exchange of the ratifications. It is concluded for an indefinite period, each party reserving to itself the right to terminate it at any time upon giving at least twelve months' notice to the other party of its intention in this respect.

ARTICLE XIX.—The present Convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible. In witness whereof the respective plenipotentiaries have signed the present Convention, and have affixed thereto the seal of their arms. Done in

duplicate, at London, the seventeenth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

(L.S.) DERBY.
(L.S.) JOHN MANNERS.
(L.S.) SOLVYNS.

The plaintiffs produced, as evidence in the case, the following documents.

1. An affidavit of John Simonds, owner of the *Daring*, verifying the allegations in the statement of claim.

2. An affidavit of George Henry Gregory, as follows:

1. That I did, on the 8th day of February 1879, attend at the office of the Continental Daily Parcels Express, to make inquiries as to the conveyance of goods and merchandise from London to Belgium, *viâ* Dover and Ostend by the mail boats, and in reply to my inquiries, I was handed the exhibit, marked with the letter "A," hereunto annexed. The exhibit referred to is a sort of time and charge table relative to the conveyance by the Government mail packets *viâ* Dover, Ostend and Calais of samples of every description, papers, plans, books, articles for private use, luggage, and packages of all kinds up to 200lbs. weight between England and the Continent, *viz.*, France, Belgium, &c.

2. By a reference to paragraph 5 thereof, it appears that the said Continental Daily Parcels Express has been in existence for the last thirty years, and further, that they ship their goods to Belgium by the mail boat, *viâ* Ostend. I asked the gentlemen in the office of the said Continental Daily Parcels Express, whether there was any other means by which they sent to Belgium, and the reply was "No, we can only ship by the mail boats, *viâ* Dover and Ostend."

3. By reference to page 9 of the exhibit "A," it appears there is no limit as to size or weight of the parcels that are so shipped, the printed tariffs on the said page going up to 200lbs., but stating as to the rate generally, as well as to the special rates to Ostend alone, an additional charge is made for every 10lbs., according to the tariff.

The exhibit "A" was a small paper book of charges to be made by the company for the conveyance of parcels to various places on the continent of Europe, *viâ* Dover and Ostend.

3. An affidavit of Eugene Carder, solicitor, of Dover, of which the material part was as follows:

2. That I did, on the 10th and 11th days of January 1879, search in the records at the offices of H. M. Customs in Dover, for the dates and particulars of the voyages of the said vessel *Parlement Belge* made between the ports of Ostend and Dover, between the 1st day of January and the 31st day of March 1878.

7. The exhibit, marked "A," hereto annexed, is a certified extract from the books of H. M. Customs, in Dover, and is signed by the local collector of Customs.

A.

Port of Dover.

Account of the arrivals and sailings of the Belgian mail steamer *Parlement Belge* from and to Ostend from 1st Jan. to 31st March 1878.

From Ostend with cargo.

Jan. 5, 7, 9, 11, 14, 16, 22, 24, 26, 29, 31	= 11	29
Feb. 2, 4, 6, 8, 11, 14, 27	= 7	
Mar. 2, 5, 7, 9, 11, 13, 16, 20, 23, 25, 27	= 11	

With mails and passengers only.

Jan. 20.

To Ostend with cargo.

Jan. 8, 10, 12, 14, 16, 21, 23, 25, 29, 31	= 10	26
Feb. 5, 7, 9, 11, 14, 28	= 6	
Mar. 2, 5, 8, 12, 14, 16, 20, 23, 26, 28	= 10	

With mails and passengers only.

Jan. 6, 27	= 2	4
Feb. 3	= 1	
Mar. 10	= 1	

On 14th Feb. vessel returned to harbour again, in consequence of a collision, left Dover 16th Feb. for Ostend in ballast.

Custom House, Dover, 11th Jan. 1879. J. M. Clarke, Col., Deputy of the Bill of Entr .

Feb. 25.—*Webster*, Q.C., Dr. *W. G. F. Phillimore*, and *Johnstone* for the plaintiffs in support of the motion.

Webster, Q.C.—The mode in which the Crown has appeared is irregular; an appearance by the Attorney-General by information and protest is not the practice of this court. A petition on protest should have been filed according to the ancient practice of the Court of Admiralty, which is not altered by the Judicature Acts in this respect:

The Vivar, 3 Asp. Mar. Law Cas. 308; 2 P. Div. 29; 35 L. T. Rep. N. S. 782.

But we don't wish to press a technical objection, and shall consider it as a petition on protest. We are in order to move for judgment; all the steps necessary to entitle us to judgment by default have been taken, and it is for the Crown to show any reason why the vessel should not be treated in the ordinary way. She had cleared from the Custom-house at Dover with cargo in the ordinary way. It is shown by the affidavits that the Continental Daily Parcels Express was in the habit of forwarding goods by her and her consorts, and by the tariff issued by that company it appears that they forward parcels up, at least, to 200lbs. weight, and without any limit to value. It cannot be said that a vessel employed in such a traffic as this, for profit and freight, is not carrying merchandise. Assuming, for the purpose of argument, that the statements in the information and protest are correct, there is nothing to show that the Convention set up is valid to bind British subjects, and to preclude them from having recourse to legal means to establish their rights. A convention or treaty which in any way interferes with the common law rights of a subject must be confirmed by Parliament. [Sir R. PHILLIMORE.—Supposing there were no convention at all, but the vessel carried the flag and crew of a man-of-war, do you contend that she would be liable to civil process?] This vessel is by necessary implication not a vessel of war, she claims to be exempt as a vessel of war under the treaty; to enable her to do so, something more is necessary than the mere fiat of the executive. An Act of the Legislature is necessary:

Wheaton's International Law by Lawrence, 2nd ed. (1863), p. 455;
Mahon's Hist. of Eng., p. 49;
Halleck's International Law, ed. 1878, vol. 1, s. 229.

[Sir R. PHILLIMORE.—Do the authorities show more than that a treaty, whilst unconfirmed by Parliament, cannot contravene an Act of Parliament?] The statute law cannot stand on a higher footing in this respect than the common law, and therefore a treaty unconfirmed by Parliament cannot deprive a subject of his common law or statutable rights:

Blackstone, bk. 4, pt. 1, ch. 6 *passim*;
Vattel, bk 2, ch. 12, sect. 154;
D. D. Field, International Code, tit. 4, ch. 15, sect. 192, p. 80.

[Sir R. PHILLIMORE.—Does not the ratification of the Legislature referred to by the last-mentioned authority, the work being that of an American author, mean the ratification by the home authority, whatever that may be, of the act of their ambassador?] That does not seem to be the case. Speech by Mr. Gladstone, Aug. 10, 1870. He says (Hansard's Parl. Debates, ser. 3, vol. 100, c. 111, p. 1790) that the Legislature can give power to the Crown to make such treaties,

therefore without the Act of the Legislature, either previous or subsequent to the treaty, the Crown has no such power. The Treaty of Berne, which is referred to in the preamble to this Convention, was confirmed by Act of Legislature (38 Vict. c. 22), and that is a treaty on precisely the same subject, *i.e.*, the International Postal Regulations. Extradition treaties, too, have always to be confirmed by Parliament. [Sir R. PHILLIMORE.—Does it not make a great difference that those treaties of necessity affect the liberty of the subject?] The treaty as to the Newfoundland Fisheries was confirmed by Act of Parliament (35 & 36 Vict. c. 45), and so also were the treaties as to International Copyright (1 & 2 Vict. c. 59; 7 Vict. c. 12). The fact that all these various international rights required the confirmation of Parliament before the treaties affecting them became valid throws the onus of proof on the Crown to show why this particular convention should be valid without it. But the present jurisdiction of the Court of Admiralty is regulated by statute, and includes "all claims and demands whatsoever . . . . for . . . . damage received by any ship or sea-going vessel" (3 & 4 Vict. c. 65, s. 6), and also "any claim for damage done by any ship" (24 Vict. c. 10,, s. 7). These being statutable provisions, unless this vessel can show an exemption by statute, she is claiming an exemption under a treaty in contravention of a statute. There is no allegation in the information and protest, which, if proved, can oust the jurisdiction of this court to arrest the ship. The treaty or convention referred to in it only confers the privilege (Art. 6) conditionally on the vessel not carrying cargo (Art. 10). This vessel has broken the condition, and cannot therefore claim the privilege, Even a vessel of war carrying cargo would be liable to civil process:

The Charkieh, 2 Asp. Mar. Law Cas. 121; L. Rep. 4 Ad. 59, p. 89 *et seq.*; 28 L. T. Rep. N. S. 513.

In the recent case of *The Constitution* (*ante*, p. 79) it was stated that the carriage of goods was not for freight, but under a special Act of the Legislature, empowering a vessel of war to be so employed in the service of the nation, but there is no such allegation here. This case is even stronger than that of *The Charkieh* (*ubi sup.*), because it is not the waiver of a right, but the contravention of the condition on which a privilege was granted. [Sir R. PHILLIMORE.—Art. 10. apparently contemplates the employment of the vessel as a merchant vessel to some extent, as it expressly permits the carriage of passengers' luggage, carriages, and horses.] Yes, but the enumeration of those particular articles make the case all the stronger against her when she carries other articles.

Dr. *W. G. F. Phillimore* on the same side.—The plaintiffs claim the ordinary common law and statute rights of subjects against the property and persons of those who injure them within the realm; to exempt the ship from this ordinary process, she must prove that she is within some special or general legal exemption. We are not now asking for process out of the Admiralty court; this court prior to the Judicature Acts was a Prerogative Court, and had special relations to the Crown, which might have affected the question; but we come to this court as a branch of the High Court of Justice, and claim by the process peculiar to this division an arrest of the *res*, our statutory remedy for a wrong committed against us in the body of a county. The statutes giving this remedy (3 & 4 Vict. c. 68, s. 6, and 24 Vict, c. 10, s. 7) do not apply to vessels of war, because by international law, well recognised at the time the statutes were passed, they were exempt from civil process, and if exempt by international law, they were so by common law (Stephen's Blackstone, 4th ed. vol. 4. p. 282); but a vessel circumstanced as the *Parlement Belge* is is not so exempt by international law, and the sovereign of a constitutional country cannot *ipso motu* so construct international law as to violate or infringe upon the rights of his subjects at common law. The decision in *The Schooner Exchange* v. *McFadden* (7 Cranch, U. S. Supreme Court Rep. 116) is based on the distinction that that vessel was an "armed" vessel. The doctrine laid down in *The Charkieh* (2 Asp. Mar. Law Cas. 121; L. Rep. 4 A. & E. 59; 28 L. T. Rep. N. S. 513), that the goods of a sovereign engaged in trade are not exempt from proceedings *in rem* is exactly in point. There is a difference recognised by the law of this country between vessels of war and other vessels in the public service:

The Cybele, 3 Asp. Mar. Law Cas. 533; 37 L. T. Rep. N. S. 774, note;
The Helen, 3 C. Rob. 224;
The Bellona, Edw. 63.

If this vessel is not within the exemption allowed to vessels of war, is she exempt on the ground that the property of a sovereign *quâ* sovereign is free from process? In *Morgan* v. *Larivière* (L. Rep. 7 H. L. 423; 32 L. T. Rep. N. S. 41) the Lord Chancellor (Lord Cairns) says: "The court having a trust fund under its control might well proceed to administer that fund, even although a foreign Government might be interested in it, and might not be before the court or subject to the jurisdiction of the court. The constitutional power of the Crown to make treaties is limited to those at the termination of war, and is an incident of the right to declare war and make peace. Any other treaty interfering with private rights is *ultra vires* so far as it infringes upon them. There is no doubt that some treaties, *i.e.*, those of extradition, require confirmation of Parliament before they became operative; and if those affecting the liberty of a subject, why not those affecting what is next in value to him, his property? The Convention, should it be decided that its words deprive a subject of his right of action, deprives him of a valuable right and a valuable property. Her Majesty has authority by Order in Council to allow to foreign ships certain privileges granted to British ships as to measurement for dues; but, inasmuch as the granting of such privileges indirectly affected the rights and privileges of subjects, it was necessary to grant that authority to the Crown by statute, as also in cases of life salvage for foreign ships out of the jurisdiction of this country (25 & 26 Vict. c. 63, ss. 59, 60). Before a treaty could be made with the United States of America, it was necessary to get an Act of Parliament (22 Geo. 3, c. 46) [Sir R. PHILLIMORE.—In that case authority was required to allow the Crown to part with a portion of British territory,] Yes; but as a treaty at the end of war it would appear to come within the general prerogative of the Crown, and therefore that general prerogative is limited to initiating a

treaty, but the treaty itself is only valid when confirmed. The fact that the Conventions as to international copyright have been authorised by Parliament shows that those conventions, unless authorised by the Legislature, would not have been recognised by the courts of law in this country. So in the case of the fishing convention with France (31 & 32 Vict. c. 45, title, ss. 6, 66), the latter section is on a matter almost exactly similar to this Convention in one respect, viz., that under certain circumstances the fishing boats should be exempted from dues, an exemption purporting to be granted by Art. 6 of this convention to these packets. This grant of an exemption is not within the prerogative of the Crown at all. "The King cannot grant an exemption from the jurisdiction of any court if he does not erect another jurisdiction of the like nature, for that would be a failure of justice:"

2 Rol. 281 c. 45;
Comyn's Dig. tit. Prerogative p. 443, D. 33.

A power to grant exemption by treaty cannot be put on a higher footing than a direct grant by the Crown, but the rule of law on that point is that "the King cannot grant to any that he shall not be impleaded, and if he makes such grant it will be void" (Viner's Abridgment, tit. "Prerogative of the King," T. 6): and "if a man is indebted to me, and the King grants to him that I shall not have action against him, it is void:" (Ib. T. 7.) But even assuming the treaty itself not to be *ultra vires*, can the vessel claim an exemption from civil process under it? The meaning of Art. 6 is only that the vessel shall be free from public process, not from private suit; "seizure" is the ordinary word used in policies of insurance, and does not mean seizure by the officer of a court at the suit of an individual, but "seizure" by the Government in case of hostilities, actual or imminent. "Detention" and "embargo" are also well understood expressions relating to the same state of affairs, and "arrêt de prince," an expression which, for want of an exact English equivalent, remains untranslated in the English version of the treaty, is defined by Cussy to be nearly the same thing as "embargo." "*L'arret de prince* ou par ordre de Puissance, autrement dit *l'embargo*, est l'obstacle qu'un souverain apporte au depart de tous ou de quelquesuns de navires qui se trouvent dans les ports de sa domination, sans distinguer s'ils appartiennent à ses sujets ou à des étrangers:" (Cussy, "Phases et Causes Célebres du Droit Maritime des Nations," vol. 1 L. 1, titre 2, s. 49, p. 120.) And again: "*L'arret de prince* peutêtre exécuté *en pleine mer* par les vaisseauz de guerre du souverain qui l'a prononcé; l'arrestation, en pareil cas, d'un navire étranger n'est point une capture semblable à celle qui est faite par des bâtiments armés en course, en temps de guerre; elle n'et pas *hostile*, elle est uniquement comminatoire; mais elle peut, il faut le reconnaitre, de même que l'embargo lui même pratiqué dans les ports conduire à des hostilities:" (Ib. p. 121.) [Sir R. PHILLIMORE.—The special expressions no doubt relate to a state of war, or a state bordering on it, but does that condition limit the general expression "by any authority whatever?"] The general expression can only be taken to mean generally all the causes individually mentioned afterwards, and others of a like nature. Treaties are not drawn with the precision of deeds; they must be interpreted with this consideration in mind, and therefore this treaty, if valid at all, must be considered only as granting such privileges, ceremonial and others, as the Crown can grant, and not as interfering with the private rights of subjects. The grant of the privilege is at all events a conditional grant, and the grantee cannot claim under an instrument at the same time that he has broken the condition of the instrument.

The *Solicitor-General* (Sir H. Giffard), the *Admiralty Advocate* (Dr. Deane, Q.C.), and *Bowen*, for the Crown.

The *Solicitor-General*.—It would probably be sufficient for the Crown to rest entirely in this case on general public grounds, but I will not rely on what is in some respects an artificial hypothesis. These vessels are not ordinary traders; they carry certain continental parcels, but not general merchandise. There is nothing to show that the provisions of Art. 10 have been infringed; the vessels are to be allowed to carry "small parcels, the weight of which shall be limited by mutual agreement between the two offices;" no such mutual agreement has yet been come to, and therefore, pending any regulation being made, the vessels are entitled to carry such parcels as are forwarded by the Continental Daily Parcels Express. Art. 6 grants in the most general way possible all the privileges of vessels of war. The article must be taken in its entirety, and the special provision must not be held to control the general ones. But even supposing there has been a breach of the provisions of Art. 10, the analogy that the plaintiffs would draw between such an infringement of an article of a treaty and of a condition in a contract is incorrect. Even between individuals, it is not every breach of a contract that will vitiate a bargain. Supposing there has been a breach of the treaty of which the Government may complain, how can that affect the rights and liabilities of private individuals? The treaty itself is not void by reason of a breach; it might be voidable by proper notice on the part of the contracting powers; but it cannot, in default of a special provision which does not exist here, become *ipso facto* void. There can be no doubt, as a matter of constitutional law; that the treaty-making power is in the Crown, how far *ipso motu* depends on other considerations. How far a treaty made by the Crown, and without any further confirmation, binds a subject, may be a matter for discussion, but not as to the validity of the treaty itself. The remedy of the subject whose rights are invaded by a treaty may be against the Crown. The Extradition Treaties are not in point; it is necessary to get the sanction of Parliament for them, or else every person sought to be surrendered could take advantage of the Habeas Corpus Act. The position of the court is not altered by the Judicature Acts. The exemption of sovereigns and their property is not the creature of statute law, but is a principle of the common law. The statute of Anne (7 Anne, c. 12) is declaratory of the common law:

Triquet and others v. *Bath*, 1 Taunton 107.

The case of *The Charkieh* (*ubi sup.*) is not in point; the decision there was based on the ground that the Khedive of Egypt was not a sovereign prince, and that therefore his property was not privileged from process. In *The Exchange* (*ubi sup.*),

p. 144, the distinction is clearly marked: "But in all respects different is the situation of a public armed ship. . . . . The implied licence, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign in whose territory she claims the rites of hospitality." There is no right of suit given *ab initio* against the public ships of a foreign country.

The *Admiralty Advocate* (Dr. Deane, Q.C.) on the same side.—The distinction which it is endeavoured to make between armed and unarmed public ships is illusory:

The Prins Frederic, 2 Dods, 451.

A yacht of the sovereign would be unarmed, but it could not be contended that on that account she was not entitled to be treated as a public vessel of war. Art. 6 expressly says that those ships "shall be vessels belonging to Government or freighted by order of Government." They must therefore be public vessels. *The Constitution* (*ubi sup.*) was not armed, but she was held to be a public vessel, and entitled to the immunities of such vessels. [Sir R. PHILLIMORE:—If the Government had power to make this Convention, I have no doubt on the matter. The question appears to me to be whether they had the power.] That is determined by the fundamental laws of the country, which in this country, as in most other monarchies, vest the treaty-making power in the sovereign (Halleck International Law, by Baker, vol. 1, p. 229). On grounds of public convenience the court will not allow the warrant to issue.

C. Bowen on the same side.—There is no precedent in the history of this or any other country for subjecting a vessel specially invited by the Crown into our ports to civil process. A treaty is not a contract, the conditions of which can be subjected to courts of law; the parties to it are beyond the reach of the law. The treaty-making power of the Crown is absolute. The provisions of a treaty, however, may or may not bind the subject; some do so *proprio vigore*, others require the sanction of Parliament; which treaties fall into which category can only be ascertained by examining each class of treaty. The language which is appropriate enough in discussions on municipal law is out of place in questions of international law. A treaty is not void, but at most voidable by reason of a breach:

1 Halleck International Law, 268;
1 Kent's Comm. 175.

Even in municipal law, where the condition of a patent is broken, a third party cannot take advantage of the breach until the patent itself is revoked by the Crown. It is, however, no doubt competent to the court to consider the stipulations of a treaty. But, as a principle of law, applying to the interpretation of Art. 6, acts of state determining the diplomatic status of foreign persons and things are binding on the courts of the country of that state; unless the central authority in the state can authoritatively say what that status is, it must remain wholly undetermined. The Judicature Acts have made no difference in this respect; they, like every other statute, must be read *Salvo jure regis*, and therefore, if it was competent to the crown, before the statute, to make such regulations as this, exempting these vessels from process out of this court, it is still competent to it to do so. The limitation of the prerogative of the Crown, referred to in Viner's Abridgement (*ubi sup.*), relate only to rights of suit already existing; *i.e.*, rights between subjects. The same principle of common law which says that those who commit wrongs, within the jurisdiction, against others shall be subject to punishment says also, that ambassadors and public ships shall not be subject to punishment, and therefore the right of suit is not a common law right against all ships. It is evident that treaties conferring any diplomatic status upon aliens do not require to be confirmed by the Legislature, because the treaties themselves are of record: "All leagues and safe conducts are, or ought to be, of record; that is, they ought to be enrolled in the Chancery, to the end the subject may know who be in amity with the King, and who be not; who be enemies, and can have no action here; and who in league and may have action personal here" (4 Coke Inst. 126, ed. 1809, p. 152); and also that the Crown alone is the competent authority to make such treaties, for, "with regard to foreign concerns, the sovereign is the delegate or representative of his people," for otherwise "foreign potentates . . . . might scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation:" (Stephen's Blackstone, 7 ed. vol. 2, bk. 4, p. 1, ch. 6, p. 490.) No doubt in any country the municipal law may limit this sovereign or supreme executive power, but that has never been done in this country. There is no doubt that the Sovereign of Belgium is recognised as an independent sovereign prince. There can be no doubt as to the status of Belgium and its sovereign, and this recognition is an act of state (Wheaton Inter. Law by Lawrence, 2nd ed. part 1, ch. 2, p. 45), and therefore the court must take judicial notice of this status:

The City of Berne in Switzerland v. *The Bank of England* 9 Ves. 347, and note thereto as to the *soi disant* Columbian Government.
The Columbian Government v. *Rothschild*, 1 Sim. 94;
The United States of America v. *Wagner*, L. Rep. 2 Ch. App. 582; 16 L. T. Rep. N. S. 86;
Cherokee Nation v. *State of Georgia*, 5 Peters (Amer.) Rep. p. 1.

Again, the recognition of the status of belligerents is an act of state:

Wheaton's International Law, by Lawrence, 2 edit. pt. 1, ch. 2, p. 40.

The decisions of the Supreme Court of the United States in prize causes in the late civil war show that a declaration of the President is conclusive on the courts of law there, and also that the Queen's proclamation was an estoppel on British subjects. So also it has been always considered an act of state to decide what articles—*ancipitis usus* — are in time of war contraband. The Declaration of Paris was never submitted to Parliament, it is an act of state. So again a declaration of a blockade and licences to trade with an enemy are acts of state; the status of an ambassador which the Crown allows after receiving his letters of credit addressed to itself is another instance. So the treating of Belgian Government vessels as vessels of war are treated, is an act of state. But apart altogether from the

treaty, as the immunity of an ambassador extends to those of his goods which pertain to his functions, so the immunity of a foreign sovereign extends to his goods, and, with regard to his ships, cannot depend on the accident of their being armed or unarmed. The not carrying of cargo is not a condition precedent to the grant of the privilege, and in these matters there can be no waiver of a right. The privilege is the privilege of Government vessels:

Briggs v. *The Light Boats*, 11 Allen, Mass. Amer. Rep.

Webster, Q.C. in reply.—I do not know if the Crown in this case claims any right of reply over.

The *Solicitor-General* intimated to the court his intention of claiming the privilege of the Crown to reply over.

Webster, Q.C.—The Crown have no right to reply over in this case. The action is not against the Crown; the writ was served on the ship, and the action is against her and her owners. The Crown only intervenes, and should have done so by petition on protest. The Crown, not being a party to the suit, has no special right of reply. [Sir R. PHILLIMORE.—In cases such as these it has always been the practice of this court to allow the Crown to appear and be heard, and to give them all the rights exercised by the Crown in cases where they are parties.] It is the first time that a treaty unconfirmed by Parliament has infringed the liberty of a British subject. As between English subjects and foreign vessels the character of the ship depends on its being armed or not armed. It may be that no right of action exists against an unarmed ship of our own Government on account of different considerations, but the whole reading of the cases shows that the exterritoriality is only accorded to foreign armed ships: (*The Exchange*, *ubi sup.*) The case of *Briggs* v. *The Light Boats* (*ubi sup.*) was one of an American citizen suing the Government vessel of his own nationality, and is therefore not in point. In *The Exchange* (p. 141) it is pointed out by the court that by treaty the ports of all civilized countries are open to the private ships of other countries when driven in by distress; but could it be contended that it was competent to the Government to deprive its subjects of right of action against ships so driven in? And again, the distinction between the private ships or property of a foreign sovereign and the public armed vessels of the nation of which he is the sovereign is drawn (p. 145), in referring to the case of the Spanish war ships arrested by a subject of the States General, for a debt alleged to be due from the King of Spain, and which ships were released either by judicial sentence or authority of the State. [Sir R. PHILLIMORE.—Might not there be a case of a vessel used for purposes of war and yet not armed?] Certainly; but, if she was regularly commissioned as a vessel of war, she would be to all intents and purposes a portion of the military marine of her country, and therefore, by the reasoning of all the cases on that point, as exempt from jurisdiction as if she were armed. But the vessel is not used for war purposes, and is not commissioned as a vessel of war. The mere carrying of a pennon, even by licence of its own Government, is not sufficient to clothe a vessel with the character of a man-of-war. The *Charkieh* (*ubi sup.*) carried the flag and pennant, but was not exempt. It is contended that the Crown has power to make treaties, and it depends on their provisions whether they require confirmation or not; even if that is so, it is plain that the treaty or convention is one of those which do require confirmation. On the face of it it is declared to be a "sequel" to the General Postal Treaty concluded at Berne, and that treaty had to be confirmed by Parliament (38 Vict. c. 22). That statute declares that the Treaty of Berne could not "be carried into effect except by the authority of Parliament," and this Convention contains provisions similar to those of the Treaty of Berne.

The *Solicitor-General* (Sir H. Giffard) replied over on behalf of the Crown.—It is no doubt competent to the courts of law in this country to consider whether the acts of the Crown are *ultra vires* or not. But there is nothing done here beyond the rights of the Crown. The fact of a vessel being armed is only one of several *indicia* of her public character:

Wheaton Internat. Law, by Lawrence, 2nd edit. p. 198.

In commenting on that case of *The Exchange* (*ubi sup.*) in the subsequent case of *The Santissima Trinidad* (7 Wheaton Amer. Rep. 283), Story, J. all along draws the distinction between public and private vessels, not using the word "armed" as a necessary condition for the public vessel claiming exterritoriality. The trading by the *Parlement Belge* is not a private trading by the King of the Belgians for his own benefit, but part of the public national employment of the vessel for the benefit of the state. [Sir R. PHILLIMORE.—It is noticeable that the immunity purporting to be granted by the Convention is only an immunity in port, and not on the high seas.] On the high seas it would not be necessary; for a vessel carrying the flag and pennant of a public vessel would be notice to everyone that she was such a public vessel. The crown has a right to remit port dues because they are originally a portion of the royal revenue, and can be granted to whom it will:

Chitty, Prerogative of the Crown. p. 174.

In none of the treaties to which reference has been made has there been any question of the common law rights of the subject. They conferred rights on certain persons, and therefore required to be incorporated formally in the statute law. Admitting that the Crown cannot grant to a person not to be sued, yet, if the Crown accepts a debtor to a subject as ambassador, the right to sue him for the debt is suspended so long as he remains ambassador. By parity of reasoning the same thing applies to ships. It is a part of the law, independent of any act of state, that an ambassador cannot be sued, and it is part of the law that a public ship cannot be subjected to process. It is for the Crown to say who is or who is not an ambassador, and what is or is not a public ship. [Sir R. PHILLIMORE.—The Convention stipulates for the payment of a certain subsidy; how is the money for that payment obtained?] The money would be voted in the estimates like all other supplies, and so confirmed by Parliament. Moreover, the trading does not preclude the claim of a public character in this vessel, inasmuch as the licence to trade under the treaty is a portion of the pecuniary consideration granted to the Belgian Government for the employment of the ship.

Cur. adv. vult.

March 15.—Sir R. PHILLIMORE.—In this case questions of international and public law of the gravest importance have been raised. The court has to

acknowledge the great assistance which it has derived from the learned and able arguments of counsel, especially valuable in a case which is, I believe, *primæ impressionis*, and which must be decided upon general principles and analogies of law rather than upon any direct precedent.

On the 16th Feb. 1878 the owners of the steam-tug *Daring* served a writ on board the steamship *Parlement Belge* against the owners of that vessel and her freight, in which they claimed the sum of 3,500*l.* for damage arising out of a collision which occurred between that vessel and the steam tug *Daring* on the 14th Feb. 1878 off Dover. The defendants put in no appearance, and took no steps whatever; the plaintiffs have proceeded by default, and taken the usual and proper course, and the case being ripe for judgment, the plaintiffs, on the 25th Jan. in this year, gave notice that, on the 4th Feb., the court would be moved to direct judgment with costs to be entered for them in respect of the damages so claimed, and that the usual order might be made of reference to the registrar and merchants, and that a warrant should issue—the action being *in rem*—against the steamship *Parlement Belge*. Having looked at the papers and pleadings, I perceived that the arrest of the ship and the judgment which were prayed might affect the prerogative of the Crown and its relations with a foreign State; I therefore directed that notice should be given to the law officers in order that they might have an opportunity, if they thought fit, of showing cause against the prayer of the plaintiffs. The Attorney-General has appeared and filed what is called an information and protest, which I will now read. [His Lordship here read the information and protest set out above and proceeded:] I have had the advantage of an argument from the Solicitor-General on the whole case. The protest of the Attorney-General raises a question of constitutional law, and a question of international law, both of great moment, and which I will endeavour to consider separately.

By the protest it is in substance contended that the steamship *Parlement Belge* is not answerable to the process of this court, (1) On the ground that she is the property of the King of the Belgians, and at the time of the collision was controlled and employed by him; (2) That Her Majesty the Queen, by a convention with the King of the Belgians, has placed this packet boat in the category of a public ship of war. I will endeavour to deal with these questions in the order in which I have stated them, though perhaps they cannot be kept quite distinct.

It is expedient to make a preliminary observation which is important in its bearing upon one, if not both, of the questions. The collision in this case took place in Dover Harbour; that is, within the body of a county, and therefore previously to the year 1840 the court would have had no jurisdiction in the matter; but by the joint operation of the statutes 3 & 4 Vict. c. 65, and 24 Vict. c. 10, the court was given a jurisdiction both *in rem* and *in personam* in cases where the collision happened in a harbour, as well as when upon the high seas. It follows, therefore, that the plaintiffs in this suit have a statutable right of action against the *Parlement Belge*, unless that vessel be of that privileged class which are not amenable to a court of law. The burden of proving that she does belong to this class lies upon the defendants, more especially as it appears from the papers before me that she was engaged in carrying on commerce, howsoever limited in its nature, at the time of the collision.

I turn now to the consideration of the first question raised in the protest. I had occasion to consider most, if not all, of the authorities upon the point in the case of *The Charkieh* (2 Asp. Mar. Law Cas. 121; L. Rep. 4 Ad. & Ecc. 59; 28 L. T. Rep. N. S. 513). I desire to state at once that, in my opinion, every public ship of war belonging to a state at amity with Her Majesty is exempt from the jurisdiction of the court. This proposition I maintained in the recent case of *The Constitution* (*ante*, p. 79) and it has been laid down in a variety of cases adjudicated both in our courts and in those of the United States of North America. They will be found collected in *The Charkieh* (*ubi sup.*), and in the case decided in the Supreme Court of Massachusetts (*Briggs and another* v. *Light Boats*, 11 Allen (Mass.) Rep. 180), and it may be considered, notwithstanding certain dicta in the case of *The Prins Frederic* (2 Dod. 464), to be firmly rooted in the jurisprudence of both countries. It has been contended on the part of the Crown, not that the *Parlement Belge* is a ship of war in the general international sense of that word, but that she is a privileged mail packet the property of the crown of Belgium, carrying the Royal pennon and officered by the commissioned officers of the Royal Belgian navy. On the other hand it must be taken that she is not a public armed ship constituting a part of the military force of her nation, nor is she a vessel, so to speak, of pleasure belonging to the Crown, and on that ground perhaps by the comity of nations in the class of privileged ships. In the case of the *Charkieh* (*ubi sup.*) I said: "I am not prepared to deny that the private vessel—for instance, the yacht of the Sultan—though equipped for pleasure, and not for war, would be entitled by international comity operating, at least so long as it is not withdrawn by the State conceding it, as international law, to the same immunity as a ship of war; though dicta to the contrary may be found in the writings of some jurists." Since that time I have not found reason to alter the opinion I then expressed. The especial duty—to borrow the terms of the treaty to which I will presently advert—is the conveyance of the mails. But, though such be the especial duty of the packet, it is by no means its sole occupation. Mr. Gregory has made an affidavit in the following words. [His Lordship here read the affidavit set out above and continued:] The *Parlement Belge*, it would appear, is neither a public ship of war nor a private vessel of pleasure belonging to the Crown of Belgium. Nor is she a public ship sent by the Government on an exploring expedition, like those employed in the Arctic expeditions, all of which ships—belonging to England—were, it should be observed, regularly commissioned as ships of war. She is a packet, conveying certain mails, and carrying on a considerable commerce, officered, as I have said, by Belgian officers, and flying the Belgian pennon. Can such a vessel so employed be entitled to the privileges of a public ship of war?

The analogy between the immunity of the ambassador and the ship of war is obvious. It

has been holden by high authorities, both in this and other countries, that an ambassador may lose his privileges by engaging in commerce. Indeed, Lord Campbell was of opinion that in such a case "all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment:" (*The Magdalena Steam Navigation Company* v. *Martin*, 2 E. & E. 94, 114, cited in *The Charkieh, ubi sup.*) "A distinction," says Story, J., "has been often taken by writers on public law as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious, and public purposes, things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce:" (*United States* v. *Wilder*, 3 Sumner (U.S.) Rep. 308, also cited in *The Charkieh, ubi sup.*) In *The Santissima Trinidad* (7 Wheaton (Amer.) Reps. 283), Story, J. said: "The Commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property"—it was a prize case—"must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations, and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the Government." Looking to the character of the suit, and the other passages in the judgment, it seems to me clear that by the expression "public ship of the Government," he meant a ship of war, and not any vessel employed by the Government. But even if the term could be treated as more comprehensive, and as including public ships such as I have referred to, sent by the Government on exploring expeditions, it would not include vessels engaged in commerce, and whose owner is, to use the expression of Bynkershoek (De Leg. Mercatore, ed. 1730 vol. 6 p. 500) "*strenue mercatorem agens.*"

Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the *Parlement Belge* as belonging to the category of public vessels which are exempt from process of law and all private claims.

I now approach the consideration of the second question, namely, whether the Convention between Her Majesty and the King of the Belgians, ratified 24th March 1876, does so far as this country is concerned, place the *Parlement Belge* while in British ports in the category of a public ship of war and exempt from the process of an English court. I may observe in passing, that the very fact that this packet is in terms given by the Convention the privileges of a ship of war in British ports, and there only, tends to show that she had not such privileges by general international law, and that a convention was deemed necessary to confer them.

It is admitted that this Convention has not been confirmed by any statute, but it has been contended on the part of the Crown, both that it was competent to Her Majesty to make the Convention, and also to put its provisions into operation without the confirmation of them by Parliament. The plaintiffs admit the former, but deny the latter of these propositions. The power of the Crown to make treaties with foreign states is indisputable. Passing by other authorities, I will cite the language of Blackstone, who was not disinclined to maintain the prerogative of the Crown: "It is," he says, "also the King's prerogative to make treaties, leagues, and alliances, with foreign states and princes, for it is by the laws of nations essential to the goodness of a league that it is made by the sovereign power, and that it is binding upon the whole community; and in England the sovereign power, *quod hoc*, is vested in the person of the King. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul; and yet lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was treated before) hath here interposed a check by the means of parliamentary impeachment for the punishment of such ministers as from criminal motives advise or conclude any treaty which shall afterwards be judged to derogate from the honour and interest of the nation:" (Blackstone's Comm., ed. 1844, vol. 1, ch. 8, s. 2, p. 256.) The learned writer, however, was certainly aware that this general proposition must receive some modification and restraint besides that which he has mentioned. Blackstone must have known very well that there was a class of treaties, the provisions of which were inoperative without the confirmation of the Legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, which could be cited, is the Declaration of Paris in 1856, by which the Crown, in the exercise of its prerogative, deprived this country of belligerent rights which very high authorities in the state and in the law had considered to be of vital importance to it. But this Declaration did not affect the private rights of the subject, and the question before me is whether this treaty does affect private rights, and therefore require the sanction of the Legislature? The authority of Chancellor Kent was relied on. That learned writer observes that, "Treaties of peace, when made by the competent power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect and the money cannot be raised but by an Act of the Legislature, the treaty is morally obligatory upon the Legislature to pass the law, and to refuse it would be a breach of public faith:" (Kent's Comm. ed. 12, 1872, vol. 1, p. 166.) And he further observes, "There can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty:" (1b. 167.) He refers to the case of *The United States* v. *The Schooner Peggy* (1 Cranch. Amer. 103), decided by the Supreme American Court. That was a case of prize capture, in which the vessel had been condemned, but subsequently a treaty had been made between France and the United States, by the terms of which the prize among others was restored to its original owners. The Court of Appeal in that case held the treaty to be binding upon it, and indeed said: "That where a treaty is the law of the land and as such

affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an Act of Congress;" (Ib. 110.) But the sentence in the case was founded upon the power of the President with the consent of the Senate to make a treaty affecting the rights of a captor in time of war, and the judgment was given upon that point. The Court said: "It is true that in mere private causes between individuals a court will and ought to struggle hard against a construction which will by a retrospective operation affect the rights of parties; but in great national concerns, where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens it is not for the court, but for the Government, to consider whether it be a case proper for compensation:" (Ib.) The whole sentence is founded upon the right of the American executive with respect to "prize of war." The like question arose in England in the famous case of *The Elsebe*. In that case Lord Stowell said: "Prize is altogether a creature of the Crown, and no man has or can have any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of those acquisitions may be of the utmost importance for the purposes of both war and peace:" (*The Elsebe*, 5 C. Rob. 181). Brougham, L.C., in the case of the booty captured by the army of the Deccan, referred to *The Elsebe* as undoubted law, observing that it was therein determined, "that when the Crown saw fit to restore the capture, the captors who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further costs of proceedings in the Admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy." Lord Brougham goes on to say: "The title of a party claiming prize must needs in all cases be the act of the Crown by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the Crown was minded to part with the property finally and irrevocably; whether, even in that case, the same paramount and transcendent power of the Crown might not enure to the effect of preserving to His Majesty the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this, at all events, is clear, that when the Crown, by an act of grace and bounty, parts, for certain purposes and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the Crown as it was before the act being done:" (*Alexander* v. *Duke of Wellington*, 2 Russ. & Myl. 54.)

The judgment in the case of *The Schooner Peggy* (*ubi sup.*) does not establish the proposition that the Crown can dispose of the rights of a subject without the sanction of Parliament. A treaty may contain provisions which are *ultra vires* of the prerogative, in part valid and operative, and in part invalid and inoperative. A treaty is, indeed, not necessarily void by reason of the infraction of some of its conditions, though it may be voidable; and the validity of it cannot be challenged, speaking generally, by any private person. But a court of justice, when called upon to execute the provisions of a treaty, may, at the instance of the subject who is affected by them, examine whether those provisions are such as to be capable of legal enforcement, just as it may inquire into the validity of letters patent granted by the Crown (*Long* v. *Bishop of Capetown*, 1 Moore P. C. N. S., 411), and also into the validity of an Order in Council duly passed and gazetted: (*Attorney-General* v. *Bishop of Manchester*, L. Rep. 3 Eq. 346.)

There have been, not to go further back than during the reign of her present Majesty, various treaties confirmed by Parliament; and by statute, power has been given to the Crown by Order in Council to do certain things which it must be presumed without such order it could not have done; for instance, 25 & 26 Vict. c. 63 (A.D. 1862), empowers the Crown by Order in Council to make rules and regulations respecting collisions and salvage services relating to the ships of foreign states; 31 and 32 Vict. c. 45 (A.D. 1868), relating to a convention between France and England as to sea fisheries, and reciting that doubts had arisen whether part of the convention relating to exemption from dues had been confirmed by Parliament, proceeded to give such confirmation; 35 & 36 Vict. c. 45 (A.D. 1872), confirms the Treaty of Washington between the United States and England; and, as will presently be seen, the very treaty of which this Belgian treaty is a sequel was confirmed by statute. Some of these treaties confirmed relate to the payment of, and exemption from, dues in harbours. One more, and not an insignificant one, will presently be added; I mention this merely as illustrative of the position that certain treaties do require parliamentary confirmation. I now turn to the provisions of the treaty which have been relied upon in this case. In the preamble it is said that, "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and His Majesty the King of the Belgians, being desirous of strengthening the friendly relations which unite the two countries, and wishing to regulate by special arrangements (forming a sequel to the general Postal Treaty concluded at Berne on the 9th Oct. 1874) the postal regulations between their respective offices, have named as their plenipotentiaries for this purpose" certain distinguished persons whose names are then mentioned. The Treaty of Berne referred to, and to which this Belgian Treaty of 1876 is "to form a sequel," being concluded in the year 1874, was specially confirmed by a statute passed in 1875 (38 & 39 Vict. c. 22), the preamble of which is as follows: "Whereas under the Post Office Duties Act, 1840 to 1871, divers powers are given to the Treasury of fixing by warrant the rates of British, foreign, and colonial postage: and whereas by a treaty made at Berne on the 9th Oct. 1874, and detailed regulations made under it, various stipulations and regulations have been made with respect to the duties

on postage and other matters connected with the exchange by post with foreign countries of letters, post cards, books, newspapers, and other printed papers, patterns of merchandise, and legal and commercial documents, and it goes on as follows: and whereas such treaty and regulations cannot be carried into effect except by the authority of Parliament, and it is expedient to give such authority, and to comprise in one Act the powers of the Treasury in relation to fixing the rates of postage, be it therefore enacted," &c. The statute then proceeds to enact a variety of provisions relating to the duties on postage and the post-office, and provides (sect. 2) for future arrangements with foreign countries with respect to the conveyance of postal packets and payments by the Treasury. This clause may perhaps suffice to render legally operative the clauses in the subsequent Belgian treaty relating to these particular matters. I find in that treaty a variety of enactments relating to the conveyance of mails between Great Britain and Belgium. By Article 10, it is provided that [His Lordship read Article 10 of the treaty (*ubi sup.*) and proceeded:] It is the 6th Article however, which has the most important bearing on this case, and which has been chiefly discussed at the bar; it is as follows [His Lordship read the article (*ubi sup.*), and proceeded:] With respect to the interpretation of the last clause of this article, it was agreed by counsel—and I am of the same opinion—that the words "seizure," "detention," "embargo," or *arrêt de prince*, related to the belligerent rights of the Crown, including the *droit d'angarie*. With respect to the other clauses of the article, I think it cannot be denied that they purport and intend to place this Belgian packet in the category of a ship of war while in a British port. It is remarkable that this privilege—by the words of the article "Privilege"—is not extended to these packets in territorial waters, nor—so far as even British ships are concerned—to the high seas, and does not give them when on the high seas immunity from actions for salvage and collision happening out of a port (*a*), and of course the treaty cannot constitute these packets ships of war in their relation to foreign states.

If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war, then the warrant which is prayed for against her as a wrong-doer on account of the collision cannot issue, and the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of the constitution. Let me consider to what consequences it leads. If the Crown, without the authority of Parliament, may, by process of diplomacy, shelter a foreigner from the action of one of Her Majesty's subjects who had suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors, but I do not think that it has therefore given the Crown authority to clothe with this immunity foreign vessels which are really not vessels of war, or foreign persons who are not really ambassadors.

Let me say one word more in conclusion. Mr. Brown in his very able speech dwelt forcibly upon the wrong which would be done to this packet if, being invited to enter the ports of this country with the privileges of a ship of war, she should find them denied to her. I acknowledge the hardship, but the remedy, in my opinion, is not to be found in depriving the British subject without his consent direct or implied of his right of action against a wrong-doer, but by the agency of diplomacy and proper measures of compensation and arrangement between the Government of Great Britain and Belgium.

I must allow the warrant of arrest to issue.

On the application of *Gorst*, Q.C., for the Crown, a stay of proceedings was granted for a fortnight, in case the Crown decided to appeal, and the question of costs was directed to stand over.

Solicitors for the plaintiff, *Lowless* and *Co.*

Solicitors for the Treasury, *Hare and Fell*, agents.

(*a*) But as the only practical means of enforcing a claim *in rem* for salvage or collision on the high seas is by arrest when the vessel is in port, the treaty gives all the protection which is necessary. The marshal may possibly have power to arrest in territorial waters, but he could not practically keep a ship in such waters, and if he brought her into port she would at once come under the terms of the treaty.—Ed.

March 18 *and April* 7, 1879.

The Maria.

Practice—Discovery—Salvage—Tender and admission of statement of claim—Reply—Amendment.

A plaintiff in a salvage action in the Admiralty Division, in which the defendants admit the allegations in the statement of claim, and tender a sum in satisfaction, is nevertheless entitled to discovery and inspection of documents, but at his own risk and cost if such discovery and inspection should be held at the hearing to have been unnecessary.

Quœre, is a reply necessary in a salvage action where the only defence is admission of the plaintiffs' facts and tender of a sum in satisfaction which is rejected by the plaintiff?

Leave given to reply, and claim amended before reply.

This was an action brought by William Brown and thirty-six others, beachmen of Palling, Norfolk, against the Russian barque *Maria*, to recover salvage reward for services rendered to the *Maria* off the coast of Norfolk.

The action was commenced on the 18th Jan. 1879, and the plaintiffs delivered their statement of claim on the 6th Feb. 1879, and thereupon obtained an order for discovery of defendants' documents. The defendants on the 15th Feb. 1879 filed an affidavit of discovery, disclosing the log of the *Maria*, and the protest of her master and crew, and nothing else. The plaintiffs thereupon on the 19th Feb. 1879 gave notice, under Order XXXI., r. 14, to inspect the said documents. On the 28th Feb. 1879 the defendants delivered their statement of defence, in which they alleged as follows:

The defendants on the 28th Feb. 1879 paid into court and tendered to the plaintiffs for their services the sum

of 250*l.*, and offered to pay the costs; and they submit that such sum was sufficient, and they admit that the statements on the statement of claim are substantially true, and do not put the plaintiffs to proof thereof.

The tender was rejected by the plaintiffs.

On the 8th March the plaintiffs inspected the said log and protest, and then also saw certain surveys which had been held on the *Maria* after the services; these surveys had not been mentioned in any affidavit of discovery; but the defendants refused to allow the plaintiffs to have copies of any of the documents upon the ground that all the facts stated by the plaintiffs in their statement of claim being admitted such copies were unnecessary. The plaintiffs thereupon took out a summons calling upon the defendants to show cause why they should not be allowed to make copies of the log and protest, and why the defendants should not make a further and better affidavit of document.

March 18.—The summons came on for hearing before the Judge in Court.

J. P. Aspinall, for the plaintiffs, contended that the defendants were bound to disclose all documents, and to allow copies thereof to be taken: Order XXI., rr. 12 and 14. The fact of the defendants having admitted the plaintiffs' facts as alleged makes no difference, as upon the documents when disclosed, new facts might be ascertained, which would enable the plaintiffs to amend their statement of claim without leave before reply: (Order XXVI., r. 2.)

E. C. Clarkson for the defendants.—The facts being admitted, there can be no necessity for copies of documents, or for further discovery. The plaintiffs knew their own case, and ought not to be allowed to better it by means of defendants' documents.

J. P. Aspinall in reply.

Sir R. PHILLIMORE.—I must make the order as asked for by the plaintiffs, but it seems to me to be an oppressive proceeding, and I shall direct the defendants to file a further and better affidavit of discovery, and to allow the plaintiffs to take copies and translations of the documents, but at plaintiffs own risk as to costs should such translations and copies be decided at the trial to be unnecessary.

The plaintiffs did not get inspection and copies of any of the said documents under this order until the 19th March, and then not of all mentioned, and were unable to do so until after the time for replying (21st March 1879) had expired. The plaintiffs took out a summons, returnable on the 29th March 1879, before the registrar, for leave to deliver reply, notwithstanding the time had expired. This summons the defendants opposed upon the ground that there was no defence, and hence no reply was necessary, and upon their application, the registrar referred the matter to the judge, and it came on before him in chambers on the 1st April 1879; the judge then gave the plaintiffs leave to join issue, but expressed an opinion that as there had been a rejection of the tender, such joinder of issue was unnecessary.

The plaintiffs thereupon on the 1st April, under Order XXVII., r. 2, delivered an amended statement of claim (before the time limited for reply and before replying), and on the following day delivered their reply, merely joining issue upon the defence.

April 7.—The action came on for hearing, and the judge awarded 400*l.* to the salvors, and costs.

Clarkson, for the defendants, applied for the costs of the discovery after the defendants had admitted their liability and paid into court, pointing out that the amendments on the statement of claim, founded upon such discovery, did not materially strengthen the plaintiffs' case.

J. P. Aspinall, for the plaintiffs, opposed the application upon the ground that as a matter of principle the plaintiffs were entitled to inspection, and it was impossible for them to determine whether an amendment was necessary or not until they had had discovery.

Sir R. PHILLIMORE.—Without laying down any general rule as to the costs of discovery in such cases, I rule that here the discovery was unnecessary, and I give the defendants the costs incidental to all discovery after defence.

Solicitor for the plaintiffs, *H. C. Coote.*

Solicitor for the defendants, *Thos. Cooper* and *Co.*

Feb. 20, 21, *and* 24, 1889.

(Before Sir ROBERT PHILLIMORE and TRINITY MASTERS.)

THE ROBERT DIXON.

Towage — Salvage — Negligence — Damage — Tug and tow.

Where in the performance of towage services the tow gets into a position of danger, to extricate her from which would entitle a stranger to salvage reward, the tug is not entitled to any reward if the situation in which the tow was placed was the result of negligence in the tug, and the tow is entitled to be reimbursed by the tug's owners for loss occasioned to the tow in being extricated from the position of danger.

Where the tug is familiar with the navigation and the tow a foreigner, it is the duty of the tug to tow in a safe direction, without waiting for directions from the vessel in tow.

THIS was an action for salvage, by the owners, master, and crew of the steam tug *Commodore*, of 120 tons burthen and of about 700 horse-power (actual), against the *Robert Dixon*, an American sailing ship of 1368 tons registered, and of the value of about 11,000*l.* The owners of the *Robert Dixon*, by counter-claim, claimed against the *Commodore* for the value of her anchors and cables.

The circumstances of the case as proved by the evidence were, that the *Robert Dixon*, when bound in to Liverpool, had been towed by the *Commodore*, and that it was agreed that the *Commodore* should tow her out again when she left Liverpool.

On the 18th March 1878 the *Robert Dixon* was ready for sea, and some conversation took place between the captain and the master of the *Commodore* as to the advisibility of going to sea on that day on account of the weather; but it was finally arranged that she should go, the master of the *Commodore* supplying the hawser to tow with, and undertaking to tow the vessel to the Skerries. The vessels crossed the bar about 5.30 p.m., when the Liverpool pilot left; he gave a course before leaving of W.N.W.; there was on board, besides the captain and regular officers and crew of the ship, an unlicensed Channel pilot to assist in the navigation of the vessel. The *Commodore* towed

the *Robert Dixon*, it was alleged, too close to the shore for safety, the *Robert Dixon* being in ballast, and sagging to leeward, and it was proved that she passed well inside of a pilot boat (No. 6) off Point Lynas, whilst other vessels in tow passed outside. Some time before midnight, the exact time being in dispute, the wind having then increased to a gale, the tug began to tow further off shore, but the wind being on shore with a heavy sea, at 1 a.m. the hawser parted and the *Robert Dixon* began rapidly to drift towards the shore; the tug was unable to get hold of her again, and it was alleged suffered damage by coming into collision with the *Robert Dixon* during the attempts. The *Robert Dixon* let go her anchor, but, as she still dragged, she let go her second anchor also and paid out a whole cable on each. There was some dispute as to whether she still dragged or not, but at daylight she was within half a mile of the shore at Bull Bay, in Anglesea. During the forenoon the weather moderated, and the *Robert Dixon*, after having refused the services of another tug, the *Rescue*, was taken in tow again by the *Commodore* and proceeded to sea; she had been unable to weigh her anchors, and had therefore slipped both cables. In the statement of defence the defendants denied that any salvage service had been rendered, and paid into court 49*l.* in respect of the towage, that amount having been agreed upon before the services were commenced, and by counter-claim alleged that the loss of the anchors and cables was occasioned by the misconduct and negligence of the plaintiffs in supplying an insufficient hawser and towing an improper course, and claimed the value of them from the plaintiffs.

Butt, Q.C., and *Potter* for the plaintiffs.—The defendants knew what the hawser was before they went to sea; besides it was sufficient for the purpose under ordinary circumstances. The course towed was a proper one—it was, in fact, the course which the Liverpool pilot, on leaving, directed to be steered; when the state of the weather rendered it imprudent to continue on that course, the tug towed her further out to sea. The violence of the weather could not be foreseen. There has been no negligence on the part of the tug; but, from unavoidable circumstances, the towage service became a salvage service, and we are entitled to salvage remuneration for it.

Milward, Q.C., *G. Bruce*, and *F. W. Raikes*, for defendants.—It was imprudent to tow a light ship on such a course with the wind on shore. The plaintiffs knew, or ought to have known, that under such circumstances the vessel would sagg to leeward, and not make good the course steered. The course steered was actually one which, if continued, would not clear the land. The plaintiffs undertook the business of towing with full knowledge of the difficulties, and undertook, in any event, to tow clear of the Skerries. Had they taken proper precautions the hawser would not have carried away; the hawser itself was not fit for the work, and the plaintiffs, knowing what that work was, had undertaken to supply a proper hawser. They ultimately completed the service, and we therefore pay into court the contracted price for the service, but we were put into peril by the misconduct or negligence of the tug, and to get out of it had to slip two anchors and cables. That is the direct result of the plaintiffs' negligence, and therefore we are entitled to receive their value:

The Minnehaha, Lush. 335; 4 L. T. Rep. N. S. 810.

Potter in reply.

Sir R. PHILLIMORE, after consulting the Trinity Masters, said:—There are certain propositions which are agreed upon, or cannot be denied, relative to this case, which it may be convenient to state before I proceed to pronounce upon the merits of the case itself.

This vessel, the *Robert Dixon*, a ship of 1368 tons register, was off Bull Bay, within a quarter of a mile of the shore. There is no doubt, first, that she was in a position of considerable danger, the wind blowing directly upon the shore; and, secondly, that she could only be rescued from that danger by the help of steam power; nor can it be doubted, as matter of law, that had the vessel that came up to her, and whose services were refused, or any other vessel except the *Commodore*, towed her out of her position, that vessel would have been entitled to salvage; and it is not because the *Commodore* did not perform what would have been in its general character salvage service that the objection is taken. It is with reference to the engagement under which she was at the time when this, which otherwise would have been a salvage service, was rendered. The *Commodore* was engaged as a tug to tow this large sailing vessel clear of the Skerries, and she tacitly contracted, of course, to find adequate knowledge and skill for the performance of this service. The vessel, however came into the position of danger which I have mentioned, and the tug now makes a claim in this court in the character of a salvor, because she says that danger was the consequence of supervening circumstances over which she had no control.

There are then two points: first, the parting of the hawser; and, secondly, the coming on of a gale. With regard to the breaking of the hawser, looking to all the circumstances of the case, namely, that it was patent to the captain of the sailing vessel that the hawser was chafed to the extent of three or four fathoms from the end, and that that was the only part of the hawser that was damaged; that his attention having been drawn to it, he refused to allow his own hawser to be used; and that the river pilot saw it, and was of opinion that it was not inadequate; and that it had been used from five p.m. to one a.m.; I do not think, and the Elder Brethren agree with me, that the tug is to blame for having attempted to tow the vessel with an improper hawser. But the more serious question remains, namely, whether the tug, if she was pursuing a proper course, would have been compelled to place the sailing ship in a position of danger. It is important to remember that the weather had been bad for some time; and that at the time when the towing was begun it was seen to be very doubtful. Now, the course that the tug ought to have pursued was a north-west course; the course she said she pursued, in the statement of claim, is this: "The wind was from the northward, a strong breeze, the sea moderate, and the vessel was being towed three-quarter speed, or five to six knots an hour, on a W. by N.½N. course. It appears from the evidence of the master of the tug himself that he

received orders from the pilot to steer a W.N.W. course. The contention is, that, whereas he did steer half a point more to the west according to the statement, and according to the evidence, he steered a course which brought him inside the pilot boat No. 6, he steered this course when to have gone outside the pilot boat would have been a course of, comparatively speaking, perfect safety, and a course that two other vessels of the same kind, and under the same circumstances as the tug, at the same time pursued. Now the master of the tug denies that after the pilot left he received any orders at all, but he says that at eleven o'clock he put the vessel N.W. by W. of his own accord. Unfortunately, it was then too late to regain the ground he had lost, and this necessitated the vessel being placed in a position of considerable danger.

Now, it is a matter very much for the Elder Brethren of the Trinity House to advise the court on a point of this description, as to whether there was a want of commom prudence and skill in going to leeward, the consequence of which was that the ship was taken within a mile and a quarter of the shore; whether it was consistent with common prudence to have taken that course in that state of the weather; and they are clearly of opinion that it was not, that it was an imprudent course to pursue, and the consequence is that the sailing vessel was placed in a position of jeopardy resulting from the imprudence of this navigation. That being their opinion, it is impossible to come to any other conclusion than that the *Commodore* did not act as a salvor, but, on the contrary, is to blame. We are clearly of opinion that, though the master of the tug acted imprudently, he acted in good faith, and we have no reason to believe, nor is it suggested, that he endeavoured to induce the crew to leave the vessel, or that he placed her in a position of danger or in any way intentionally misconducted himself. But he did not give that skill and prudence which he tacitly contracted to give when he engaged to tow the vessel.

It may be as well to refer to the very careful language used by the Privy Council in the case of *The Minnehaha* (4 L. T. Rep. N. S. 810; Lush. 355), which is: "Whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a subject of great doubt, as it is in the present case; but there is one point upon which their Lordships can entertain no doubt, and upon which they are surprised that any doubt should have been thrown at the bar. If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She never can be permitted to profit by her own wrong or default. When it is remembered how much in all cases—how entirely in many cases—the ship in tow is at the mercy of the tug; how easily, with the knowledge which the crews of such boats usually have of the waters on which they ply, they may place a ship in their charge in great real or apparent peril; how difficult of detection such a crime must be, and how strong the temptation to commit it, their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some jealousy."

I am of opinion, after receiving the advice of the Elder Brethren, that this case is brought within the scope of these observations of their Lordships of the Privy Council in the case of *The Minnehaha*, and that the tug did "materially contribute to the danger" and the position in which this vessel was placed.

It remains only to consider the other part—the counter-claim—in this case, namely, certain damage to the vessel by reason of being obliged to slip both her anchors. She claims to be reimbursed for the loss occasioned to her, as she says by the tug; and, inasmuch as I am of opinion that the loss of the anchors and chains was a consequence of the imprudent navigation of the tug, I must refer the matter to the registrar and merchants to ascertain their value, and the amount of the loss which was so caused.

Solicitor for the plaintiff, owner of the *Commodore, Ayrton.*

Solicitors for the defendants, owners of the *Robert Dixon, Neale* and *Philpot.*

March 7, 8, 14, *and* 18, 1879.

(Before Sir R. PHILLIMORE.)

THE HANKOW.

Collision—Damage—Compulsory pilotage—Exemptions—Exceptions from—Port or place to which ship belongs — Particular provisions — Costs— 6 *Geo.* 4, *c.* 125, *preamble, s.* 59 — 17 *&* 18 *Vict. c.* 104, *ss* 353, 370, 376, 379, 388.

The provisions of the Pilotage Act 1825 (6 Geo. 4, c. 125), *as to compulsory pilotage and exemptions therefrom, are preserved by the Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *s.* 353.

A vessel within the limits of her own port at a place where, previous to the passing of the Pilotage Act 1825, *there were provisions in force for the appointment of pilots, is not exempt from compulsory pilotage.*

The provisions of the Trinity House Charter, granted by James II., and of the Acts of Parliament relating to the pilotage of the river Thames and Medway, and the approaches thereto, are "particular provisions" relating to the port of London, within the meaning of sect. 59 *of the Pilotage Act, so far as that port is contained in the pilotage district.* (a)

(a) There may be some doubt as to whether the charter of James II. has really any bearing on the question. The *Hankow* was an inward-bound vessel from Australia, and would therefore in all probability have come by Dover. In that case she would under the original pilotage law (3 Geo. 1, c. 13, s. 1: 7 Geo. 1 stat. 1, c. 21, s. 14; 5 Geo. 2, c. 20, s. 12; 43 Geo, 3, c. 52), have had to employ a Cinque Port pilot, and none other. The reciprocal right of piloting vessels inward by the South Channel was only conferred on the Trinity House of Deptford pilots by 48 Geo. 3, c. 104, s. 2, and was confirmed by 52 Geo. 3, c. 39, s. 2. Therefore the charter of James II., though giving power to the Trinity House of Deptford to appoint pilots for the Thames, could not have affected the case of a ship inward bound having passed Dover. The Cinque Port pilots do not appear to have obtained their right of piloting inwards by charter, as the preambles of the Acts referring to it speak of them as having existed "time out of mind," and having enjoyed the exclusive right. But however long their rights may have existed, those rights seem to

A ship belonging to the port of London, and bound to London from Australia with passengers, is obliged to employ a pilot by compulsion of law, under the provisions of sect. 59 *of the Pilotage Act* 1825 (6 *Geo.* 4, *c.* 125), *when within the limits of the port of London, by reason of there being at that time "particular provisions" for the appointment of pilots for the rivers Thames and Medway below bridge.*

The Stettin (*Br. & Lush.* 199; 6 *L. T. Rep. N. S.* 613; 1 *Mar. L. C. O. S.* 229) *not followed*

The Killarney (*Lush.* 427; 6 *L. T. Rep. N. S.* 908; 1 *Mar. L. C. O. S.* 238) *approved.*

When defendants rely solely on the defence of compulsory pilotage and are successful, they may not get costs if the court is of opinion that under the circumstances the plaintiffs were justified in bringing the action.

THIS was an action for damage by collision brought by the owners of the *Nelson* steam tug against the *Hankow*. The collision happened in the river Thames, above Gravesend, about three p.m. The *Nelson* was engaged in towing a ship called the *Beltana* up to London, and was lashed alongside of her. The *Hankow* (a screw steamer of 2322 tons register) was bound to London from Sydney in New South Wales with a cargo of wool and seventy or eighty passengers. At the time of the collision she had a duly licensed pilot on board and in charge of her.

The action was originally brought in the City of London Court against the owners of the *Hankow* and also against the pilot, and was transferred by the judge of that court on the ground that he could not entertain a suit of that nature against a pilot. At the trial in the Admiralty Division the defendants did not dispute that the ship was to blame but alleged that the pilot was employed by compulsion of law, and that all his orders were obeyed, and that therefore the owners of the *Hankow* were not liable for the damage. At the hearing it appeared that the statement of defence only alleged that the *Hankow* (par. 2) "was in charge of a duly licensed pilot," and (par. 7) that "before and at the time of the collision the *Hankow* was being navigated by the defendant Robert John Oates, a duly licensed pilot, and if and so far as the collision was caused by any negligence of any on board the *Hankow* it was caused by the negligence of the said pilot."

March 7.—*Milward*, Q.C. and Dr. *W. G. F. Phillimore*, for the defendants.—The plea of compulsory pilotage being the only question to be decided, the defendants have the right to begin.

Clarkson.—There is no plea that the pilotage is compulsory; the pleadings only assert that you had a pilot on board, and that he was in charge; they do not say that his employment was compulsory.

Milward, Q.C. asked leave to amend the pleadings so as to raise the issue distinctly.

Sir R. PHILLIMORE,—I shall allow the amendment.

The pleadings were therefore amended by interpolating in paragraph 7 of the defence a statement that the employment of the said pilot was compulsory.

Milward, Q.C.—I have to show, first, that I had a pilot on board; secondly, that I was compelled to employ him; and, thirdly, that his orders were obeyed.

Sir R. PHILLIMORE.—There are two questions to be decided: one of law, whether the pilotage was compulsory; one of fact, whether the pilot's orders were obeyed.

The pilot himself was thereupon called. He stated that he went on board at Gravesend, took charge of the ship, that she was from Australia with passengers, that he was a properly licensed pilot, and that all his orders were obeyed.

Clarkson claimed the right to cross-examine the pilot as to what his orders were. Thereupon other witnesses were called for the plaintiff to show that all the material orders were obeyed. After hearing the evidence and counsel,

March 8.—Sir R. PHILLIMORE.—On the question of fact, I am of opinion that the pilot gave the order to slow the engines; and on the question of nautical science, the Elder Brethren advise me, that whether given or not, or obeyed or not, it could not have contributed to the collision.

Milward, Q.C. then called an official from the Trinity House, who produced a box containing, as he alleged, the original charter granted to the Trinity House by James II.

The argument as to whether the pilotage was compulsory was then postponed, and was argued on March 14th and 18th. The argument turned upon the following enactment:

6 Geo. 4, c. 125 (An Act for the Amendment of the Law respecting Pilots and Pilotage; and also for the better Preservation of Floating Lights, Buoys, and Beacons).

Preamble:

Whereas, ships and vessels have frequently been wrecked, and many lives and much property have been lost from the ignorance and misconduct of persons taking charge of such ships and vessels as pilots; and whereas the master, wardens, and assistants of the guild fraternity, and brotherhood of the Most Glorious and Undivided Trinity, and of St. Clement, in the parish of Deptford Stroud, in the county of Kent, commonly called the "Corporation of Trinity House of Deptford Stroud," have as well by usage for more than three centuries, as by grants from the Crown, been empowered to appoint pilots, loadsmen, or guides, to conduct ships and vessels into and out of and upon the river Thames, through the

have been definitely settled by 3 Geo. 1, c. 13, s. 1, which provided that no person save a duly qualified Cinque Port pilot should pilot a ship "by or from Dover, Deal, or the Isle of Thanet, to any place or places in or upon the rivers Thames or Medway"; and this Act contained no exemption in favour of ships within their own ports. This was apparently the exclusive right of the Cinque Ports pilots. As to all other pilotage in the Thames, provision was made by the charter and Acts applying to the Trinity House. Hence, prior to the 48 Geo. 3, c. 104, there was particular provision made for all the pilotage both up and down the Thames by all channels. The last mentioned Act (sect. 35), and 52 Geo. 3, c. 39 (sect. 59) both contain provisions exempting masters of vessels from employing a pilot "within the limits of the port or place to which his ship belongs;" but they also contain a similar proviso to that in the later Acts by which the exemption does not extend to a "port or place in relation to which provision hath heretofore been made by an Act or Acts of Parliament, or by any charter or charters, for the appointment of pilots." Hence it would seem that either by the Trinity House charter, or by 3 Geo. 1, c. 13, there was, at the time of the passing of the Merchant Shipping Act 1854, particular provision in force for the appointment of pilots to pilot vessels entering the Thames by whatsoever channel, and that there was no exemption even for vessels belonging to the port of London.

The charters of the Trinity House — granted by Henry VIII. and James II.—have been printed and published in a small volume (in the year 1730); but this volume seems difficult to procure. There is a copy of it in Lincoln's-inn Library.—ED.

North Channel, to or by Orfordness, and round the Long Sand Head, or through the Queen's Channel, the South Channel, or other channels, into the Downs, and from or by Orfordness, and up the North Channel, and up the rivers Thames and Medway, and the several creeks and channels belonging to or running into the same, and to make such orders and constitutions as should be needful for the wholesome government of seafaring men, and maintenance and increase of navigation, and of all seafaring men within the said river of Thames; in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purposes before mentioned, and made orders for the better regulation and government of the same: And whereas there has been, time out of mind, and now is, a society or fellowship of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, who have had the pilotage and loadmanage of all ships for the said places up the rivers Thames and Medway, which said society or fellowship have been confirmed by various Acts of Parliament for regulating the pilots of the society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Ports pilots; and whereas, by certain Acts of Parliament, and more particularly by an Act passed in the fifty-second year of the reign of his late Majesty King George III., intituled "An Act for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of England," certain additional powers and authorities were vested as well in the said corporation of Trinity House of Deptford Stroud and the said society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots, as also in the corporation of the Trinity House of the ports of Hull and Newcastle respectively; and whereas a certain other Act of Parliament was passed in the fifty-fifth year of the reign of his late Majesty King George III., intituled "An Act to relieve certain foreign vessels resorting to the Port of London in respect of pilotage, and to regulate the mode of payment of pilotage on foreign vessels in the said port;" and whereas the provision of the several Acts have been found inadequate and insufficient, and it is therefore expedient that the same should be repealed (except as hereinafter provided), and that the several provisions therein contained respecting pilots and pilotage should be improved and amended and consolidated in one law: May it therefore please your Majesty that it may be enacted, and be it enacted, &c. . . . . that the said Act passed, &c., and also the said Act passed, &c. . . . . and all and every the clauses, provisions, powers, penalties, forfeitures, matters, and things relating as well to pilots appointed by the said corporation of Deptford Stroud as to pilots of the fellowship of Dover, Deal, and the Isle of Thanet, and to the pilotage by and regulation of all such pilots as aforesaid, and also as to the conduct of all persons in matters of pilotage within the jurisdiction of the said corporation of Trinity House of Deptford Stroud, and the liberty of the Cinque Ports, which are contained in any Act or Acts of Parliament heretofore made, shall be and the same are hereby repealed; Provided always, that nothing in this Act contained shall extend or be construed to extend to repeal so much of the said Acts passed in the fifty-second and fifth-fifth years of the reign of his late Majesty, or either of them, as relates to any rates of pilotage due or to become due, or to any penalty or forfeiture incurred or to be incurred, or any other act, matter, or thing done or to be done before the commencement of the operation of the provisions of this Act, in relation to any such matter and things as last aforesaid.

Sect. 59:

Masters of certain ships may pilot same as long as not assisted by unlicensed persons.

Provided always, and be it further enacted, that for and notwithstanding anything in the Act contained, the master of any collier, or of any ship or vessel trading to Norway, or the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards for the ports between Boulogne inclusive and the Baltic (all such ships and vessels being British register, and coming up either by the North Channel, but not otherwise), or if any Irish trader, using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone for Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel, when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons then the ordinary crew of the said ship or vessel.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

Compulsory Pilotage (General).

Compulsory pilotage, in what mode to be enforced.

353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force; and every master of any unexempted ship navigating within any such district who, after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose, either himself pilots such ship without possessing a pilotage certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, and every master of any exempted ship navigating within any such district who after a qualified pilot has offered to take charge of such ship or has made a signal for that purpose employs or continues to employ an unqualified pilot to pilot her, shall for every such offence incur a penalty of double the amount of pilotage demandable for the conduct of such ship.

Trinity House to license pilots to act within certain limits.

370. The Trinity House shall continue, after due examination by themselves or their sub-commissioners, to appoint and license under their common seal pilots for the purpose of conducting ships within the limits following or any portion of such limits; (that is to say,)

(1.) "The London District," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas or channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south: so nevertheless that no pilot shall be hereafter licensed to conduct ships both above and below Gravesend.

Compulsory Pilotage (Trinity House).

Penalty on masters of ships employing unlicensed pilots, or acting as pilot.

376. Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London districts, and the Trinity House outport district, as hereinbefore defined; and the master of every ship navigating within any part of such district or districts, who, after a qualified pilot has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a certificate enabling him so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence, in addition to the penalty hereinbefore specified, if the Trinity House certify in writing under their common seal that the prosecutor is to be at liberty to proceed for the recovery of such additional penalty, incur an additional penalty not exceeding five pounds for every fifty tons burden of such ship.

Exemptions from compulsory pilotage.

379. The following ships, when not carrying passengers shall be exempted from compulsory pilotage in the

London district, and in the Trinity House outport districts; (that is to say,)

(1.) Ships employed in the coasting trade of the United Kingdom:

(2.) Ships of not more than sixty tons burden:

(3.) Ships trading to Boulogne or to any place in Europe north of Boulogne:

(4.) Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone being the produce of those islands:

(5.) Ships navigating within the limits of the port to which they belong:

(6.) Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits nor anchoring therein.

Saving of Owner's and Master's Rights.

Limitation of liability of owner where pilotage is compulsory.

388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

Milward, Q.C. (with him Dr. *W. G. F. Phillimore*) and *Verney*.—The pilotage of this vessel at the place in the London district (Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, s. 370) is compulsory (Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, s. 376); she had passengers on board, and therefore cannot claim exemption under sect. 379 of that Act, though she is navigating within the limits of her own port, being above Gravesend, and therefore above Yantlett Creek also:

General Steam Navigation Company v. *British and Colonial Steam Navigation Company*, L. Rep. 4 Ex. 230; L. Rep. 4 Ex. 238; 19 L. T. Rep. N. S. 357; 20 L. T. Rep. N. S. 581.

She is not exempt under sect. 353 of the same Act, for that section preserves only the exceptions existing at the time it was passed; that is, those existing under 6 Geo. 4, c. 125. Sect. 59 of that Act, only excepts ships "whilst within the limits of the port or place to which she belongs" when that port or place is not "a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots." Therefore, if London is a port or place for which previous to that Act particular provision had been made for the appointment of pilots, whether their employment was compulsory or not, this vessel cannot be exempt under that section. I have proved the existence of a charter for the appointment of pilots in that place, and it is recited in the preamble of the Act *(ubi sup.)*, together with previous statutes having reference to it. The decision in *The Stettin* (Br. & Lush. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. C. O. S. 229) was given because this charter and the Act relating to it were not brought to the notice of the learned judge. He is reported in the report of the case in the LAW TIMES Reports to have said: "I am aware of no such Act of Parliament, and no such Act has been mentioned, so I must conclude there is none." I have shown that there was such an Act (59 Geo, 3, c. 39) recited in the preamble to the very Act (6 Geo. 4, c. 125), in which that provision is made, and which was therefore in operation at the time the latter statute was made. When any such particular provision as is required by the statute was brought to the notice of the learned judge, he decided that it was a bar to the exception:

The Killarney, Lush. 427; 6 L. T. Rep. N. S. 908 1 Mar. L. C. O. S. 238.

That case is precisely similar to this, with the exception that the port or place is there Goole, and here London. The other leading cases on the subject of pilotage are not in point, as the exemptions claimed in *The Earl of Auckland* (1 Lush. 164; 3 L. T. Rep. N. S. 786; 1 Mar. L. C. 27, 177); *Reg.* v. *Stainton* (8 E. & B. 445), and *The Moselle* (32 L. T. Rep. N. S. 572), were on the ground that the carriage of passengers (sect. 379 Merchant Shipping Act 1854) did not necessitate the employment of a pilot by a vessel exempted under sect. 59 of 6 Geo. 4, c. 125, by reason of being engaged in a particular trade.

E. C. Clarkson.—The decision in *The Stettin* (*ubi sup.*) was based on sect. 59 of 6 Geo. 4, c. 125, and therefore the statute was before the learned judge; that being so, it was not necessary to give evidence of the charter, as it is recited in the Act. The real ground of the decision in *The Stettin* (*ubi sup.*) was, that though special provisions are made for the appointment of pilots by the Trinity House by the charter, and the employment of such pilots is rendered compulsory by the Act with certain exemptions, the charter and Act only relate to certain districts of which the London district is one, and not to the port of London; therefore this ship is exempt from compulsory pilotage because she is within the port (London) to which she belongs, such not being a port for which any particular provision is made. It is true that there were special provisions at the place where she happened to be, but this place was for pilotage purposes on the river Thames, and the ship cannot be said to belong to the river Thames. *The Killarney* (*ubi sup.*) is decided on the express grounds that the port in which she was, and to which she belonged, was a port for which particular provisions were made. *The Stettin* (*ubi sup.*) was followed by the Lord Chief Baron in the *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* L. Rep. 3 Ex. 330; 19 L. T. Rep. N. S. 357), and there the charter of James II. and the Acts making pilotage compulsory were specially referred to. There was a general provision for pilotage in the river Thames and waters adjacent thereto, but no "particular provision" has been made for the "port" of London to which this vessel belongs; she therefore is exempt from the necessity of carrying a pilot, as being "within the limits of the port or place to which she belongs" sect. 59, 6, Geo. 4, c. 125).

Sir R. PHILLIMORE.—This is a case in which the court, if it had the option, would not choose to decide where the statutes are so very conflicting upon the question; but I have no option of my own.

By sect. 376 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), it is enacted that "subject to any alteration to be made by the Trinity House, and to the exceptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district" . . . . Then sect. 370 of the same Act defines the London district as follows: [His Lordship here read sect. 370 (1) *ubi sup.*] Now it is admitted that the collision took place in

the river Thames above Gravesend. If, therefore, that statute (the Merchant Shipping Act 1854) stood alone, the law would be tolerably clear that as that vessel had passengers on board, and could not therefore take advantage of the exemptions given by sect. 379, a pilot would be compulsorily employed on board her when within these waters. But the question really turns on the construction of the Pilotage Act 1825 (6 Geo. 4, c. 125).

It has been shown to me that there is a charter of the Trinity House, which was in existence prior to the passing of that Act, making provisions for the appointment of pilots at the place where the collision happened. The question is whether that is a "particular provision" to satisfy the requirements of sect. 59 of the statute, qualifying the exemption given to vessels when within the limits of their own port, as this vessel was. I am of opinion that it is.

The point was before my learned predecessor twice, once in the case of *The Killarney* (Lush. 427; 6 L. T. Rep. N. L. 908; I Mar. L. C. O. S. 238), and once in the case of *The Stettin* (Br. & Lush. 199; 6 L. T. Rep. N. S. 613; 1 Mar. L. C. O. S. 229); and what surprises me is, that when the whole of the subject-matter was discussed, no reference to the former case was made in the latter. In *The Killarney* (*ubi sup.*) Dr. Lushington says, speaking of the exemption from compulsory pilotage: "One of these exemptions (the only one at all applicable to this case) is that a master may pilot his own ship whilst the same is within the limits of the port or place to which she belongs. Here the *Killarney* was in Goole, the port to which she belonged, and accordingly this case would appear to be within the exemption, and the pilotage would be voluntary only. But there is an exception to this exemption, for the section goes on to say, 'the same,' that is 'the port or place, not being a port or place in relation to which particular provision has heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots.' The whole case, therefore, comes to this: Had any particular provision been made in relation to Goole before the year 1826 by any Act of Parliament or by any charters for the appointment of pilots? If there had been, the exemption just mentioned did not attach, and the pilotage was compulsory." Then he went on to say that there was an Act of Parliament which brought Goole within the operation of the exception in the statute. So in the case of *The Stettin* (*ubi sup.*) he is reported as saying, in the report of the case in the Mar. Law Cases and LAW TIMES REPORTS: "I am well aware that to put one construction upon the 59th section of the Pilot Act, and another upon the 379th section of the Merchant Shipping Act, tends to create some confusion; but I cannot help myself, for the Legislature has used different expressions, as I think conveying different meanings. Then follow the words, 'the same not being a port or place in relation to which particular provision has heretofore been made by Act of Parliament. . . .' Now, I am aware of no such Act of Parliament, and no such Act has been mentioned, so I must conclude by this there is none. The result is that I must hold that the steamer was exempt from compulsory pilotage." But there is no reference to the charter in that case, and it is more than probable that it never was brought to the judge's attention on that occasion, and it does not appear to have been present to his mind. I feel some difficulty in discovering why the decision in *The Killarney* (*ubi sup.*) is not referred to in the case of *The Stettin* (*ubi sup.*). There is one more case referred to which I ought not to pass by, that is the case of *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company* (*ubi sup.*). I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgments, which are conflicting on almost all points, therefore I must put that case on one side.

Upon the whole, I am of opinion that it is proved in this case that the pilotage was compulsory, the *locus in quo* being a "place" which is excepted from the more general exemption given by the statute. The case is one in which it is very difficult to find one's way with satisfaction; but I shall hold that in this case there was a pilot by compulsion of law.

Milward, Q.C. asked for costs.—We only relied on the pilotage being compulsory, having admitted that the collision was caused by the negligence of the pilot in charge of our ship. We therefore have succeeded on the only issue before the court, and are entitled to our costs:

The Royal Charter, L. Rep. 2 Ad. & E. 362; 3 Mar. Law Cas. O. S. 262.

Sir R. PHILLIMORE.—The question has been one of such complexity, and the opinion which I have formed being contrary to that expressed by my learned predecessor in *The Stettin* (*ubi sup.*), I think the plaintiffs were justified in coming here, and I shall make no order as to costs.

Solicitors for plaintiffs, owners of the *Nelson*, *Lowless* and *Co.*

Solicitors for defendants, owners of the *Hankow*, *Cooper* and *Co.*

April 7 and 8, 1879.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE MARY HOUNSELL.

Damage—Collision—Lights—Infringement—Pilot vessel—Vessel in tow—Regulations for preventing collision at sea—Article 5 and 8—36 & 37 Vict. c. 85, s. 17.

A sailing vessel of any description when in tow is bound to carry at night the two coloured side lights prescribed by Articles 3 and 5. The white masthead light prescribed by Article 8 for sailing pilot vessels is only to be carried by those boats when independent, and not in tow of any other vessel.

A sailing vessel, and, semble, any other vessel, towing another vessel, is responsible for the lights carried by both vessels being in accordance with the regulations, and an infringement by the towed vessel brings the towing vessel within the scope of sect. 17 of the Merchant Shipping Act 1873.

THIS was an action for damages by collision brought by the owners of the British brigantine *Bessie* against the British brigantine *Mary Hounsell*. The owner of the *Mary Hounsell* counter-claimed against the *Bessie* for the damages sustained by their vessel in the same collision.

The *Bessie* was bound from Cardiff to Cadiz with a cargo of coals. The *Mary Hounsell* from Youghal to Llanelly in ballast. The collision

occurred on the 23rd Feb. 1879, off Barry Island, in the Bristol Channel, about 6.45 p.m.

The case for the *Bessie* was that, the wind being N.N.W., and the weather cloudy, but clear, she was sailing close hauled on the starboard tack, heading W. by N., and making four or five knots, and that she had a pilot on board, whose boat was in tow astern of the *Bessie*, and had her own sails set as well; that she observed a red light on her port bow; that as the vessel exhibiting it approached the red light was obscured, and a green light became visible; that the helm of the *Bessie* was ported, and the other vessel hailed to port, but the collision took place, the other vessel, which proved to be the *Mary Hounsell*, with her stem striking the *Bessie* on her port bow with such violence that the *Bessie* soon after sunk.

The lights exhibited by the *Bessie* were the ordinary regulation sailing lights for a vessel under sail (Art. 5), and the pilot boat in tow astern of her had the white light prescribed (Art. 8) for sailing pilot vessels.

The case for the *Mary Hounsell* was that, the wind being N.E. by N., and the weather clear and dark, she was sailing by the wind on the port tack, heading E. by S. half S., making about four knots; that she observed the red and green lights of the *Bessie*, and the white light of the pilot boat about half a point on the starboard bow; that she supposed the lights to be those of a steamer (Art. 3), and held her course, until the *Bessie*, whose red light had been obscured for some time, rendered a collision imminent by porting; that the *Mary Hounsell* then put her helm hard down, but the collision nevertheless happened.

It was proved that the pilot on board the *Bessie* had no certificate as a pilot, and that there was no one on board of or belonging to the pilot boat who had a certificate, that the persons using her were in the habit of piloting vessels in the absence of certificated pilots, and were in the habit of exhibiting the light prescribed for pilot boats (Art. 8). They had not on the occasion of the collision exhibited the flare-up light spoken of in the latter part of Article 8, within fifteen minutes, or at all.

The argument principally turned upon the true direction of the wind, as affecting the question of the credibility of the witnesses on either side as to their vessel being close-hauled, and on the question of lights, as to whether those carried by the *Bessie* and the pilot boat in tow were proper under the circumstances; and if not, whether by the exhibition of them the *Bessie* was to be held to blame for the collision.

The articles and sections of the Act referred to are as follows:

Merchant Shipping Act 1862 (25 & 26 *Vict.* c. 63). Table (C).

Regulations for preventing collisions at sea—Rules concerning lights.

Art. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, and 9, and no others, shall be carried in all weathers, from sunset to sunrise.

Lights with steam ships.

Art. 3. Sea-going steam ships when underweigh shall carry:

(*a*) *At the foremost head*, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b*) *On the starboard side*, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*c*) *On the port side*, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d*) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow.

Light for steam tugs.

Art. 4. Steam ships, when towing other ships, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steam ships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steam ships are required to carry.

Lights for sailing ships.

Art. 5. Sailing ships under weigh, or being towed, shall carry the same lights as steam ships under weigh with the exception of the white mast-head lights, which they shall never carry.

Lights for pilot vessels.

Art. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85, s. 17):

If in any case of collision it is proved to the court before which the case is tried that any of the regulations contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ships by which such regulation has been infringed shall be deemed to be in fault, unless it be shown, to the satisfaction of the court, that the circumstances of the case made departure from the regulation necessary.

Dr. *W. G. F. Phillimore* (with him *Butt*, Q.C.) for the plaintiffs, owners of the *Bessie*.—We were justified in what we did; being on the starboard tack close-hauled we were bound to keep our course, and we did so until by the action of the *Mary Hounsell* a collision became inevitable, when we threw ourselves into the wind, which was the proper course to pursue:

The Mamion, 27 L. T. Rep. N. S. 255; 1 Asp. Mar. L. C. 412.

If the pilot boat exhibited a wrong light we cannot be held to blame under the Merchant Shipping Act 1873, s. 17, for that is a penal enactment and confined to the ship guilty of an infringement of the regulations; it cannot be said that the *Bessie* infringed the regulations. There is no special provision for sailing vessels towing, as there is for steamers under Art. 4; we therefore had only to obey Art. 5, and we have done so. But the pilot boat exhibited her proper light. To make a vessel a pilot boat, it is not necessary to carry licensed pilots: it is enough if those on board of her are and act as pilots (*The Columbus*, 2 Hagg. 178, note), and the fact that at the time of the collision there was no one on board who could

act as pilot, does not alter the case, for the rule as to lights attaches to the character of the vessel, not to the condition in which she may happen to be. This is shown by the article relating to fishing boats lights (Art. 9), where, when the nature of the light to be exhibited depends on the condition of the vessel, it is so stated. "Sailing" in Art. 8 refers only to the character of the vessel as opposed to a steam vessel or a rowing boat, not to the way in which she is progressing, or the fact of her progressing at all; this is shown by the interpretation which has been put on Art. 5 universally, where it has been held that a vessel tripping her anchor, but not yet under weigh, has to carry the lights for a "sailing" ship or a "steamship" as the case may be.

Milward, Q.C. for defendants, owners of the *Mary Hounsell*.—The boat is not a pilot boat at all. If she ever was a pilot boat she was at this time *functus officio*, as she had no professing pilots to give to ships in want of them. But, even assuming that under any circumstances she would be entitled to show the lights of a pilot boat under Article 8, she could not do so when in tow. Article 5 is the article which governs the case; there can be no question but that, whether pilot boat or not, she was a sailing vessel, and as such, and in tow, she is bound by Article 2 to exhibit the side lights prescribed by Articles 3 and 5, and no others; by showing a white mast head light, she has infringed the provisions of all three of those articles, and there can be no question but that that infringement might, as in fact it did, cause or contribute to the collision; the lights shown by these two vessels would resemble those of a steamer, and so induce us to continue our course (Article 18) in the expectation that she would alter hers (Article 15).

Dr. *Phillimore* in reply.

Sir ROBERT PHILLIMORE, after consultation with the Trinity Masters.—I am of opinion that the *Bessie*, with the pilot cutter attached to her by a rope, must be considered in the application of the navigation rules as one vessel; and I am of opinion, and the Elder Brethren agree with me, that the white light which the pilot vessel carried might have been a misleading light. Whether the 5th article or the 8th article applies, it appears to me that either is hostile to the case set up on the part of the *Bessie*. If the 5th article applies—*i.e.*, if the pilot cutter was a ship "under weigh or being towed"—she falls under the express provision of the article, which goes on to say that she "shall never carry" a white mast-head light. But if she falls under the 8th article, that article says, "Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast head, visible all round the horizon," and in my opinion contemplates the case of a pilot vessel, not being towed by another vessel, but in an independent condition, and in that case the light would not be misleading. It appears, therefore, that the cutter was to blame for showing this white light, and the other vessel, the *Bessie*, was to blame for allowing herself to proceed with three lights on or connected with herself, and if so, there was an infringement of the regulations under the Merchant Shipping Act 1862. The 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) enacts that "the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." There are no circumstances in this case that "made a departure from the regulation necessary," and a construction has been put upon these words by the Privy Council, namely, "If by possibility the infringement of the regulation could be contributory to the collision" (*The Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 565; 32 L. T. Rep. N. S. 646), the ship shall be deemed to be in default; I therefore pronounce the *Bessie* in fault for towing the other vessel exhibiting a white light. The next question is this, whether the *Mary Hounsell* is not also to blame? and after conference with the Elder Brethren on this point we are all of opinion that the story told by the *Bessie* is the true story, and that she was heading W. by N., and was close-hauled on the starboard tack, and that the *Mary Hounsell* had the wind free, and ought to have got out of the way, which she did not do. The evidence preponderates greatly in favour of the story of the *Bessie*. I ought to observe that the man at the helm of the *Mary Hounsell*, greatly prevaricated. On the whole the evidence preponderates in favour of the fact that the *Bessie* was close-hauled on the starboard tack, while the *Mary Hounsell* had the wind free; I therefore pronounce the *Mary Hounsell* also to blame. The result will therefore be that the damages will be divided, and no order will be made as to costs.

Solicitors for plaintiffs, owners of the *Bessie*, *Stokes, Saunders*, and *Stokes*.

Solicitors for defendants, owners of the *Mary Hounsell*, *Ingledew, Ince*, and *Greening*, agents for *Ingledew, Ince*, and *Vachell*, Cardiff.

(Before Sir R. PHILLIMORE.)

April 4 and 5, 1879.

MUD HOPPER, No. 4.

Salvage—Damage to salvor—Demurrage.

Where a vessel in rendering salvage service sustains damage without negligence on her part, she is entitled to be repaid for such damage, and for demurrage during repairs by the owners of the vessel salved.

THESE were consolidated actions of salvage brought by the owners of steam tug *Lord Lyon* and the steam tug *Toiler*, to recover salvage reward for services rendered to *Mud Hopper No. 4*, a steam barge, the property of the Mersey Docks and Harbour Board. The *Hopper* was coming out of the Sandon Dock Basin into the Mersey, when she came into collision with a large steamship, the *Neera*, which cut the *Hopper* nearly in two, and the two vessels remained fast together. The two tugs towed the *Hopper* clear, and she, being kept afloat by her water-tight compartments, was, by the tugs, put ashore at Seacombe, on the Mersey, and afterwards taken into the docks and repaired. In rendering the service the *Lord Lyon*, without any negligence on her part, sustained damage; in her statement of claim she claimed 78*l.* for the damage and four days demurrage at the rate of 25*l.* a day. At the hearing the plaintiffs tendered evidence to shew the amount of the damage and the rate of

demurrage; the evidence as to the latter being a letter from the defendants' solicitor admitting that 60*l.* would be a fair amount of demurrage; this latter sum the plaintiffs were willing to accept.

There also was, in another action heard at the same time, a claim by the same tugs against the *Neera* for salvage reward.

Butt, Q.C. (*Gully*, Q.C. and *J. P. Aspinall* with him) objected to the admission of the evidence as to the demurrage on the ground that such evidence was never allowed by the court which gave its award in a lump sum to cover all such claims. The service was rendered without much risk or danger.

Phillimore (*Goldney* with him), for the *Lord Lyon*, contended that demurrage was part of the damages sustained in rendering the service, and was always allowed in such cases.

Milward, Q.C. and *Clarkson* for the *Toiler*.

Myburgh and *Stewart* for the *Neera*.

Sir R. PHILLIMORE.—There is no doubt a salvage service was rendered to both vessels. The contention that the demurrage is not to be allowed to the *Lord Lyon*, I cannot accede to, and I may say at once that the sum—which is not to be included in the amount given as reward for salvage, but is to be considered as paid for repairs and demurrage—amounts to 138*l.* (78*l.* for damage and 60*l.* for demurrage). The vessels whilst fast together were in a position of danger to themselves and to the navigation of the river, but there was no danger to the salvors. I award 560*l.* beyond the 138*l.* above-mentioned, 372*l.* to be paid by the *Neera*, 188*l.* to be paid by the *Hopper*.

Solicitor for the owners of the *Lord Lyon*, *J. W. Carr*.

Solicitors for the owners of the *Toiler*, *Stone*, and *Fletcher*.

Solicitor for the owners of the Mersey Docks and Harbour Board, *A. T. Squarey*.

Solicitors for the owner of the *Neera*, *Field* and *Weightman*.

Tuesday, April 8, 1879.

THE EIDER.

Co-ownership accounts—Settlement of—Not after date of writ—Agent—Right of action—Admiralty Court Act 1861, *s.* 8.

In an action brought by one co-owner of a ship against the other co-owners under the Admiralty Court Act 1861, *sect.* 8, *for a settlement of accounts between the co-owners, the plaintiff is entitled to a settlement of such accounts only as are or ought to be rendered to the co-owners prior to the date of the writ in the action, and cannot recover any sum due upon accounts, which in the due course of the ship's business could not be rendered to the co-owners until after such date.*

Where a ship's accounts are rendered half-yearly, a co-owner is not entitled to recover upon accounts rendered for and at the end of the half-year in which the writ is issued.

When a co-owner acts as ship's agent (not managing owner) for a coasting steamer at one of her ports of call, he cannot in a co-ownership action for the settlement of ship's accounts recover amounts due to him as agent.

THIS was an action brought *in rem*, under the Admiralty Court Act 1861, s. 8, by William Holden, owner of sixteen 64th shares in the steamship *Eider* against that vessel and her other owners to obtain, as appeared by the indorsement on the writ (dated 24th Jan. 1878):—1. An inquiry into the conduct of the managing owner, Henry Ward; 2. An account of the earnings of the ship from the month of May 1871 to the date of writ, and a decree for payment of the amount that should appear due to him; 3. A sale, if necessary, of the shares of certain of the defendants.

In his statement of claim (delivered April 2, 1878) the plaintiff alleged that he had become owner of the said shares in the ship with the knowledge and consent of the defendant Ward upon the terms that he (the plaintiff) was to act as agent for the ship at Hull, between which place and Ipswich she was engaged in trading; and that he was to be paid for his agency at the rate of 5 per cent. on the gross freight inward and outward manifests and of the said vessel, that the plaintiff acted as such agent from Nov. 1875 until Jan. 1877, when he was wrongfully and improperly dismissed by the defendant Henry Ward, and thereby lost his commission; and that the defendant Henry Ward managed the business of the vessel at Ipswich from May 1876 until the commencement of the action, and acted as managing owner thereof, and that it was his duty to render to the plaintiff from time to time true and correct accounts of the earnings and disbursements of the vessel, and of all charges and matters relating to the business of the vessel at Ipswich, and to pay over a proportion of the profits which became due to the plaintiff, but that the defendant Ward did not render true accounts but rendered incorrect accounts, and did not pay over to the plaintiff his share of the profits, and neglected to manage the business of the vessel with due skill, and managed her to his own advantage, and to the plaintiff's disadvantage, and caused her to be employed in a less profitable way than she might have been; and the plaintiff claimed—first, an inquiry into the accounts of the earnings and disbursements of the said vessel from the 19th May to the then present time, and concerning the commission payable to the plaintiff as such agent at Hull as aforesaid; 2nd, an inquiry into the conduct of the defendant, H. Ward, the managing owner, touching the matters alleged as to the employment of the vessel; third, a decree for the payment to the plaintiff of such sums as might be found due to him on a true statement of accounts; fourthly, a decree for such damages as the court might think fit to award in respect of the wrongful acts complained.

Upon this statement of claim being delivered, the defendants took out a summons, to strike out so much of it as related to the claim for wrongful dismissal of the plaintiff from his agency as being embarrassing, and the Registrar on the hearing of the summons struck out all such portions of the statement of claim as related to such agency and the dismissal, on the ground that the court having no jurisdiction *in rem* over a claim for the wrongful dismissal of an agent, the statement of claim was in this respect embarrassing.

The statement of defence thereupon delivered alleged that the accounts of the ship were made up half yearly by the defendant Ward, and that he had duly rendered them to the plaintiff and the other owners within a reasonable time, and that if there had been any delay it had been occasioned

by the plaintiff not sending to the defendant the accounts of the Hull agency for a long and unreasonable time; that nothing was due to the plaintiff as his share of profits of the vessel, but on the accounts the plaintiff owed money to defendant Ward; that the ship's business and employment had been properly managed, and by way of counter-claim the defendant Ward alleged that the plaintiff, as owner of the said shares, was indebted to the said defendant Ward on a balance of co-ownership accounts between them; and the defendant Ward claimed a reference to the registrar and merchants, and judgment for the amount found due with costs. Upon this issue was joined.

On the 26th Oct. 1878 the parties agreed that all questions raised by the pleadings should be referred to the registrar, assisted by merchants, to report thereon, and that as to any question raised by the pleadings which either party was entitled to have tried by the court the action should, after the filing of the said report, proceed in the ordinary manner. An order of reference was made in the terms of this agreement, and the reference was heard on Dec. 16, 1878, Jan. 4 and 11, 1879.

The defendant, Ward, filed no accounts at the reference, alleging that he had rendered to the plaintiff sufficient accounts. The plaintiff filed such co-ownership accounts as had been delivered to him by Ward, including all the half yearly accounts from May 1876 to Dec. 1877, and the account for the half year ending June 30, 1878, and also filed the agency accounts rendered to him by Ward showing the amounts due to him as agent at Hull. At the reference it was contended, on behalf of the plaintiff, that he was entitled to have all accounts investigated up to the date of the hearing of the reference, and, hence, that he was entitled to go into the accounts for the half year ending June 30th, 1878; for the defendants it was objected that no accounts could be investigated to the delivery of which the plaintiff was not entitled prior to the date of the writ, and that the plaintiff could only recover in this action such sums as appeared due upon accounts deliverable before action brought, *i.e.*, before Jan. 24, 1878. The registrar upheld the defendant's objection and declined to investigate the accounts for the half year ending June 30th, 1878.

The plaintiff also claimed at the conference to be entitled to have his Hull agency accounts settled by the registrar and to recover in this action the amount found due to him upon these accounts; the defendants admitted the necessity for the investigation of the agency accounts, the amount due to the plaintiff upon them being a necessary figure for the settlement of the co-ownership accounts, but the defendants disputed the plaintiff's right to recover in this action as agent or in any other way than as a co-owner.

On the 22nd March 1879 the Registrar made his report, and after setting out the facts, said:—"The result of this prolonged investigation, which I think by a little moderation and sound judgment on the part of the plaintiff might easily have been avoided, is as appears by the schedule that there is due from the plaintiff to the defendant on the co-ownership account the sum of 11*l.* 2*s.* 3*d.* The amount due to him as agent, including his commission, is 52*l.* 5*s.*; if, therefore, his share of the loss on the profit and loss account be deducted, the balance due to him as agent will be further reduced to 41*l.* 2*s.* 9*d.* Under the circumstances thereby stated above, as the plaintiff has failed to establish any of the grounds of complaint urged on his behalf against the defendants, I am of opinion that there was no adequate cause for the lengthened inquiry which has taken place before me and the merchant by whom I have been assisted, and that the costs of such inquiry ought to be paid by Mr. Holden, the plaintiff."

On the 26th March 1879 the plaintiff gave notice that he should move the court for an order directing the defendants to pay the costs of the action and reference, and directing the registrar to add to the amount found to be due to the plaintiff the sum of 62*l.* 3*s.* 8*d.* admitted to be due to the plaintiff in the co-ownership account rendered on the 30th June 1878.

On the following day the defendants gave notice that they should move the court to confirm the registrar's report, pronounce judgment in the defendants' favour for the sum of 11*l.* 2*s.* 3*d.*, and condemn the plaintiff therein, and in the costs of the action, reference, and that application.

April 8.—*Gainsford Bruce* for the plaintiff.—Upon the account rendered to June 1878 there is a balance due to the plaintiff on the co-ownership account, which he is entitled to recover. [Sir R. PHILLIMORE.—It became due after the date of writ, and how can you recover it in this action?] By the practice of the Court of Chancery, accounts are always settled up to the date of the chief clerk's certificate (Daniell's Chancery practice, 5th edit p. 1120 *et seq.*) It would be a great hardship to drive the plaintiff to bring another action for this balance. Moreover, the registrar has reported that there is a balance due to the plaintiff on the accounts prior to the date of writ, and on these grounds alone the plaintiff is entitled to his costs of the action and reference.

J. P. Aspinall for the defendants.—The plaintiff can recover in this action only what is due to him on the co-ownership accounts up to the date of writ, and as on these accounts the registrar has reported a balance against him, he cannot recover at all. The agency accounts were only incidentally gone into, and the balance found due upon them cannot be recovered in this action. I ask for judgment on the claim and counter-claim with costs.

Bruce in reply.

Sir R. PHILLIMORE.—In this case the writ appears to have been issued on Jan. 24, 1878, and the registrar by his report appears to have investigated all the co-ownership accounts due and rendered up to that date. Now the registrar has followed the invariable practice by so taking the accounts up to the date of writ and by refusing to take any subsequent accounts. In fact, in all co-ownership actions in this court it has been the practice without exception, as I am informed by the registrar, to lodge accounts up to the date of writ, and the registrar in dealing with them limits the taking of such accounts to the date of writ, so that the plaintiff cannot in any event recover anything which has become due after that date. This being the settled practice of the court, it is not likely to be altered, and I should only depart from it if it was made clear to me that the practice was founded on a wrong principle; but I am of opinion that the practice is not founded on a wrong principle. Counsel for the plaintiff has referred

to the practice of the Court of Chancery, but the Court of Admiralty has always had an independent practice of its own. If I were to hold otherwise it might very well be that in the case of a vessel making weekly or monthly voyages, the accounts would never be finally settled and the registrar might be kept sitting *de die in diem*, and the reference would never come to an end. I shall not alter the practice of the court. The registrar has reported that there is a balance of 11*l.* 2*s.* 3*d.* due to the defendant on the co-ownership accounts, and as these were the only accounts referred to the registrar I shall not disturb his report. The report therefore is confirmed, and I give judgment for the defendants; and with regard to the costs the plaintiff must pay the costs of the action as well as the costs of the reference.

Solicitors for the plaintiff, *Chester* and *Co.*
Solicitor for the defendant, *H. C. Coote.*

April 24, 25, *and May* 20, 1879.

THE CITY OF MANCHESTER.

Practice—Costs—Cargo suing—Both to blame.

Where an action is brought by owners of cargo laden on board one ship against another ship for damages sustained by the cargo through collision between the ship in which it is laden and that other vessel, and both vessels are found to blame for the collision; the plaintiffs will recover their costs as well as half their damages from the ship against which they have brought their action.

On the subject of costs, The Milan (*Lush.* 388; 3 *Mar. Law Cas. O. S.* 185) *confirmed; and* The Hibernia (2 *Asp. Mar. Law Cas.* 454; 31 *L. T. Rep. N. S.* 805) *dissented from.*

THIS WAS a motion in a cause of damage by collision, brought by the owners of cargo laden on board the *Moselle*, against the owners of the *City of Manchester*. The cause was heard on the 24th and 25th April, when, by the judgment, both vessels were found to blame for the collision.

Benjamin, Q.C., *Phillimore* and *Stubbs*, for the plaintiffs, argued that, the action being by owners of cargo only, the Admiralty rule of dividing the damages between the two ships did not apply, and therefore, though admitting that this court would follow the decisions in *The Milan* (3 Mar. Law Cas. O. S. 185; Lush 388) and other cases, yet formally asked for judgment against the *City of Manchester* for the whole amount, so as to give an opportunity for taking the case to the House of Lords.

Butt, Q.C. and *Clarkson* for the defendants.—The court will follow the decision of Dr. Lushington and the Privy Council.

Sir R. PHILLIMORE.—I shall make the decree in accordance with the precedents in this court and the Privy Council both as to damages and costs.

May 20.—Dr. *W. G. F. Phillimore* moved that the court would condemn the *City of Manchester* in the costs. He argued that, however the appeal as to the amount of the damages was decided, whether *The Milan* (3 Mar. Law. Cas. O. S. 185; Lush. 388) and other cases following it was overruled or not, the plaintiffs were, at all events, entitled to costs. It does not appear that there is any settled practice where the action is by owners of cargoes and not of ships, and the judgment declares that both ships are to blame. But the owners of cargo ought to get their costs; the cargo is at all events innocent, and they substantially succeed in their action, and are therefore entitled to their costs: (Order LV.) The question has in reality never been argued. [Sir R. PHILLIMORE.—I am informed by the registrar that he has examined the records of the court, and finds that in *The Milan* (Lush. 388) costs were given, but not in the subsequent cases of *The Hibernia* (3 Asp. Mar. Law Cas. 454; 31 L. T. Rep. N. S. 805) and *The Malta* (not reported).] That is to say, that there is no uniform practice; but for the future one uniform rule as to costs is to apply to all divisions of the High Court: (*The Condor*, see *post*; 40 L. T. Rep. N.S. 442.) If the defendants had admitted their partial liability, but claimed a contribution as to half the damages from the owners of the *Moselle*, they might claim to have won in the issue, which would then have had to be tried between them and the owners of the *Moselle*; but we claim for damages occasioned to us by their negligence, and we have got damages, though not all we claimed. The case is different from that of an action by the owners of one ship against the owners of another, when both are found to blame, for then, after the damages of each are assessed in the registry, it may be found that the half of the defendant's damages, which the plaintiff has to pay, exceed in amount the half of the plaintiff's to be paid by the defendant, and that, therefore, in the result the defendant recovers on the balance, and therefore, whilst it is still uncertain which side in the result will have to pay, it is not inequitable that each should pay their own costs. Besides, both are wrong doers, and therefore disentitled to costs. But the case is not so with plaintiffs, who are owners of cargo; they are not to blame, and must, however the damages are assessed, pay nothing to, but recover half their total amount of damages from, the wrong-doing ship, against which they have brought their action.

E. C. Clarkson.—The Condor (see *post*; 40 L. T. Rep. N. S. 442) is not meant to govern the discretion of the courts below, it only applies to the costs of appeals. *The Milan* (Lush. 388) was never argued as to the question of costs, therefore a decision given *sub silentio* cannot guide the practice of the court. [Sir R. PHILLIMORE.—I decided *The Malta* (not reported) as following *The Hibermia* (31 L. T. Rep. N. S. 805), but it appears from the report, when my attention is directed to it, that the question was not argued in that case either.] It cannot be said that the cargo is in the technical sense not to blame; it is identified with the ship on board which it is carried, at least as much as a passenger on an omnibus with the omnibus. Yet in such a case at common law the passenger was held to be so far identified as to be unable to recover from another omnibus for damage sustained in a collision between them, and for which both drivers were to blame (*Thorogood* v. *Bryan*, 8 C. B. 115; 18 L.J. 836, C.P.), and therefore he certainly would not get his costs, and there is no reason why, because the peculiar practice of the Admiralty Court gives him half his damages, to which he would not before the Judicature Act (36 & 37 Vict. c. 66, s. 25, sub-sect. 9) have been entitled in any other court, that practice should still further ameliorate his condition by giving him his costs. The principle of *Thorogood* v. *Bryan* has been lately approved

in *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (L. Rep. 10 Ex. 47; 33 L. T. Rep. N. S. 228.) [Sir R. Phillimore.—In those cases it is decided that the plaintiff recovers nothing, therefore he gets no costs; here he recovers half from the defendants in this action, and the other half from the owners of the ship in which his cargo was carried.] That would depend on the terms of the contract of carriage in the charter-party and bill of lading. It is not possible to distinguish the case of the cargo from that of the ship in which it is laden, and if the ship were plaintiff in this action she could not recover costs; it is inequitable that she should be enabled to do so by setting up the owners of cargoes to fight the battle for her. The plaintiffs have sought to prove defendants wholly to blame for this collision, and they have failed; that was the issue they set up, and they have only proved half of it, and therefore are not entitled to costs.

Sir R. Phillimore. — There is considerable obscurity in the question, owing to the diverse decisions both in this court and in the Privy Council; but, on consideration, I think the decision in *The Milan* (Lush. 388) the most consistent with justice to the parties, and I shall follow it, and the plaintiff will be entitled to his costs of action.

Stokes, Saunders and *Stokes*, plaintiffs' solicitors; *Gellatly, Son*, and *Walton*, defendants' solicitors.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. Roche, J. P. Aspinall, and F. W. Raikes, Esqs., Barristers-at-Law.

Nov. 6, 1878, *and March* 22, 1879.

(Before Baggallay, Brett, and Cotton, L.JJ.)

Chapman *v.* Royal Netherlands Steam Navigation Company.

Steamship — Collision — Limitation of liability— Both vessels to blame—Merchant Shipping Act 1854, *s.* 514—*Merchant Shipping Act Amendment Act* 1862, *s.* 54.

Plaintiff was owner of the steamship S., the defendants were owners of the steamship V. and of her cargo. A collision had occurred between the two vessels, whereby the V. had been lost with her cargo. The S. was also damaged. In an action in the Admiralty Division, both vessels had been found to blame, and the ordinary Admiralty rule where both vessels were to blame was ordered to apply, namely, that each was to pay half the damage to the other. The owner of the S. then took proceedings in the Chancery Division to obtain the benefit of the provision of the Merchant Shipping Act, which enables shipowners to limit their liability to a sum equal to 8*l. per ton of the tonnage of their ship. The loss on the V. and her cargo was about* 28,000*l., and the limit of liability at* 8*l. per ton of the S. would be only* 5200*l. The loss on the S. was about* 4000*l. The owner of the S., while claiming to limit his own liability to* 8*l. per ton, claimed nevertheless to recover half the damage sustained by his own vessel against the owners of the V., which would make him liable for a balance of about* 3200*l. The owners of the V. on the other hand claimed to have the two sets of damages first assessed, and the S.'s half damage deducted from the V.'s half damage, and then contended that the owners of the V. should prove against the S. for the balance to the extent of* 8*l. per ton, which would make the plaintiff liable to the full limit of his liability, namely* 5200*l.*

Held, by Baggallay and Cotton, L.JJ. (reversing the decision of Jessel, M.R.), Brett, L.J. dissenting, that on the true construction of the 54*th section of the Merchant Shipping (Amendment) Act* 1862, *there could be no set-off under the circumstances, that the principle advocated by the plaintiff was the correct one, and that the proof must be for the whole moiety of the damage ascertained to have been sustained by each ship.*

This was an appeal by the plaintiff from a decision of the Master of the Rolls in a suit for the limitation of the liability of shipowners in a case of collision, the crews of both vessels having been to blame.

The plaintiff was the owner of the steamship *Savernake*; the defendants, the Royal Netherlands Steam Navigation Company, were the owners of the steamship *Vesuvius*, and the owners of her cargo.

On the 7th April 1876 a collision had occurred between the two vessels, whereby the *Vesuvius* had been sunk, and was lost, with her cargo. The *Savernake* was also damaged.

On the 22nd April an action for damages was commenced in the Admiralty Division by the owners of the *Vesuvius* against the owners of the *Savernake*, who defended the action, and put in a counter-claim against the *Vesuvius*.

The action was tried on the 24th July 1876, before the judge of the Admiralty Division, who held both vessels to blame, and the ordinary Admiralty rule where both vessels were to blame was ordered to apply, namely, that each was to pay half the damage to the other.

The owner of the *Savernake* thereupon commenced the present action in the Chancery Division to obtain the benefit of the provision of the Merchant Shipping Act Amendment Act 1862, s. 54, which enables shipowners (where there is no loss of life) to limit their liability to a sum equal to 8*l.* per ton of the tonnage of their ship. He claimed a declaration that he was only answerable in damages in respect of loss and damage to the owners of the *Vesuvius* and her freight, the goods, effects, and merchandise, and other things, on board the said ship, to an aggregate amount not exceeding 5064*l.*, being the amount of 8*l.* per ton on the gross registered tonnage of the *Savernake*, and for relief consequent on such declaration. The loss on the *Vesuvius* and her cargo was about 28,000*l.* and the limit of liability at 8*l.* per ton of the *Savernake* would be only 5200*l.* The loss on the *Savernake* was about 4000*l.* The present plaintiff, the owner of the *Savernake*, while claiming to limit his own liability to 8*l.* per ton, claimed, nevertheless, to recover half the damage sustained by his own ship against the owners of the *Vesuvius*, which would make him liable for a balance of about 3200*l.*

The owners of the *Vesuvius*, on the other hand, claimed to have the two sets of damages first as-

sessed, and the *Savernake's* half damage deducted from the *Vesuvius's* half damage, and then contended that the owners of the *Vesuvius* should prove against the *Savernake* for the balance to the extent of 8*l.* per ton, which would make the plaintiff liable to the full limit of his liability, namely, 5200*l.*

On the 7th Aug. 1878 the case came before the Master of the Rolls, when he gave the following judgment, deciding in favour of the defendants, the owners of the *Vesuvius*.

Jessel, M.R.—I will first of all give my view of what the meaning of the thing is, and then I will see how far that view is consistent with the well-known forms of precedents.

When two ships come into collision and both are in fault, one or the other can recover damages, and only one of the two, because the result of the action is that either the plaintiff or the defendant is to win something. That is the meaning of it. The consequence of the collision is, that damage being done to one or both vessels, the owner of one vessel can recover something from the other. The Admiralty rule in such a case is to take the amount of the damage done to each vessel, to add the amounts together, and to halve them, so that each owner is *inter se* to bear half, and then to ascertain who is to pay to the other, and the monition finally issues for the balance.

That is all that is ever recovered in the action. Now let us look at what the statute provides: "Where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods," &c., the owners are not "answerable in damages" beyond a certain amount. What were they then answerable for before the Judicature Act passed? They were answerable for the balance. The other side could not have got from the Admiralty judge a monition for more than the balance. Since the passing of the Judicature Act is there any distinction? If there is, it is entirely in favour of the same view, because since then these things are no longer raised by cross-causes but by counter-claims. It is a mere question of procedure. What is to be done on that judgment? What is the duty of the judge? I think it is plain that that which was formerly called "set-off" is now a matter of right and duty, a right in the first party to pay and a duty in the judge to grant. That is perfectly clear when you look at the Act of Parliament, which is for the purpose of enabling the court to do complete justice. Is it complete justice to make one side pay and leave the other side without paying? The 24th section of the Judicature Act 1873, sub-sect. 3, says: "The said courts respectively and every judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." Nothing can be wider. "All such relief" shows it may be in diminution of the plaintiff's claim, or it may be in excess of the plaintiff's claim, but although it is no longer to be a cross-action, the judge is to do complete justice between the parties. The 3rd rule of Order XIX. says: "A defendant in an action may set off or set up, by way of counter-claim against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not; and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim." And Order XXII., r. 10, says: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." Now, I am asked to make that word "relief" mean "where he wins altogether," but I decline to accept such interpretation. It may be in diminution of the plaintiff's claim, as it is in the 3rd sub-section of the 24th section of the Act of 1873. The result therefore is this, that where it says, "the court may adjudge," it means "the court shall," and consequently where the question in the action is, who is to pay damages on account of the collision, the court is bound to see who is to pay on the balance, and to order for it. Therefore the result under the Judicature Act is the same as the practical result was before the Judicature Act, by reason of the judge only issuing the monition for the balance. The total result therefore, is this, that the mode of calculating the damages is what I have stated, but the damages are calculated as the damages arising from the collision, payable by one party to the other, which is the balance in case both vessels are damaged.

Of course, in the case of only one vessel being damaged, there is only one payment in respect of that one vessel. That, I think, is the fair view of the Act of Parliament—not two losses, not two independent actions, and two separate independent rights, but the loss arising from the collision; and if you look at the Act you will find that there is nothing said about the person entitled to recover. It is only a limitation of the amount that the owner of the vessel is liable to pay. It appears to me a fallacy to say that the owner of that vessel is entitled to recover from the owner of the other; on the contrary, he is liable to pay the balance and not entitled to recover. Although, by reason of some defective procedure, you may have a difficulty in making your demand effectual, it appears to me that is the substance of the matter, and all the rest is mere form. That being so, it seems to me, as between the owners of the two vessels, the amount payable as damages to the owners of the *Savernake* is the difference or balance of the two moieties ascertained in the way I have indicated. So far as they are concerned they have a right to prove, and, as I have already said, it does not make the owner of the *Savernake* liable to pay beyond the 8*l.* per ton, nor was it intended that he should pay more. Now, as regards the intention of the Legislature, I think it is plain. Originally it was the value of the vessel, but there was inconvenience about that, and instead, this tonnage value was substituted; the theory being that, when the owner of the vessel gave up all he was entitled to, he should not pay more. That was the theory of the

Legislature, and when you look at it in that light, it is quite clear he is not to be in a position to receive compensation for damage to his vessel, and at the same time not to pay compensation for damage done to the vessel of the other people. Clearly he is to get no profit, and he is to give up his vessel and freight, and that will be the result, according to the decision at which I have arrived.

The plaintiff appealed, on the ground that, according to the true construction of sect. 54 of the Merchant Shipping Amendment Act 1862, the defendants should prove for a moiety, when ascertained, of the amount of damage sustained by the *Vesuvius*, without deducting a moiety of the amount of damage sustained by the *Savernake*.

The material facts and the nature and effect of the arguments are fully set out in the written judgments of their Lordships.

Davey, Q.C., *Webster*, Q.C., and *Clarkson*, for the appellant, cited

The North American, 1 Lush. 79; 5 Jur. N. S. 659;
The Singapore, L. Rep. 1 P. C. 378;
The Milan, 5 L. T. Rep. N. S. 590; 1 Lush. 388; 3 Mar. Law Cas. O. S. 185;
The Saracen, 6 Moore P. C. C. 75;
Wahlberg v. *Young*, 4 Asp. Mar. Law Cas. 27 n.; 45 L. J. 783, P. C.;
The West Friesland, Swab. 456;
The Aurora, 1 Lush. 327;
Pritchard's Digest, 591, 594 (2nd);
Merchant Shipping Act, 1854, s. 514;
Merchant Shipping Act Amendment Act 1862, s. 54.

Holl, Q.C., and *W. Phillimore*, for the owners of the *Vesuvius*, referred to

The Seringapatam, 2 W. Rob. 39;
Devaux v. *Salvador*, 4 Ad. & Ell. 531;
General Steam Navigation Company v. *London and Edinburgh Shipping Company*, 3 Asp. Mar. Law Cas. 454; 36 L. T. Rep. N. S. 743; L. Rep. 3 Ex. Div. 467.

Baggallay, L.J.—The question involved in this appeal has arisen under the following circumstances:—On the 7th April, 1876, a collision took place between the steamship *Savernake* belonging to the plaintiffs, and the steamship *Vesuvius* belonging to the defendants. On the 22nd of the same month an action for damages was commenced in the Admiralty Division by the owners of the *Vesuvius* against the *Savernake* and her owners: the owners of the *Savernake* defended the action, and put in a counter-claim against the owners of the *Vesuvius*. The action was tried on the 24th July 1876, before the judge of the Admiralty Division, who held both vessels to blame, and condemned the owners of each in a moiety of the losses and damages sustained by the other; and it was referred to the registrar of the Admiralty Division, assisted by merchants, to assess the amount of such damages respectively. The owners of the *Savernake* thereupon availed themselves of the provisions of the Merchant Shipping Acts, and commenced the present action in the Chancery Division, claiming a declaration that they were not answerable in damages in respect of loss and damage to the *Vesuvius* and her freight, the goods, effects and merchandise, and other things on board the said ship, to an aggregate amount exceeding the sum of 5064*l*., being the amount of 8*l*. per ton on the gross registered tonnage of the *Savernake*, and for relief consequent on such declaration. The defendants to the limitation action were the Steam Navigation Company and the owners of a portion of the cargo which was on board the *Vesuvius* at the time of the collision. By an order of the Master of the Rolls leave was given to the plaintiffs to pay into court to the credit of the action the sum of 5212*l*. 3*s*. 5*d*., being the amount of the aforesaid sum of 5064*l*. together with interest thereon at 4 per cent. per annum from the time of the collision; and on 20th Dec. 1876, 5212*l*. 3*s*. 5*d*. was paid into court pursuant to such order. By the same order the defendants, the owners of the *Vesuvius*, and the defendants, owners of the cargo, were restrained from further prosecuting the proceedings commenced by them in the Admiralty Division against the owners of the *Savernake*, in respect of the collision, until judgment in the present action or further order, without prejudice to the continuance of the proceedings in the said division in respect of the counter-claim of the *Savernake*. On the 25th June 1877 judgment was given by the Master of the Rolls in the limitation action, and a declaration of limitation of the liability of the owners of the *Savernake* as claimed by them was made, and inquiries were directed for the purpose of ascertaining who were the persons entitled to the fund so paid into court and its accumulations, and in what proportions it ought to be distributed among the persons who should be found entitled; and the injunction awarded by the order of the 9th Dec. 1876 was continued until further order against the defendants, the Steam Navigation Company. It appears that the effect of the proceedings in the present action is to leave the damages in which the owners of the two ships have been respectively condemned to be assessed by the registrar and merchants under the order of the Admiralty Division of the 24th July 1876. In the course of the prosecution of the inquiries so directed by the Master of the Rolls, the defendants, the Steam Navigation Company, as owners of the *Vesuvius*, claimed to prove for the full amount of the losses and damage sustained by them by reason of the collision, or, in the alternative, to prove for one moiety of such losses and damage, less the moiety of such damage as should be found to be payable by them to the plaintiff in respect of the losses and damage sustained by the plaintiff, and to be paid *pro ratâ* with the other claimants out of the fund in court in respect of the amount for which they should be held entitled to prove. On the 7th Aug. 1878, the claims so asserted by the defendants, together with certain other questions which had arisen in the course of the proceedings, were brought under the consideration of the Master of the Rolls, upon an agreed statement of facts: the first of the alternative claims of the company does not appear to have been pressed, at any rate it has not been supported in argument before us, and it is clearly untenable; the second was opposed by the plaintiff, who insisted that the company ought to prove for a moiety, when ascertained, of the amount of damage sustained by the *Vesuvius*,, without deducting a moiety of the amount of damage sustained by the *Savernake*. If this contention of the plaintiff were to prevail it would leave him in a position to assert his claim against the owners of the *Vesuvius* for the amount, when ascertained, in which such owners have been condemned in respect of the damage occasioned by the *Savernake* by the improper navigation of the *Vesuvius*. The Master of

the Rolls decided in favour of the second of the alternative claims of the company, and from that decision the present appeal is brought. The owners of the *Vesuvius* have not asserted any claim to a limitation of their liability.

The question involved in the appeal is one of considerable importance, not only to the parties interested in the present action, but also as affecting the principle upon which the liabilities of shipowners are to be measured in cases where both ships are held to blame in respect of a collision, and the owners of one or both claim a limitation of liability under the provisions of the Merchant Shipping Acts. If the contention of the respondents is well founded, the plaintiff, as owner of the *Savernake*, instead of having his liability limited to 8*l.* per ton upon the registered tonnage of his ship, will also lose the amount in which the owners of the *Vesuvius* have been condemned, and will be in exactly the same position, as regards the amount of loss he will have to bear, as he would have been in had he been held alone to blame, that is to say, he will have to pay the 8*l.* per ton, and bear the loss of all the damage done to his own ship. The owners of the *Vesuvius*, on the other hand, by reason of their escaping the payment of the amount in which they have been condemned by deducting it from the amount in which the owner of the *Savernake* has been condemned, and proving for the balance only, will obtain payment in full of so much of the amount in which the owner of the *Savernake* has been condemned as is equal to the amount in which they have themselves been condemned. The claimants in respect of cargo, &c., are also benefited by the decision of the Master of the Rolls, inasmuch as the proportionate parts of the fund paid into court, to which they are entitled, will be increased in amount by the reduction of the proof of the owners of the *Vesuvius*, and we consequently find them siding with the company in opposing the appeal.

Now it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with the true construction of the Merchant Shipping Acts; but, if such be their true construction, we are bound to adopt and act upon it, however inequitable, in our opinion, the result may be. The question, therefore, for present consideration is, whether the true construction of the Acts is that which the Master of the Rolls has adopted. With all respect for that learned judge, and for Lord Justice Brett, who is of opinion that the appeal should be dismissed, I think that the view contended for by the plaintiff is more in accordance with the true construction of the Merchant Shipping Act 1862, upon which, as it seems to me, the whole question turns.

The 54th section of that Act, so far as it is applicable to the case we are now considering, may be stated in the following terms: "Where by reason of the improper navigation of any ship, but without the actual fault or privity of its owners, loss or damage is caused to any other ship, or to any goods on board such other ship, the owners of such first-mentioned ship shall not be answerable in damages, in respect of such loss or damage, to an aggregate amount exceeding 8*l.* per ton of their own ship tonnage." The aggregate, which is limited to 8*l.* per ton, is made up of (1) damages in respect of the loss or damage to the other ship, and (2) damages in respect of the loss or damage to the goods on board such other ship; but, as regards both classes of damages, they are to be in respect of loss or damage occasioned by the improper navigation of the ship, whose owners claim the benefit of limited liability. What then are the damages to which the owners of the *Vesuvius* would be entitled in respect of the loss or damage occasioned to that ship by the improper navigation of the *Savernake*, if no claim to limited liability had been made by the owner of the *Savernake*? It appears to me that the damages to which, upon this hypothesis, the owners of the *Vesuvius* would be entitled would be a moiety of their claim in the Admiralty action, as assessed under the order of the 24th July 1876, or under any substituted jurisdiction. It may be, and probably is, quite true, that after the assessment of the amounts in which the owners of the two ships were respectfully condemned, the Admiralty Division would order the owner of the *Savernake*, which had admittedly sustained less damage than the *Vesuvius*, to pay to the owners of the *Vesuvius* the difference between the amounts of the two assessments, but that would be mere procedure, adopted for convenience only, and to avoid the circuitous course of reciprocal payments; the amount of damage occasioned to each ship by the improper navigation of the other could not be altered by the order for payment of the balance by the one condemned in the larger amount. And it is in respect of the damage occasioned to one ship by the improper navigation of the other, as such damage could be ascertained independently of the provisions of the Merchant Shipping Acts, that limited liability is given by those Acts, and not in respect of the ultimate balance which, under the procedure of any court having jurisdiction, may be payable in the final winding-up of all matters of account arising out of the collision. But our attention has been directed, in the course of the argument, to the practice of the Court of Admiralty as constituted previously to the passing of the Judicature Acts, of setting off, as it were, in cases of collision in which both ships were held to blame, the amounts in which owners of the ships were respectively condemned, and of issuing a monition for payment of the balance by the owners of the ship condemned in the larger amount; and it has been contended on behalf of the respondents that such balance, being the amount which would have been so ultimately recovered by the owners of the ship that had sustained the greater amount of damage, should be treated as the amount of damages provable by them in a limitation suit. It is immaterial, in my opinion, to consider the various steps in the proceedings in the Admiralty Court which would have preceded the issuing of a monition for the payment of a balance under such circumstances as have been referred to in argument, though cases have been cited on the subject by the one side and the other. I will assume, for the purpose of the few remaining observations which I have to make, that the practice was as it has been represented by the counsel for the respondents. But in what respect did the practice of the Admiralty Court, of issuing a monition for the payment of the balance after the sums which each party was liable to pay to the other had been ascertained, differ in principle

from that which might, and probably would, be adopted by the Admiralty Division under similar circumstances, and to which attention has been directed? Then, as now, convenience dictated the form in which the ultimate order should be made, but such ultimate order was for the purpose of giving effect to rights previously declared after the pecuniary results of such declaration had been assessed. It appears to me that, under the provisions of the Admiralty Court Act 1861 and the recent Judicature Acts, the Court of Admiralty, previously to the last-mentioned Acts coming into operation, and the Admiralty Division from that time, acquired the power of doing directly what the Court of Admiralty, previously to the Act of 1861, had done or endeavoured to do indirectly, that is to say, the power, after the amounts in which the owners of each ship were liable to the owners of the other had been ascertained, of securing that the owners of one ship should not receive the amount coming to them without ample provision being made that they should in return pay on account for the amount of their own liability, and in no better way can such provision be made than by setting off the one amount against the other, and ordering payment of the balance, and for that purpose, and for no other, as it appears to me, have monitions or orders for payment of the balance been from time to time made.

I am of opinion that the order of the Master of the Rolls should be reversed, and that an order should be made declaring that the owners of the *Vesuvius* ought to prove for the amount of one moiety of the loss or damage sustained by their ship by reason of the improper navigation of the *Savernake*, when such amount shall have been assessed in manner directed by the order made in the Admiralty Division on the 24th July 1876, and that the costs should follow the result.

Brett, L.J., after referring to the facts, said:—The Master of the Rolls decided in favour of the view presented by the owners of the *Vesuvius*, and his order carries out that view. The appeal is against that order. Our decision must depend upon what is the true application to such a case of sect. 54 of the statute of 25 & 26 Vict. c. 63 (the Merchant Shipping Act Amendment Act 1862), by which, omitting inapplicable matter, it is enacted that the owners of any ship "shall not where any loss or damage is, by reason of the improper navigation of such ship, caused to any other ship, be answerable in damages in respect of loss or damage to ships, goods, or merchandise, &c., to an aggregate amount exceeding 8*l.* for each ton, &c." The case to which we have to apply this enactment is that of a collision between two ships, a claim and a counter-claim in the Admiralty Division, a judgment thereon that both vessels were to blame, a limitation action in the Chancery Division by the owners of the vessel which was the less injured of the two. The same question might have been raised by a petition in the Admiralty Division for a declaration of limitation. No difficulty in the application of the statute in question can arise except where both vessels are pronounced to be in fault. At the time of the passing of the Act of 1862 the difficulty therefore could only have arisen in respect of a decision given, or to be given, in a suit in the Admiralty Court. Since the passing of the Judicature Act of 1873 (sect. 25, sub-sect. 9), it may arise in respect of a decision in the other divisions of the High Court. But the Merchant Shipping Amendment Act 1862 must be interpreted, I think, as it would have been on the day after it came into operation. I, therefore, with deference, think it better not to discuss the effect of the procedure under the Judicature Acts. Whatever was the effect of the Limitation Act upon the rights of the parties before the Judicature Act must, in my opinion, be its effect now. The Judicature Acts did not alter rights but only procedure.

In order to interpret the Limitation Act, or to apply it, it seems to me necessary to consider what, at the time of the passing of the Act, was the course of procedure in the Admiralty Court in a cause of damage. In case of a collision a cause was instituted by the owners of one of the ships, a warrant was issued, either the ship proceeded against was seized, or her owners, without waiting for such seizure, entered an appearance upon giving bail to, or paying into court, the amount in which the case was instituted; if the ship was seized bail might be given to the ascertained value of the ship, if that was less than the sum for which the cause was instituted, or to the amount in which the cause was instituted, if the value of the ship was greater than that sum—the cause then proceeded. The owners of the ship proceeded against might or might not institute a cross action. If they did not the single cause proceeded to a hearing. If the question of joint blame was raised by proper pleading in that cause the court would in that suit give judgment, either that the defendants' ship was solely to blame, or that both ships were to blame, and the court, in and by such judgment, unless the amount was admitted, would refer to the registrar and merchants the amount of damage done to the plaintiff's ship. In the former case the plaintiff would eventually be entitled to recover the whole amount of damage done to his ship; in the latter case the half of such amount. After the report of the registrar to the court, the plaintiff applied to the court for an order for the payment of the money due to him. If the defendant had paid money into court, the order was to pay to the plaintiff the amount due out of the fund in court, and upon such "order of payment" the plaintiff obtained a cheque from the registrar. If the defendant and sureties had given bail, the "order for payment" was an order on the defendant and his bail to pay the amount on a particular day. If the amount was not paid on that day, the "order for payment" was enforced by "monition" to pay it on a particular day, and on neglect by "attachment." But in general, before the Judicature Acts, the defendants in a suit instituted in respect of a collision did at some time, sooner or later, institute a cross-cause. To the cross-cause thus instituted the original plaintiffs sometimes appeared, and sometimes did not appear. If they appeared, they in their turn gave bail. If they did not appear, and their ship could not be seized, the cross-cause could not for the time proceed. Yet the court, before 1862, had no power to stay proceedings in the first cause. This was decided in several cases, as in *The Seringapatam* (3 W. Rob. 38); *The Heart of Oak* (29 L. J. 78, Adm.); *The Carlyle* (6 W. Rep. 197); and *The North American* (1 Lush. 81). The first case proceeded to judgment, that is

to say, to the judgment which declared the liability, and it further proceeded to the inquiry thereupon by the registrar and merchants. And the court could not direct an inquiry as to the amount of damage done to the defendant's ship, so as to allow the defendant to deduct the half of such amount from the amount due to the plaintiff. That was decided in *The Seringapatam*. The court therefore allowed the inquiry to proceed as to the amount of damage suffered by the plaintiff's ship, and issued "an order for payment" against the defendants and their bail. But the court by anticipation refused to issue a "monition" to the defendants and their bail to pay the plaintiffs the loss or damage suffered by the plaintiffs' ship; for instead of making the "order for payment" an order to pay the plaintiffs, it ordered "the amount to be paid into court under the decree, not to be paid out till the plaintiffs should consent to a deduction in respect of the damage done to the defendants' ship." Thus in *The North American* and *The Tecla Carmen* (1 Lush. 79), where there was no appearance to the cross-action, the court refused to stop the proceedings in the first action, or to refer the damage done to both vessels; but after the report of the registrar on the amount of damage done to the plaintiffs' vessel, refused to make an "order for money" to the plaintiffs until decree should be given in the cross-action, and ordered the amount reported due by the registrar to be paid into the registry. It is obvious that the Court of Admiralty was struggling to effect, in these cases, as the result of the litigation, that only one payment should, in fact, be made, and that such payment should be a payment of the balance between the amounts of the two damages. But the court could not interfere until the moment when it was asked to enforce the decree it had been obliged to make; that is to say, until it was called upon to issue a "monition to pay." That it refused to do. The difficulty in proceeding in a manner in which the court so evidently considered to be just, namely, so as to make the suit end in one payment only, and that a payment of the balance was met by the enactments contained in sect. 34 of the Admiralty Court Act 1861: "The High Court of Admiralty may, on the application to the defendant in any cause of damage, and on his instituting a cross-cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross-cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross-cause the ship of the plaintiff cannot be arrested, and the security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause." The court, after that statute, could, if the defendant instituted a cross-cause, force the plaintiff to appear to it, and insist that both causes should be heard together. This could be for no other purpose than to arrive directly at the result which had been sought, and which was properly arrived at indirectly in the case of *The Seringapatam* and *The North American*. The same result was now procured whether there was at the commencement of the litigation only one cause or a cause and a cross-cause. Before the litigation was ended there was a cause and a cross-cause. But, in such circumstances the two causes, though tried together, and upon the same evidence, were distinct and separate causes just as they had been before: (*The Calypso*, Swab. 28,) Each therefore proceeded by separate pleading and resulted in form in separate judgments as to liability. In each there was, if the proceedings were formally drawn out, a judgment or decree which declared that both ships were to blame and ordered a reference to the registrar and merchants to ascertain the amount of damage suffered in each cause by the plaintiff's ship. Whether the registrar would thereupon in form hold two separate references I know not. I doubt much whether he ever did. He would, in strictness, I presume make a report in each case though I should think he never did. It may even be that an order for payment would be made in each suit though I much doubt it. But it seems to me impossible to suppose that more than one monition ever issued. It cannot be that the Court of Admiralty ever issued two monitions so as uselessly and ridiculously to force both the parties to pay money, one of them thereby both paying and receiving an identical sum. There must have been one monition and that must have been to pay the balance only, upon which monition, if disobeyed, one attachment alone could issue. One party only was, or may well be said to have been, "made liable in damages."

The question then is how to apply the 54th section of the Merchant Shipping Amendment Act 1862 to such a procedure? The limitation of liability is applicable as well to cases in which the defendant's ship is solely to blame as to cases in which both ships are to blame. It was therefore when the statute was passed, applicable to claims enforced by common law actions as well as to claims enforced in the Admiralty only that the complication arising from action and cross-action in which both ships should be held to blame could only arise in the Admiralty, for upon such a finding in the common law actions neither party could be liable to pay any damages. Again, the limitation might be required either where the only claim against the defendant was by the owner of the other ship or where there were several persons claiming against him. In the former case, if the action were at common law, the amount of the verdict was, I have no doubt upon evidence given, confined to the limitation amount; the verdict being practically the last step in the cause other than mere administrative steps taken as a matter of course, by the party. If the suit were in the Admiralty Court, and the defendants' ship was declared solely to blame, there must have been an inquiry by the court, *i e.*, the registrar and merchants, as to the amount of damage suffered by the plaintiff's ship, and if that amount was greater than the limitation amount, the "order for payment" must have been confined to the limitation amount. But if, in either court, there were several claims in different actions against the defendant, or if several claims were apprehended, the defendant as against all those actual or apprehended claimants, might proceed in Chancery by a bill, or after the Admiralty Court Act 1861, in the Admiralty by a petition

for a declaration of the amount of his liability, and for an injunction to stay actions, and for an order as to the distribution of such amount rateably amongst the several claimants. This power was given to the Court of Chancery formerly by the statute 53 Geo. 3, c. 159, s. 7, and afterwards by the Merchant Shipping Act 1854, in part 9, s. 514. It was given to the Court of Admiralty by the Admiralty Court Amendment Act 1861, s. 13. This application by a shipowner was, it must be observed, made in a different action or suit from the collision action or suit, and was made as between the shipowner and parties, who were not parties to any one collision action, or suit. The limitation suit, or petition, might be commenced before or after the judgment as to liability in an Admiralty suit, and, so far as I can see, if before execution, before or after judgment in a common law action. The claim for a limitation of liability as against several or aggregate claims, could not be made by any means in any of the suits brought in the Admiralty for compensation by reason of collision, or in any action at law brought to recover such compensation. And that being so, it seems to me to follow that every such suit or action must, if not stopped by injunction at an earlier stage, have proceeded to judgment as if no statute limiting the liability existed. How then could the statute affect such suit or action if allowed to proceed? Only after judgment, and before execution. Suppose then a cause in the Admiralty by the one shipowner against the other, and a cross cause and judgment in each declaring that both ships were to blame, and ordering inquiry as to the amount of damage suffered by the ship proceeded against; and suppose such inquiry or inquiries held, and report or reports made as to the amount of damage suffered by each ship: if there were no Limitation Act, the one party would obtain an "order for payment" of the balance, and the other party would obtain no order for payment; or at the most one party alone would obtain a monition, and that would be a monition to pay the balance. But then suppose other claims are made or apprehended against him who would have to pay such balance, and he thereupon, in a suit instituted by him, or in a petition presented by him, claims a declaration of limitation of liability. He must claim a declaration to be answerable in damages to all claimants only to the extent of 8*l.* per ton in the aggregate. How would that affect the order for payment already obtained against him? It cannot alter it. The Court of Chancery could not direct the Court of Admiralty to alter its order already properly made in a cause properly before it. The Court of Admiralty could not, on the petition, alter its order given in the cause. There is no such power mentioned in the statutes giving power to declare the limitation. Upon such a petition or in such a suit, the court is directed to declare the amount of limitation, and to distribute such amount among the claimants. There is no other direction. The amount of one claim is in the case supposed already settled. There is no power to unsettle that amount. In such a state of circumstances, therefore, the amount of the shipowner's claim would be the amount already ascertained by the inquiry before the registrar as to the amount to be paid and recovered, which would be the balance ascertained without reference to limitation. If this would be the result where the application by bill in Chancery or by petition in Admiralty was made after judgment declaring liability was given in the collision causes, could the result be different, ought it to be held different, where the application for limitation is made before such judgment is given? Upon such application for limitation the court may or may not, "as it thinks fit," the statute says, restrain further proceeding in the collision causes. The present case is an instance. The Master of the Rolls has not stayed all further proceedings in the collision causes, but on the contrary has directed further proceedings in the limitation cause to stand over until the loss and damages which the plaintiffs and defendants, the Royal Netherlands Steam Navigation Company, have sustained, have been assessed in the Admiralty Division. But the court in the limitation cause does not restrain further proceedings in the collision causes, it cannot give any direction as to the form of proceeding in those causes. Then the proceedings in those causes must follow the ordinary form. In such case, therefore, of cause and cross-cause, and decrees or judgments therein declaring both ships to blame, the inquiry or inquiries before the registrar must proceed in the ordinary form, and then the amount of loss or damage suffered by both vessels must be ascertained, and the balance be ascertained, and so the right to payment in favour of the party to be paid be ascertained, and the amount which he is entitled to be paid ascertained, all in ordinary form. Then, the court acting in the limitation suit interposes and distributes the limitation amount. It seems to me impossible that the court could in such a case distribute upon a different amount than that thus ascertained. Where, therefore, the limitation action or application by petition is instituted after the judgment in a damage cause or causes, or where either of them is instituted before such judgment but no order is made to stay any proceedings in the damage causes, the 54th section of the Merchant Shipping Acts Amendment Act 1862, to be invoked as against several claimants, cannot prevent the more successful party from ascertaining in the usual way and according to the usual rules the amount of loss or damage primarily due to him. In such cases the phrase, "answerable in damages," is applicable to the last proceeding only of the whole litigation; that is to say, to the distribution of the limitation amount among the parties. And if, in such cases, it would and could be applicable only to the last proceeding, it seems to me to follow that it ought only to be applied to the same last proceeding in all cases. If so, where the Court of Chancery in a limitation suit, or the Court of Admiralty on petition, thinks right to stop the proceedings in the Admiralty collision causes before the balance of the two losses is ascertained, and to ascertain itself the balance, it is bound, as it seems to me, to ascertain such balance according to the ordinary rules, and not to apply the 54th section until after such balance is ascertained, and it is about to perform the last act, namely, to distribute the limitation amount.

It is suggested that by such a contruction the plaintiff in the limitation cause, *i.e.*, the defendant in one of the collision causes, is deprived of his right to obtain a deduction in respect of the damage done to his ship, but it does not seem to me that such objection is well founded. He does obtain such

deduction. Such deduction is made in order to arrive at the rateable amount in respect of which the other shipowner's share of the distribution is to be paid to him, The amount for which such other shipowner is to prove is the balance between his loss and the loss of the plaintiff in the limitation cause. It is not this, but the other construction which would work relative, if not direct injustice. The owner of the cargo in the one ship suing the other ship in the Admiralty where both ships are pronounced to be in fault, can recover only half the loss or damage done to his cargo: (*The Milan*, 1 Lush. 388.) But no deduction can be made from the half. Suppose then, by way of example, cross-causes by the two ships, and also a cause by owner of cargo against the ship claiming limitation. Let the limitation amount of the ship B. be 2000*l.*; let the damage to ship A. be 6000*l.*; half the damage to A. is 3000*l.*; half damage to ship B. is 1000*l.*; damage to cargo in ship A. is 6000*l.*; half damage is 3000*l.* Upon the construction of the Limitation Act adopted by the Master of the Rolls ship A. would prove for 2000*l.*, cargo in ship A. would prove for 3000*l.* But by force of the Limitation Statute neither could recover payment of the whole of his loss. The fund to distribute being 2000*l.*, ship A. would recover 800*l.*, cargo in ship A. 1200*l.* But upon the opposite construction ship A., though damaged to the extent of 6000*l.*, the half damage being 3000*l.*, would only be entitled to say that ship B. was liable to pay her 2000*l.* Ship B., damaged to the extent of 2000*l.* would claim 1000*l.* Ship A. would prove only for 1000*l.*; cargo in ship A. would still prove for 3000*l.* The fund to be distributed being still 2000*l.*, ship A. would recover only 500*l.*; cargo in ship A. would recover 1500*l.* The Limitation Act was passed solely in favour of ship B. Why, without any advantage whatever to ship B., should it be construed so as thus to alter the relative rights of ship A. and the cargo of ship A.?

A statute for the purposes of public policy derogating, to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the shipowner against the other shipowner. Upon the construction suggested by the appeal, it would derogate also from his relative rights as regarding the parties. It should be so construed as to derogate as little as is possible, consistently with its phraseology, from the otherwise legal rights of the party. It seems to me that the phrase "answerable in damages" may be, and therefore on this last rule of construction ought to be, applicable to the last step in litigation; that is to say to the damages, which but for this section would be ultimately payable by the person seeking its protection. It need not, and therefore ought not to be applied until the last stage is reached. If so, it leaves untouched all the preceding steps necessary to ascertain the amount of that last payment which, but for it, would have to be made. In the present case therefore, it is not to be applied until the balance, which would otherwise be payable to the owners of the *Vesuvius*, is ascertained by the same rules as it would be ascertained irrespective of the Limitation Act. That result is effected by the order of the Master of the Rolls. In my opinion that order is right, and ought to be affirmed.

In consequence of the arguments used before us I have given reasons for my judgment more technical than those given by the Master of the Rolls for his. I, however, entirely agree with him in the larger reasons given by him for his judgment.

Cotton, L.J.—This appeal is against so much of an order of the Master of the Rolls as declares that the defendants are entitled to prove for one moiety of the loss and damage sustained by them less a moiety of the loss and damage sustained by the steamship *Savernake*, which belonged to the plaintiff, and against the directions consequential on that declaration.

The plaintiff, the owner of the *Savernake*, commenced an action to obtain the protection given by the Merchant Shipping Acts. Under an order of the Master of the Rolls the plaintiff paid into court the sum fixed by sect. 54 of the Act of 1862 as the amount of his liability, and is entitled to the benefit of that section, which enacts that "the owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity—that is to say, first, where any loss of life or personal injury is caused to any person being carried in such ship; secondly, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; thirdly, where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; fourthly, where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat—be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to any aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury, or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage."

Where an action is commenced and money paid into court under sect. 54 of the Act of 1862, the liability is provided for under that Act by proof against the fund paid into court. It is provided that the sum paid into court shall be the limit of the statutory liability for the loss or damage caused by reason of the improper navigation of the ship. The effect of the order of the Master of the Rolls is to deprive the owners of the *Savernake* of the amount of one-half the damage occasioned to their vessel, for which the owners of the *Vesuvius* were, by the order of the 24th July 1876, in the Admiralty Court, condemned or declared to be liable, and it does so for the purpose of satisfying a portion of the amount of the damages sustained by the *Vesuvius* by reason of the improper navigation of the *Savernake* which, under the Acts referred to, is to be provided for solely out of the fund in court. This is apparently against the words and meaning of the Merchant Shipping Acts and the provisions therein contained limiting the liability of the owners of the *Savernake*, and certainly is so, if the amount assessed as half the damage to the *Vesuvius* is the damage

for which the owners of the *Savernake* would, independently of the Act be liable. But it is attempted to support the order appealed from by urging that in the Admiralty Court a monition to enforce payment in such cases is issued only for the balance of the moiety of the loss sustained by the greater sufferer after deducting the moiety of the loss sustained by the other vessel. This, in fact, is the case, and on this it is contended, and I understand this was the view of the Master of the Rolls, that the action and cross action in the Admiralty Court, and all the proceedings therein up to and including the monition, are means taken to ascertain one set only of damages, viz., that to which the greater sufferer is entitled, being the balance mentioned in the monition. I am unable to agree with this view. The monition was preceded by the decree of the 24th July 1876, in which both vessels were declared to be in fault, and each was condemned in a moiety of the claim of the owners of the other vessel. A monition is, according to the practice of the Admiralty Court, the first step in the process to enforce payment, not the declaration of liability, and though it issues only for the balance of the sums for which the parties have been declared liable, each to each, yet this, in my opinion, is done only as a matter of convenience to work out the result of the cross claims and to avoid process being issued by each party against the other. It is said that the monition is the judgment. This depends on the meaning in which the word is used. It is so in the sense of being the order in which process to enforce payment is issued, but, in my opinion, it is not so in the sense of being the order of the court, which declares and establishes the liability. What takes place is, in my opinion, like what frequently occurs in proceedings in the Court of Chancery where parties have cross claims against each other, the amount of which depends upon accounts or enquiries to be taken or made in chambers. In such cases the decree declares the liability of each; the necessary accounts or inquiries to ascertain the amount are directed, and the decree on further consideration directs payment of the balance. Looking to the form of the order of the Master of the Rolls, it can hardly be supposed that he intended the proceedings in the Court of Admiralty to be carried on till a monition for payment was obtained. But even if a monition were obtained in this case, it would not be right (if the view which I take is otherwise correct) that it should be for the balance of half the damage sustained by the *Vesuvius* after deducting half the damage sustained by the *Savernake*, for, under the circumstances, there can be no set-off, as the owner of the *Savernake* has claimed the benefit of the limited liability given by the Act, which leaves to the owners of the *Vesuvius* a right to be paid a dividend only on the damage sustained by that ship while they, the owners of the *Vesuvius*, remain liable in full.

For these reasons I agree with Baggallay, L.J., that the order appealed from must be reversed, and that the defendants, the owners of the *Vesuvius*, must rank against the fund in court for the entire amount of the moiety of the damage to which they have been declared entitled.

Appeal allowed.

Solicitors: *T. Cooper* and *Co.*; *Stokes, Saunders,* and *Stokes*; *Pritchard* and *Co.*

March 29 and 31, 1879.

(Before James, Baggallay, and Bramwell, L.JJ.) assisted by Nautical Assessors.)

The Condor.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damages—Collision—Thames Conservancy Rules—Lights—Practice—Costs—36 *&* 37 *Vict. c.* 85, *s.* 17.

The owners of a vessel which has infringed a regulation as to lights, made by a competent authority, must, when plaintiffs, show that that infringement could not have caused or contributed to the collision. It is not necessary for the defendants, who are not counter-claiming for damages, to prove that in point of fact it did cause or contribute to it.

Quære, whether an infringement of the Thames Conservancy Rules 1875 *causes the vessel infringing them to be "deemed to be in fault," within the meaning of sect.* 17 *of the Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85.)

In future the costs in Admiralty appeals, as in all other appeals, will follow the event, notwithstanding the former practice of the Judicial Committee of the Privy Council in certain Admiralty appeals.

This was an appeal in an action for damage by collision. The action was brought in the Admiralty Division by the owners of the dumb bargee *Swansea* against the steamship *Condor* and her owners, the General Steam Navigation Company (Limited). The collision took place in the Lower Pool, river Thames, opposite the Aberdeen Steam Wharf, about midnight on the 24th Oct. 1877. The night was dark but fine and calm, and the tide flood running about three knots. The *Swansea* was proceeding up the river, in company with two other dumb barges, in tow of the steam launch *Jane*, at full speed. The two other barges were astern of the launch, and abreast of each other, the *Swansea* being astern of them, the steam launch had the proper lights for a tug, *i.e.*, two bright white masthead lights vertically in addition to the ordinary side lights. The barges had no lights of any sort.

The *Condor* was proceeding down the river under steam. There was evidence that the river was very crowded. There was a great conflict of testimony as to what took place on board both vessels before the collision happened, but the *Condor's* stem struck the *Swansea* on the port-side abaft the beam. There was no counter-claim on the part of the *Condor*, and the defence was that, so far as the *Condor* was concerned, the collision was the result of inevitable accident, and was occasioned by negligence on board the *Swansea* and the steam launch *Jane*.

The argument principally turned upon the construction and effect of rule 3 of the Bye-laws for the Navigation of the River Thames, made by the conservators of the river, under the provisions of the Thames Conservancy Acts 1857, 1864, and 1867, and the Thames Navigation Acts 1866 and 1870, and approved by Order in Council of the 17th March 1875, and of Sect. 17 of the Merchant Shipping Act 1873. Rule 3, is as follows:

3. The person in charge of the sternmost or last of a line of barges, when being towed, shall exhibit between

sunset and sunrise a white light from the stern of his barge.

And the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85.) sect. 17:

If in case of any collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

June 20, 1878.—The cause came on for hearing before Sir R. Phillimore and Trinity Masters.

Milward, Q.C. and *Phillimore*, for plaintiffs, owners of the *Swansea*.—The bye-law in question has never been properly published; those on board the *Swansea*, in common with the generality of people using the Thames, had never heard of it; its absence did not cause or contribute to this collision; the *Condor* could see the barge in plenty of time to have avoided it; the two masthead lights on board the steam tug were notice to her that there were barges in tow. The object of the stern light is to show vessels coming up astern the position of the barges: this is shown by rule 2 of the same bye-laws, which requires all independent dumb barges to have a light ready to show. She knew that vessels in tow coming up with the tide could not be stopped and reversed with the ease of an independent steamer. We did no wrongful act, we were in a proper place and properly navigated; it was the duty of the *Condor* to keep out of the way, and she did not do so, therefore she is to blame for the collision. A bye-law for the navigation of the river Thames, made by the Conservators of the Thames in 1875, is not a "regulation for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873," and therefore the breach of it does not carry with it the consequences that have been held to result from sect. 17 of the Merchant Shipping Act 1873.

Butt, Q.C. and *Clarkson*, for defendants, the General Steam Navigation Company, owners of the *Condor*.—The barge ought to have carried a light, she did not do so, and therefore has infringed the regulations, and is to blame under sect. 17 of the Merchant Shipping Act 1873. The object of the regulation as to lights is not merely to show vessels coming up astern their position, but—since where there is a string of barges in tow, that string may, following the curves of the river or alterations in the course of the tug, be far from a straight line—to show to vessels approaching from any direction where the end of that line is, to allow time to get past in safety. This, in fact, was shown by the fact that the regulations as to exhibiting a light by barges in tow only applies where there is a string of barges. If only a single barge, or two abreast are in tow, the towing lights of the tugs are sufficient notice; but where there is a train, the termination of that train of uncertain length is required to be marked. If there had been a light on the last barge, which was the one we came into collision with, we could have seen her sooner, and should have known she was in tow, and might have avoided the collision. We were hardly moving at all, and the barge swept across our bow. We could do nothing more than we did to avoid the collision. The speed at which the barges were coming up the river was improper, seeing the crowded condition of the navigation, and the admitted difficulty of stopping them when going with the tide.

Milward, Q.C. in reply.

Sir R. Phillimore, after consultation with the Trinity Masters.—This is a case of collision which happened about midnight, or later, on the 24th Oct. 1877, in the river Thames, opposite the Aberdeen Steam Wharf. The vessels which came into collision were the *Swansea*, a dumb barge in tow of a tug called the *Jane*, and the steamship *Condor*. The stem of the *Condor* went into the port midships of the *Swansea*, abaft her beam, and did her considerable damage. The state of the weather may be taken, both on the admissions of the *Condor* and on the general result of the evidence, to have been what is well known and often described in this court as "clear but dark," and the pilot of the *Condor*, in his evidence, states distinctly that it was a night in which lights could be seen at a reasonable distance. The main defence, as it appears, and I think was hardly denied by the counsel for the *Condor* in this case, was, that, looking at the crowded state of the river and other circumstances, the collision was the result of unavoidable accident. In the first place, I have consulted the Elder Brethren on the nautical points of the case—there are several points of this nature that present themselves more for their opinion than for mine—and we have no doubt whatever that the *Jane*, with her three barges, two immediately astern of her and one immediately astern of the two, were properly navigated on the north side of the mid-channel. with this one exception, that she disobeyed the rule of the Thames Conservancy, which was binding on her, and which is in these words [His Lordship read rule 3, and proceeded:] There was a clear infringement of this rule here, for no such light was exhibited from the stern of the last barge. The defence—that the parties were ignorant of the existence of the rule, and that it was generally not observed—is not valid, in my judgment, and I should be very sorry that anything I should say should by any possibility lead to the conclusion that the court would listen to such a defence as this. Therefore there has been in this case what amounts to a direct infringement of the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), and the court is at liberty to consider whether the disobedience to the rule I have referred to did or did not contribute to the collision in this case. (*a*) The elder Brethren are very clearly of opinion, and I agree with them, that it did not contribute to the collision. What is necessary for the decision of this case may be stated in a few words. The *Condor's* engines had been stopped previous to clearing the single barge that was lying about mid-river. Those on board the *Condor*, it appears from the evidence, had seen the lights of the tug *Jane* with barges in tow, crossing her bows, as the pilot and captain of the *Condor* say. Now, if the pilot of the *Condor* had not set her engines on, as he did do, until the tug and the barges that

(*a*) This sentence is a correct transcript of the judgment of the court below as printed for the appeal; but there would appear to be some typographical error in it, having regard to the decided cases in sect. 17 of the Merchant Shipping Act 1873, and the fact that it has never been decided that the Thames Conservancy Rules are such "regulations" as are contemplated by that section.

the tug was towing had passed clear of her, there would have been, in the judgment of the Elder Brethren, in which I agree, no collision. The collision was caused by the *Condor* going ahead before the tug got clear. The Elder Brethren are also of opinion that the tug *Jane* was quite right in going full speed, as by so doing the chance of a collision was lessened. I must therefore pronounce the *Condor* alone to blame for the collision.

From this judgment the defendants appealed.

The appeal was heard on 29th and 31st March 1879, before James, Baggallay, and Bramwell, L.JJ. (assisted by two nautical assessors).

Butt, Q.C. and *Clarkson*, for appellants.

Milward, Q.C. and *Phillimore* for respondents.

The arguments used were the same as those reported in the court below.

James, L.J.—We have had the opportunity of considering this case with our nautical assessors, who, as well as ourselves, have very carefully read the evidence, and heard the arguments based upon it, and we find ourselves unable to concur with the judgment given in the court below. Bearing in mind the crowded state of the river, and the fact that the *Condor* was compelled to do something to get out of the way of another barge drifting up in mid-river, she did nothing, in our opinion, except give herself the very smallest headway possible to enable her to clear that barge. There was nothing in what the *Condor* did to render her liable to a charge of bad seamanship, or neglect, or other improper conduct in clearing that barge, but it brought her into the place where the collision occurred with the barge *Swansea*, which was going up the river, together with other barges, in tow of a steam tug, and which (it is not immaterial to consider) were going up the river at full speed, as great a speed as the tug could go, and with a strong flood-tide giving an additional speed of two or three knots an hour. The *Condor*, moreover, was placed in a position of additional difficulty by another matter, in the view of which, taken by the court below, we cannot agree—the absence of a light. It is quite clear that the steam tug, with its train of barges, in coming up the river under the circumstances I have mentioned, did violate the express rule of navigation of the Thames, by not having a light on the stern of the barge which should have carried it; the object of which must be to give everybody, having anything to do with the navigation of the river, notice of what it is they are likely to come into collision with. If the steam tug and its barges had shown that light, it is impossible to know what would have been the conduct of the master and pilot of the *Condor* on seeing it, and knowing that the tug and barges were coming full speed up the river incapable of stopping themselves. If the steam tug had been, like the *Condor*, without the burthen of barges behind it, it seems to me it would have been as much the duty of the steam tug to stop as of the *Condor*. Their duty would have been the same each to the other. But the steam tug could not stop her barges, and there was no notice given to the *Condor* that that state of things existed. There was nothing to inform the *Condor* of the fact that there was a train of barges behind the tug, and she had to deal with the lights in the river as they appeared to her. In the absence of that intimation, the circumstances being so likely to throw the *Condor* into a difficulty, I cannot consider that we ought to hold the master of the *Condor* to blame for not having done that which he might have done, or rather for having done that which he probably would not have done if he had known what the true state of affairs was, and if he had had that full intimation which he ought to have received from the tug and barges by the exhibition of that light which plainly, by the rules, ought to have been exhibited.

Baggallay, L.J.—I am of the same opinion. It appears to me that the *Condor* was in a position of very considerable difficulty. The navigable portion of the river is very narrow where the collision happened, and there were a number of barges about. There was a strong adverse tide, and she was therefore obliged to keep her engines going ahead to a certain extent to stem the tide and keep steerage way. I am unable to take the same view that was taken in the court below as to the absence of a proper light in the stern of the last barge in tow, and it appears to me that, having regard to all the circumstances, the *Condor* adopted a reasonable course, and the accident was the result of circumstances which could not have been avoided by her. In point of fact she might have a right to assume, seeing the mast-head lights in the steam tug, and no other light indicating where the tow ended, that there were only one barge or two barges abreast astern of the steam tug, and had there been no more than that, the accident would not have occurred, for in the result the first two passed by safely, and it was only the last barge, which had no light on it, which was struck. I agree therefore with James, L.J., that the judgment of the court below should be reversed.

Bramwell, L.J.—I am of the same opinion. The learned judge in the court below, after stating a few of the facts, says that "the main defence . . . was, that . . . the collision was the result of unavoidable accident;" but it seems to me that we should consider what was the conduct on the part of the plaintiffs. I asked the counsel for the plaintiffs why it was wrong for the *Condor* to get way on her as she did; but he did not, to my mind, give a satisfactory answer to that question. I could not think that that act was wrong in itself, unless there was some reason to suppose that there was something for her to run against, and I cannot see that there was such reason.

Clarkson applied for costs below and of appeal. There is now one uniform practice in the Court of Appeal as to costs:

The City of Berlin, 2 P. Div. 187; 37 L. T. Rep. N. S. 307.

The practice of the Court of Admiralty was not uniform to the contrary:

The Innisfail; The Secret, 35 L. T. Rep. N. S. 819.

Milward, contra.—When a collision is the result of inevitable accident it has always been the rule in the Court of Admiralty and the Privy Council that there should be no order as to costs; and this court, sitting as a Court of Appeal in Admiralty causes, will follow the practice of the Privy Council in such cases:

The City of Cambridge, 35 L. T. Rep. N. S. 781;
The Corinna, 35 L. T. Rep. N. S. 781;
The Daoiz, 37 L. T. Rep. N. S. 137.

James, L.J.—With regard to the question of costs in this case, it is quite clear, from what has been said on both sides, that there has been a general impression in the profession that the old rule of the Judicial Committee of the Privy Council should be followed, and there is colour for that opinion in the decisions which have been shown to us by the registrar, and it appears that this court, in a particular case, decided the same thing. We think that requires great consideration, and we should consider whether it can be right that there should be one rule as to costs in one branch of the High Court of Justice, and another rule in another branch of that court. I think in future that the rule will in every case follow the result, as it does in other branches of the High Court; but we are not prepared to apply that rule for the first time in this case. I am not satisfied with the evidence given on behalf of the *Condor*, and on the general facts of the case, and all the circumstances, and with regard to the former decision of this court, I think we should dismiss the action without costs. I think it may be considered as settled that for the future there will be no difference as to the costs between Admiralty and other appeals.

Baggallay and Bramwell, L.JJ. concurred.

Appeal allowed and action dismissed, but without costs either below or on appeal.

Solicitor for appellants, owners of *Condor*, *W. Batham.*

Solicitors for respondents, owners of *Swansea*, *Waltons*, *Bubb*, and *Waltons.*

Friday, March 28, 1879.

(Before James, Bramwell, and Baggallay, L.JJ.)

The Lauretta.

APPEAL FROM ADMIRALTY DIVISION.

Admiralty appeal—Costs—Both vessels to blame—Motion by way of cross appeal—Rules of Supreme Court, Order LVIII., r. 6.

The fact that respondents in an appeal from the Admiralty Division, where both have been held to blame, have given notice under Order LVIII., r. 6, *of their intention to ask for a variation of the decree below makes no difference in the practice of dismissing the appeal with costs if the judgment below be confirmed, provided such costs as are occasioned by the respondent's notice will be deducted.*

An action *in rem* was brought by the owners of the *City of New York* (Inman Line) against the brigantine *Lauretta* to recover damages for a collision between the two vessels, and the owners of the *Lauretta* counter-claimed for the damages sustained by their vessel in the same collision.

The action was tried in the Admiralty Division on the 16th April 1878, and the judge (Sir R. Phillimore) pronounced both vessels to blame and made the usual decree.

From this decree the owners of the *City of New York* appealed, giving notice of appeal in accordance with Order LVIII., rr. 2 and 4. The owners of the *Lauretta* thereupon gave notice under Order LVIII., r. 6, that they intended on the hearing of the appeal to contend that the decision of the court below should be varied by pronouncing the *City of New York* alone to blame.

The Court of Appeal, after hearing counsel for the appellants and respondents, confirmed the finding of the court below, and dismissed the appeal.

Myburgh and *Phillimore* (with them *Aspinall*, Q.C. and *Goldney*), for the respondents, applied for costs of the appeal.—The notice given by the respondents does not affect their right to costs, as they could, under Order LVIII., r. 6, have raised any question as to the decree without notice. The notice has occasioned no extra costs. All the costs have been occasioned by the appellants appealing. They brought the respondents here. The notice is not a cross appeal, such as was necessary in the Privy Counsel, and the respondents could never have been before this court at all if the appellants had not appealed.

Butt, Q.C. (with him *Milward*, Q.C. and *Clarkson*), for the respondent, submitted that the notice was in fact a cross appeal, and that it had always been the practice of the Privy Council to leave each party to pay his own costs; here there were cross appeals, and both vessels were held to blame.

James, L.J.—There appears to me to be no necessity under the Rules of the Supreme Court, Order LVIII., r. 6, to give this notice at all. All questions could be raised without the notice. Hence the respondents have done more than they need. The appeal will be dismissed with costs, but if any costs have been occasioned by the respondents' notice these costs will be deducted.

Bramwell and Baggallay, L.JJ. concurred.

Solicitors for the appellants *Duncan Hill* and *Dickinson.*

Solicitor for the respondent, *J. W. Carr.*

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins and W. Appleton, Esqrs., Barristers-at-Law.

June 27 *and* 28, 1878.

Before Bramwell, Cotton, and Thesiger, L.JJ.)

Wright *v.* The New Zealand Shipping Company.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—Charter-party—Action for delay in discharging—Duty of charterer—Reasonable time—Circumstances at port of discharge.

Where the time to be allowed for unloading is not named in a charter-party, the charterer is bound, on the arrival of the ship at the usual place of discharge within the port of discharge, to provide sufficient appliances of the kind ordinarily in use at the port for the purpose of unloading, and it is no answer to a claim for damages for delay in unloading to show that the delay was caused by the crowded state of the port.

The action was brought by the plaintiff, owner of the ship *China*, against the defendants, charterers, for not unloading the ship at the port of discharge within a reasonable time. The ship was chartered by the defendants to carry a general cargo from London to Port Lyttleton, in New Zealand, and there deliver, "as per bills of lading, into lighters alongside or at the wharf, as charterers' agents might direct, ship being always afloat; cargo to be brought to and taken from alongside, free of expense and risk to the ship." The ship loaded in London, and sailed for New

Zealand on the 14th Nov. 1873, and arrived at Port Lyttleton on the 17th March 1874. On the 18th March 1874 she was placed in a discharging berth, over a mile from the town, as she drew too much water to go alongside the wharf. The usual mode of discharge for vessels not able to go alongside the wharf at Port Lyttleton was at that time by means of lighters. The ship was ready to commence discharging on the 19th March 1874, but no lighters were sent to her by the charterers' agents till the 30th March, when she commenced discharging. The discharging went on at intervals till the 29th May 1874, when it was completed. The ship was at Port Lyttleton seventy-three days before her discharge was complete; of these days there were twelve days before the discharge was commenced, eleven Sundays and fifteen days when there was no discharging. The usual time taken in discharging vessels of the class of the *China* was from thirty to forty days, all included. The trial took place at the spring Northumberland assizes 1878, before Pollock, B., and the plaintiff gave evidence to show that the time of a vessel's arrival from England could be calculated within ten days; that at the time of the arrival of the *China* there was a greater number or rush of vessels in the port than usual, of which the greater part were chartered to the defendants; that many of these vessels were chartered for the passage out and home, and contained provisions fixing the time for loading and discharging, and providing for the payment of demurrage in case of delay, and that consequently it was the defendants' interest to discharge and load these vessels before unloading the *China*, and that they did so. The defendants relied upon the fact that, at the time when the ship arrived at the port of discharge, Port Lyttleton, in New Zealand, the port was crowded with vessels, and there were only a limited number of lighters in the port, the consequence of which was that it became impossible to unload the ship as soon as she could have been unloaded if there had been a sufficient number of lighters in the port to meet the requirements of all the vessels which were there at the time, or if the port had not been so crowded with shipping. The time when the ship arrived was the time of year when the port was generally most crowded. There were a considerable number of other vessels in the port besides the *China*, either belonging to or chartered by the defendants, and it was alleged on behalf of the defendants that they distributed all the lighters which they could obtain between the ships which they were discharging, including the *China*.

The learned judge, without giving any specific direction as to what was to be considered a reasonable time, asked the jury whether the vessel had been loaded in a reasonable time under the circumstances.

A verdict was found for the defendants, and the Divisional Court (Cockburn, C. J. and Mellor, J.) set the verdict aside as being against the weight of evidence, and directed a new trial, but refused to grant the rule on the ground of misdirection.

The defendants appealed.

Cave, Q.C. and *Hugh Shield*, for the defendants, contended that the crowded state of the port, being usual at the time of year at which the ship arrived, must be taken to be an ordinary circumstance of the port, that the impossibility of obtaining sufficient lighters discharged the defendants from their liability to unload within what would otherwise have been a reasonable time, and that the verdict was justified by the evidence given at the trial.

Herschell, Q.C. and *J. P. Aspinall*, for the plaintiff, contended that the difficulties which the defendants relied upon as having relieved them from their obligation under the charter-party were such as they were themselves bound to provide against, and they could not throw the consequences upon the plaintiff; and further that, in any case, the verdict was against the weight of evidence:

Adams v. *The Royal Mail Steam Packet Company*, 5 C. B. N. S. 492; 28 L. J. 33, C. P.; and
Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; 19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; 38 L. J. 52, Q. B., affirmed in Exchequer Chamber, 23 L. T. Rep. N. S. 165; L. Rep. 5 Q.B. 282; 39 L. J. 188, Q. B., were cited.

Cur. adv. vult.

June 28.—Bramwell, L.J.—I am of opinion that this appeal should be dismissed. I think the order of the court below was right. I think the verdict was against the evidence, so that it ought to be set aside. In order to show that I think so, it is necessary for me to consider what I hold to be the law upon this matter.

Now, the charter-party contains no statement as to the number of days in which the charterers should be entitled to discharge the vessel; they were therefore bound to do it within a reasonable time. Now, in my judgment, a reasonable time for doing a thing is the time within which it can be done, working reasonably. What I mean to say is this: you are to look at the time necessary for doing the act without taking into account the time that may have been, or might under the particular circumstances be, necessary for the man who has to do it to make his preparations. Applying that rule to this particular case, it seems to me that the defendants, upon the arrival of the ship, were bound to have—I do not mean, as I said before, lighters on the shore ready manned to start off, but were bound to have lighters presently, or immediately, or forthwith, or within a reasonable time, ready to discharge the ship, and were not entitled to say, "We had not got them, not through any fault of ours, but because there were only a certain number of lighters there, and there were other ships which required those lighters, belonging to other people, and we could not get them, and we behaved reasonably and fairly to you in getting lighters for you as soon as we could." To my mind, that is no answer; they must do the thing, and they must be ready to do it, and being ready, they must do it within a reasonable time.

Now, if that is the law, it is manifest that this verdict is against the evidence, because the case of the defendants is, not that they did it within a reasonable time in such a way as I have mentioned, but that they did it in a reasonable time, taking into account the embarrassment they were under on account of there being only a certain number of lighters, and a large collection of ships. Of course, in considering a case of this sort, you would have to take into account what one may call the physical conditions of the port. If the vessel cannot get within two miles the charterer must have a longer time for unloading

her than if she came within a few yards. Things of that sort may be taken into account, but not such as are relied upon by the defendants in this case. A difficulty was suggested as to a ship being bound to go to a certain place, and that place not being accessible. It seems to me that if the condition or the obligation of the defendant was to have that place ready, why then it was his place, or, if he was in any way bound to have it ready, he is responsible, although it may be occupied by anything else; but if he is not bound to have it ready, as in the case of a dock which I put, where the dock is not his dock, where both parties have agreed that the ship shall be discharged there, and the ship cannot get into the dock on account of some defect at the entrance of the dock, which is not the fault of the shipowner or the charterer, then the charterer is not liable, nor is the shipowner; neither of them has made any default in doing the thing within a reasonable time, and it would be as unreasonable to say in such a case that the charterer had not discharged the ship within a reasonable time as it would be to say the shipowner had not got his ship into dock within a reasonable time; neither statement would be well founded. I cannot help thinking the illustration I gave was a good one. I order a coat of a tailor, and he must make it in a reasonable time. What is that? Why it is the reasonable time required by a man who has got workmen and needles and cloth, and other things for making a coat. In considering what is a reasonable time, he must not say that he ought to have some time for buying the cloth and to go and get workmen and the materials necessary.

Lord Justice Cotton has been good enough to read to me what he is going to say upon this. He has put down his view of what the law is on the matter, with which I entirely agree.

Cotton, L.J.—I agree in thinking there must be a new trial; that is to say, that even according to the ruling of the learned judge at the trial, the court from which the appeal comes was right in saying the case must go back, and that really disposes of the appeal; but I think it would not be right, as it is to go back for a new trial, not to say what, after argument, in our opinion is the law applicable to the case, in order that there may be no necessity for the case coming again to this court, after a further trial, on a question of law.

Now the contract is one imposing an obligation on the charterer to unload within a reasonable time, nothing being said about the time to be taken; that is, in law, that he must do it within a reasonable time. When that is the contract there always arises a difficulty as to what is meant by "reasonable time," and I think the difficulty always arises in this way, from not considering what the obligations of the parties are, and not considering what facts are to be taken into account as between the parties to the contract in estimating what is reasonable. Therefore, I propose to state what I consider is the obligation of the charterer under those circumstances, what he is entitled to take into account in his favour in fixing what is a reasonable time, and what he is not—not of course exhaustively, but as applicable to this particular case, and to some extent to all cases.

Now, I apprehend, in saying anything determining whether an obligation of this sort has been performed within a reasonable time, we must take it that this is an obligation of the charterer, namely, that he must provide at the port of discharge sufficient appliances of the kind ordinarily in use at the port, and that he must have them ready either when the ship arrives or within a short time (one might say a reasonable time, but that would be ambiguous) within, we may say, a day, or a couple of days, after the arrival of the ship. Possibly, cases may arise where a ship arriving unexpectedly, much more shortly than could reasonably have been expected, a longer delay might be claimed and allowed than in ordinary cases where the ship arrives at the time when she is expected, and when there was no difficulty in knowing when she would come. I say appliances of the kind ordinarily used in the port for which the ship is destined, because of course it is not reasonable that the charterer should be supposed to provide at the port appliances which are in use in some ports, such as the port of London, which would never be expected to be provided, and never be deemed to be in the contemplation of the parties as being provided, at such a port as that we are dealing with—a port in New Zealand; then, I take it, he must provide a sufficient number of them, and have them ready in order to make use of the appliances provided for unloading the ship, and although he is not bound to work during the whole of the twenty-four hours, he must work during the ordinary time of working at that port where the ship is to unload.

That being so, for what is allowance to be made? I apprehend the first allowance applicable to the present case is this, that allowance must be made if any difficulty or delay arises from the natural or physical peculiarities of the port; such, for instance, as this, that the ship is obliged to lie at some considerable distance from the land, or that in particular winds, or those which in ordinary ports would not be of such strength as to prevent a ship being unloaded into lighters, yet, in that particular port, owing to its exposure to a particular quarter, or the particular character of the port in other respects, it is not safe, speaking reasonably, to unload during that time; and then if a ship could be more conveniently unloaded by bringing it, after a portion of its cargo is taken out, nearer to the shore, then for any interruption of the work really caused by bringing it there, allowance is also to be made. Whether or no the work of unloading can be going on during the removing or changing of the berth, would be a question upon which the jury must give their opinion. Of course, allowance must be made for that, and I should say allowance must also be made for any holidays usually observed at the port, during which working men will not work, such as in the present case, Easter Monday.

Now, I do not mean to say that there may not be other allowances, but those allowances affecting the present case appear to me to be allowances to which the charterer is entitled. But is he entitled to that on which his counsel relied in the present case? As I understood his argument, it was this: "I had a number of ships in this port, and besides my own ships there were a number of others, the number of lighters at the port being limited, and what I did was this, without favour to anybody I used such lighters as

I had got, and the number of other ships belonging to other persons allowed me, and distributed them fairly between the ships." Now upon that point I think the verdict was unsatisfactory, having regard to the evidence. But is that law? Now, in my opinion, it is not. In my opinion, for the purpose of determining what was a reasonable time on the contract between the plaintiff and the defendant, the defendant is not entitled to excuse delay that would otherwise be inexcusable by saying, "I sent so many ships to that port that the lighters which I engaged did not enable me to unload your ship within what would otherwise (and if I had not taken those other ships to that port) have been a reasonable time." In my opinion he cannot excuse his delay by claiming an allowance for the time during which he used his lighters, which could have been used for that ship, for the purpose of unloading other ships sent by him to the port. In my opinion it was his duty as between himself and the owner of the ship to provide sufficient appliances for unloading the ship. In like manner, in my opinion, he cannot excuse his delay by saying, "there were at the port other vessels not belonging to me, so many in number as to prevent me from applying the appliances which otherwise might be applied to the purpose of unloading the ship."

That, in my opinion, must be the principle on which to decide what, upon the contract between these parties, is or is not a reasonable time for unloading according to the charter.

Thesiger, L.J.—I am of the same opinion.

The contract between the parties to this action was that which the law implies, namely, that the ship should be unloaded at the port of her discharge within a reasonable time. A reasonable time means a reasonable time under ordinary circumstances, and in the absence of some stipulation altering the implied contract between the parties the charterers would not be relieved from the fortuitous and unforeseen impediments affecting only the due performance by them of their part of the contract. This seems to be the result of the case of *Adams* v. *The Royal Mail Steampacket Company* (5 C. B. N. S. 492; 28 L. J. 33. C. P.), and the case of *Ford* v. *Cotesworth* (3 Mar. Law Cas. O. S. 190, 468).

In the present case it is proved that at Port Lyttleton about thirty-five working days would in general be occupied in discharging a vessel of the burden of the *China*, loaded as she was loaded under the charter-party in question; but it is said on the part of the defendants that at the particular time of the year at which she arrived at the port the concourse of vessels was, as a yearly occurrence, such that lighters could not be obtained regularly enough to discharge the vessel within the time mentioned. Now, although that circumstance might be one which did as a matter of fact occur at the same time in each year, that was not, in my opinion, an ordinary circumstance of the port the consequence of which the shipowner was called upon to bear. He has a right to assume, when he contracts to discharge the cargo into lighters, that the charterers will provide a proper supply of lighters to unload the cargo within such time as would be reasonable, having regard to the character of the vessel and the quantity and description of the cargo; and the effect of there not being sufficient lighters for the purpose is one of those fortuitous and unforeseen (unforeseen at least as regards the shipowner) impediments affecting only the due performance by the charterers of their part of the contract, and from the consequences of which they are not relieved. And, as a matter of common fairness, they ought not to be relieved from them unless some express stipulation on the point is made in the contract of charter, and for this reason, namely, that the shipowner cannot in any way control the arrangements as to lighters, and cannot be supposed to know the times at which, owing to the circumstances of the particular port, there may be a difficulty in obtaining them. He therefore makes his arrangements for the employment of his vessel with reference to the time within which, under ordinary circumstances, and amongst them the circumstance of a due supply of lighters, his vessel will be discharged. On the other hand, the charterers have a control as well as knowledge in the matter, and can, if they choose, make special arrangements to meet special emergencies, and if they do not choose to make those special arrangements in order that the charterer's vessel may be unloaded within a time which would be a reasonable time, under what the shipowner would naturally and properly assume to be the ordinary circumstances of the port, it is but reasonable that they should indemnify the shipowner for the loss thereby sustained.

If this be the law it is clear—and indeed it was admitted by counsel for the defendants—that the jury had not the law presented to them as it should have been, and for that reason, therefore, there should be a new trial; but even assuming that the difficulties in obtaining lighters, caused by the rush of vessels to the port of discharge at the particular time in question, were to be taken into account in favour of the defendants, I am further of opinion, upon the grounds which have already been stated, that the verdict was against the evidence, and should be set aside.

Bramwell, L.J.—I quite agree with every word spoken by Lord Justice Thesiger. The judgment will be affirmed. Appeal dismissed.

Judgment affirmed.

Solicitor for plaintiff, *Coote*, for *Adamson*, North Shields.

Solicitors for defendants, *Hollams, Son*, and *Coward*.

March 6 and 7, and April 9, 1879.

(Before Brett, Cotton, and Thesiger, L.JJ.)

Reuter, Hufeland, and Co. *v.* Sala and Co.

Sale of goods — Divisible contract — Shipment "per vessel or vessels" — Rescission.

Plaintiffs contracted to sell to defendants "about 25 tons (more or less) Penang black pepper, Oct. and Nov. shipment, from Penang to London, per sailing vessel or vessels . . . the name of the vessel or vessels, marks, &c., to be declared to the buyer in writing within sixty days from date of bill of lading." Plaintiffs within the contract time declared 25 tons of pepper shipped in one vessel, of which 20 tons were properly shipped and declared, but 5 tons were shipped in Dec., and defendants in consequence refused to accept the whole quantity. Subsequently plaintiffs de-

clared 5 tons of Nov. shipment in substitution for the 5 tons shipped in Dec., but this declaration was made more than sixty days after date of bill of lading, and defendants refused to accept it. On the vessel arriving in England, plaintiffs as a performance of their contract, tendered the 20 tons properly shipped and declared, and the 5 tons properly shipped but declared after the contract time had elapsed. Defendants refused to accept any of the pepper so tendered, and plaintiffs claimed damages for such refusal.

Held, per Cotton and Thesiger, L.JJ. (Brett, L.J. dissenting), that the contract time for declaration was an essential condition; that the contract was not divisible; and that defendants therefore were entitled to reject the whole 25 tons.

Brandt *v.* Lawrence (*L. Rep.* 1 *Q. B. Div.* 344) *discussed and distinguished.*

Per Brett, L.J.: The defendants were bound to take delivery of the 20 tons, as the contract was divisible, and the incurable failure of plaintiffs to deliver the 5 tons according to the contract was a breach as to part only of the consideration, which could be compensated in damages.

Appeal from a decision of Lord Coleridge, C.J.

The action was to recover damages for loss alleged to have been sustained through the defendants' refusal to take delivery of 25 tons of pepper under a contract of sale made between the plaintiffs and defendants.

At the trial, before Lord Coleridge, C.J. and a special jury, the learned judge ordered judgment to be entered for defendants.

The plaintiffs appealed.

The facts of the case and the arguments in the Court of Appeal fully appear in the judgments (*post*).

Benjamin Q.C. and *Pollard* for plaintiffs.

Watkin Williams, Q.C. and *J. C. Mathew* for defendants.

The following cases were cited and referred to during the arguments:

Boswell v. *Kilborn*, 14 Moore P. C. C. S. 309;
Shand v. *Bowes*, 3 Asp. Mar. Law. Cas. 203, 367; 36 L. T. Rep. N. S. 857; L. Rep. 2 App. Cas. 455; 46 L. J. 561, Q. B.;
Roper v. *Johnson*, 28 L. T. Rep. N. S. 296; L. Rep. 8 C. P. 167; 42 L. J. 65, C. P.;
Graves v. *Legg*, 2 H. & N. 213; 26 L. J. 316, Ex.;
Simpson v. *Crippin*, L. Rep. 8 Q. B. 14; 42 L. J. 28, Q. B.;
Brandt v. *Lawrence*, L. Rep. 1 Q. B. Div. 344; 46 L. J. 237, Q. B.

Cur. adv. vult.

April 9.—The following judgments were delivered:

Brett, L.J.—In this case the facts which I consider material are, that a contract of purchase and sale was entered into between the plaintiffs and defendants on the 29th Dec. 1876. By it the plaintiffs sold to the defendants about 25 tons, more or less, Penang black pepper, October and November shipment from Penang to London, per sailing vessel or vessels, at $4\frac{3}{16}d.$ per pound. The name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading; but, should the vessel or vessels which may apply to this contract be lost before declaration, this contract to be cancelled as far as regards such lost vessel, &c. Should the vessel or vessels and the pepper, or any portion thereof, be lost, this contract to be cancelled for the whole or such portion, &c. Prompt three months from final day of landing; deposit 20*l.* per cent., and difference on presentation of weight notes; no discount. In fulfilment of this contract the plaintiffs, on the 22nd Jan., within sixty days of the dates of three respective bills of lading of pepper, shipped on board a vessel called the *Borga*, declared in one declaration three distinct parcels of pepper, all on board the *Borga*, thus: S.B.; B. 285 bags, bill of lading dated 29th Nov.; C. 110 bags, bill of lading, dated the 29th Nov.; F. 105, bill of lading, dated the 11th Dec. Two of the parcels, which amounted to 20 tons, were shipped and declared in accordance with the contract, but the third parcel, although declared within due time after date of bill of lading, did not fulfil the contract, because it was not a November shipment. The plaintiffs were asked whether this declaration, which both parties called a tender, was final, and answered that it was. On the 27th Jan. the plaintiffs asked whether the defendants would accept the December shipment named in the declaration of the 22nd Jan. No definite answer was given, but on the 2nd Feb. the defendants refused the whole, on the ground that a part was not a November shipment. It is somewhat difficult to appreciate the legal effect of this refusal. I know of no legal obligation to accept or reject a declaration which is an act to be done solely by the seller, nor of any legal effect to be given to an alleged refusal to accept a declaration. The highest effect which can be given to this refusal at this time is that it is a notice by the defendant that he does not accept the declaration as good for 25 tons. On the 5th Feb. the defendants wrote to substitute for the December shipment a November shipment, which was also on board the *Borga*. The date of the bill of lading of this lot was the 29th Nov.—that is to say, they offered a November shipment. But they made the offer or declaration more than sixty days after the date of the bill of lading. This was refused by the defendants. The *Borga* arrived in June. The plaintiffs tendered three parcels of Penang pepper, all of November shipment, and amounting in all to 25 tons, being the two parcels of November shipments declared on the 22nd Jan., and the one parcel offered or declared on the 2nd Feb., but which last was not declared within sixty days of the date of the bill of lading relating to it. The defendants refused to accept any part, on the ground, by reference to their former letter as to the declaration, that they would not receive a part if offered, because the whole had not been declared according to contract.

Upon this state of facts it is obvious that the declaration of 20 tons, per *Borga*, made on the 22nd Jan. was a different declaration of 20 tons, unless the declaration of so much was rendered nugatory by the wrong declaration of the other 5 tons, the December shipment; and it is equally obvious that after the 28th Jan. the plaintiffs could not make a valid declaration of any November shipment. So that on the arrival of the ship in June the plaintiffs could only tender as well shipped, and also well declared, 20 tons, and could not by any contrivance tender as well shipped, and also well declared, the other 5 tons. The plaintiffs did tender 25 tons. If the defendants had refused on the ground of having 25 tons offered to them, whereof they

were only bound to take 20 tons, so that they had left it open to be said that if the 20 tons had been offered to them they might have accepted them, then the tender of the 25 tons must have been bad; but the defendants did not take that point. They refused in terms which amounted to saying that they would not take the 25 tons, nor the 20 tons if offered, because they could not have 25 tons shipped and also declared according to contract. This refusal seems to me to have absolved the plaintiffs from the necessity of tendering separately the 20 tons, and to oblige us to treat the case of liability as if the plaintiffs had tendered the 20 tons at the time when they tendered the 25 tons. The question is whether, if the plaintiffs had tendered the 20 tons only, not being able to tender according to contract any 5 tons to make up the 25 tons, the defendants could have refused to accept the 20 tons.

That raises, first, the question, What is the proper construction of the contract?

In *Jonasshon* v. *Young* (4 B. & S. 296) an action was brought for not accepting coals. The contract was that the plaintiffs would sell and deliver to the defendant as many coals, equal to a former sample cargo, as a steamer called the *Great Northern* could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards, in successive voyages, the steamer to be sent by the defendants, and the plaintiffs to ship the coals at 5*s.* 9*d.* per ton, payments at the beginning of each month for the preceding month's shipments, less 2½ per cent discount. The defendants pleaded that on the first voyage the plaintiffs shipped a cargo not equal to sample. To this plea there was a demurrer. The failure of the first cargo was therefore admitted. It was impossible that the plaintiffs could by any subsequent deliveries satisfy the contract if it was one and indivisible; but the court held that the plea was bad, because the breach by the plaintiff went only to part of the consideration. Now, the consideration for the whole of the defendants' undertaking—which was of course the undertaking to accept and to pay for all which the plaintiffs were to deliver—was that the plaintiffs undertook to deliver all, and to deliver a cargo each time that the defendants should send the steamer. The judgment is that the failure to deliver the first cargo according to the contract, though an incurable failure, did not absolve the defendants from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiffs. Apply that case to the question raised is this. Here the whole consideration for the defendants' promise to accept the pepper was the plaintiff's promise to deliver the whole 25 tons. The plaintiffs were ready and willing to deliver 20 tons, but failed by an incurable failure to be able to deliver the other 5 tons. The case cited answers that the failure of the plaintiffs is a breach only of part of the consideration, and the defendants are not absolved from the duty of accepting the 20 tons.

In *Simpson* v. *Crippin* (L. Rep. 8 Q. B. 14) the action was for non-delivery of coal. The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into defendant's waggons, at plaintiff's collieries, in equal monthly quantities during the period of twelve months, from 1st July, at 5s. 6d. per ton; terms, cash monthly, 2½ per cent. discount. The plaintiffs failed to send waggons according to the contract in the first month. That was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The judge told the jury that, as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants in point of law in cancelling the contract. "It cannot be denied," says Blackburn, J., "that the plaintiffs were bound in every month to send waggons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract, and the question is whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of waggons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract. Apply the case to the present. The point taken on the behalf of the defendants is that, by reason of the incurable breach as to the five tons, the plaintiffs are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shown why damages would not be a compensation for the breach by the plaintiffs as to the five tons.

In *Brandt* v. *Lawrence* (L. Rep. 1 Q. B. Div. 344) the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4500 quarters of Russian oats, at 28s. per quarter delivered 304lbs., including freight and insurance, to London; shipment by steamer or steamers during February; payment by cash on receipt of [and in exchange for shipping documents, less interest at one-fifth per cent. for the unexpired portion of three months from date of bill of lading. In fulfilment the plaintiff tendered 11,392 quarters, per *Winsland*. The defendant, for a given reason, refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the *Oxford*, but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender, the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of 4500 quarters of oats within a specified time. It could not be split into parts. If the whole was not shipped in time the defendant was entitled to reject the part which was in time. The Q. B. Div. thought that this was not so, because the contract says "Shipment by steamer or steamers." In the Court of Appeal Mellish, L.J., said, "I think the legal inference is that it was intended that the shipment should be made (which might mean might be made) in different parcels, and that the purchaser was bound to accept them as they came, if they were in time;" and, again, "was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers. That judgment was rested solely on the construction of the contract.

No reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood it was the same as if he had only shipped a portion by one ship and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendant was not bound to accept the twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, was the defendant the purchaser bound to accept that part of the goods which was shipped and declared in time? The answer according to the judges in the Queen's Bench and in error in the case cited is that he was, because the contract says that the shipment is to be, *i.e.*, may be, in sailing vessel or vessels. Mellish, L.J., cited in that case the case of *Simpson* v. *Crippin* (*sup.*). It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on *Johnasson* v. *Young* (*sup.*).

The chief use of authoritative cases is to enable us to deduce from them, if we can, a general principle applicable to succeeding similar though not identical cases. It seems to me that the general principle to be deduced from these cases is that, where in a mercantile contract of purchase and sale of goods to be delivered, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of those deliveries does not absolve the other party from the duty of tendering or accepting, in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages, without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part that the other party should have been, or should be always ready and willing and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other. Suppose in the case of shipments, the seller to have by contracts made abroad provided for all the successive shipments, and to have taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfil his contract, and so that the first shipment fails, the purchaser under the main contract we are discussing may upon one construction suggested throw up the whole contract, although he would be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without any compensation. So if the purchaser has made contracts and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation. Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the whole party, although he himself might be amply compensated by a payment in damages. Or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations; and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view. Moreover, it is most important, in my opinion, that the construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on variations either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in *Brandt* v. *Lawrence*, but it differs very little as to the terms of payment from the other cases cited. That difference as to the period of payment makes no difference in the reasons given for the decisions in those cases in which the stipulation as to the payment was not noticed, and in *Brandt* v. *Lawrence* it is not even reported.

I am of opinion that the plaintiff is entitled to recover in respect of 20 tons, leaving the defendant to a cross action in respect of 5 tons.

Cotton, L.J.—This was an action on a contract dated the 29th Dec. 1876, whereby the defendant agreed to buy from the plaintiff 25 tons of pepper, more or less, of October or November shipment, from Penang to London, per sailing vessel or vessels, marks and other particulars to be declared within sixty days from the date of the bill of lading. On the 22nd Jan. 1877 the plaintiffs, by a letter addressed to the defendants, declared 25 tons of pepper, shipped in various parcels on board the *Borga*. Of these 25 tons, 5 had in fact been shipped in December, and were therefore not pepper which according to the contract the defendants were bound to take; and on the 30th Jan. the defendants declined to take the 25 tons. Afterwards, but after the expiration of the time within which the pepper was under the contract to be declared, the plaintiffs declared other 5 tons of pepper, shipped in November, on board the same vessel, in substitution for the 5 tons previously declared, but which were not shipped till December, and to which the defendants had a right to object. The vessel arrived in this country in June, and the defendants refused to take the pepper. Hence the present action, and Lord Coleridge, C.J. decided in favour of the defendants that they were not bound to take the 25 tons of pepper, or any part thereof. The plaintiffs have appealed to this court.

The first point urged by the appellants was that the defendants, before the expiration of the time within which under the contract the plaintiffs were to declare the 25 tons, had by

their conduct either waived the condition as to time or induced the plaintiffs to believe that the condition would not be insisted on until it was too late for them to declare other 5 tons in substitution for that part of the 25 tons which were shipped in December, and therefore not in accordance with the contract. In my opinion this contention cannot be supported. It was for the plaintiffs to declare 25 tons of pepper of the quality, and shipped at the time, stipulated by the contract, and to do so within a limited time. The defendants were indeed asked whether they insisted on the objection that 5 tons were not of October or November shipment, and did not answer till the 30th Jan. But there is really nothing to support the contention that this delay, if any, was intended to mislead the plaintiffs, and in the absence of evidence from which such a conclusion could be arrived at we cannot release the plaintiffs from the stipulation as to time. It was urged that the rules of courts of equity are now to be regarded in all courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such, *exempli gratiâ*, as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must, therefore, hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity on which reliance is placed do not apply.

But then it was urged that the contract was divisible, and that the defendants were bound to take the 20 tons—that is to say that, although 5 tons was a difference which could not be covered by the words "more or less," under this contract the defendants would be bound to take and pay for any substantial portion of the 25 tons which the plaintiff might be ready and willing to deliver to them; and in support of this contention reliance was placed on the words "per sailing vessel or vessels," and it was argued that this showed that the contract was divisible. In my opinion it has not this effect. These words do indeed show that the 25 tons might be delivered in several parcels, and possibly might arrive in England at different times. But this is very different from the contention that the defendants, having stipulated for 25 tons, would be bound to take a small portion—say, 5 tons—when the plaintiffs were unable or unwilling to supply the balance of the stipulated quantity. The contract in this case was in December, after the pepper must, in order to comply with the condition of the contract, have been shipped, and I think that the reference in the contract to "vessel or vessels" may well have been intended to obviate any difficulty arising from the circumstance of 25 tons of the required quality of pepper not having been shipped in one vessel. But that is to enable the plaintiffs to require the defendants to take and pay for the pepper; there must be the 25 tons, though in different vessels. But it is urged that the decision in *Brandt* v. *Lawrence* (*sup.*) has given a judicial interpretation to the words "per vessel or vessels" in a contract which would otherwise be entire and indivisible. I cannot consider that case of *Brandt* v. *Lawrence* as laying down a general rule of construction, but merely as deciding that the contract in that case having regard to these words "vessel or vessels," was divisible. The contract is not stated at length in the report, but we have been furnished with a copy of it. There the contract was entered into before the shipment was under the contract to be made, and payment was to be made in cash on receipt of or in exchange for shipping documents. In that case the seller shipped in a vessel a portion of the oats, and tendered it to the buyer with a view to the supply of the entire quantity, and the whole of the oats in that vessel were oats which complied with the conditions of the contract as to quality and time of shipment, and the seller had therefore under the contract a right to ask for the price in cash for this part of the entire quantity in exchange for the bill of lading. This is, I think, a substantial difference between the contracts in the two cases, and sufficient to prevent the construction put upon the contract in that case affording authority for a decision in favour of the plaintiffs on the present contract. But there is also a difference in the circumstances under which the plaintiffs in this action make their claim, for in the present case the plaintiffs have not severed or separated the 25 tons of pepper, which is the subject of the contract, in the only way contemplated by the contract, namely, by shipping it in different vessels, but shipped in one vessel 25 tons, of which they contend the defendants are bound to take the whole.

I am of opinion that the decision of Lord Coleridge was correct, and must be affirmed.

Thesiger, L.J.—This is an action brought by the plaintiffs as sellers against the defendants as buyers for the non-acceptance of about 25 tons of black pepper, shipped from Penang to London. The defendants refused to accept any portion of this pepper, while the plaintiffs have contended in this court that the defendants were either bound to accept and take delivery of the whole or at least were bound to take delivery of a portion amounting to about 20 out of 25 tons. The contract between the parties was made on the 29th Dec. 1876, and was as follows. [His Lordship here read the contract.] On the 19th Jan. 1877, the plaintiffs, purporting to act in pursuance of the contract, declared by a vessel called the *Borga* 500 tons of black Penang pepper, which would be equal in weight to about 25 tons in three parcels, the subject of separate bills of lading, viz., 285 and 110 bags under bills of lading dated the 29th Nov. 1876, and 105 bags under a bill of lading dated 11th Dec. 1876. In answer to the declaration, the defendants by letter requested information as to the date of shipment of the pepper. On the 22nd they repeated the request, and on the 24th Jan., having in the meanwhile received no information as to the date of shipment, the defendants asked whether the declaration, or, as they called it, tender of the 19th Jan. was final or not, and were answered on the same day that it was. On the 25th and 26th Jan. the defendants again inquired as to the date when the whole of the pepper was shipped, and on the 27th Jan. the following letters passed between Messrs. Moon, Bower, and Co., acting for the plaintiffs, and the defendants:—"From Moon, Bower, and Co. to Messrs. J. Sala and Co. Jan. 27. We have received the following in

reply to your memo. of yesterday's date: 'We beg to acknowledge receipt of your memo. of yesterday's date, and are at a loss to know what you want. We have already furnished you with dates of bills of lading, and which in declaration is always considered sufficient." "London, 27th Jan. 1877.—From J. Sala and Co., 108, Fenchurch-street, to Messrs. Moon, Bower, and Co. Pepper cont. 29th Dec. 1876.—We have your memo. of this day. By furnishing us with dates of bills of lading you only fulfil one part of your contract, but the most important for us is the date of shipment, which, according to the contract, ought to have been made at the latest during November. We want, then, to know if you tender the said 500 bags as being all shipped during November." Upon the same day an interview took place between the parties, with the object, so far as the plaintiffs are concerned, of learning whether the defendants would accept the declaration, but nothing definite passed. In point of fact, the shipment of the 105 bags under the bill of lading of the 9th Dec. 1876 had not been made until the month of December, and on the 30th Jan. 1877 the defendants wrote to the effect that they did not accept the declaration, as it was not for the full quantity according to the contract terms. Upon the 31st Jan. the plaintiffs, through Messrs. Moon, Bower, and Co., proposed by letter an arbitration, to decide whether their tender or declaration constituted a fair delivery according to the contract, and in answer to that letter the defendants on the 2nd Feb. wrote as follows:—"We have your memo. of 31st ultimo. If the pepper you tender is all of November shipment at latest there is nothing to arbitrate upon, and the contract would be in order so far. If any portion of what you have tendered is not November shipment at latest, we reject said tender entirely, and refuse to arbitrate, as the contract has not been fulfilled by you." On the 5th Feb. the plaintiffs substituted for the declaration of 105 bags per *Borga*, under bill of lading of 11th Dec. 1876, a similar number of bags by the same vessel, under a bill of lading of 29th Nov. 1876; but, this declaration being made more than sixty days after the date of the bill of lading to which it referred, the defendants on the same day wrote as follows:—"We have your memo. of this day, and do not admit your tender. If even other reasons did not exist, as you will find by previous correspondence, your tender aforesaid, would be out of date." Some correspondence then passed between the parties, upon which, coupled with what passed before and at the interview of the 27th Jan., the plaintiffs found a contention that either the stipulation as to time of declaration was waived, or that the defendants by their conduct had misled the plaintiffs into a belief that the breach of the stipulation would not be relied upon, and were estopped from setting up such breach. It does not seem to me that this issue, which would be one peculiarly suitable for a jury, was really intended to be tried, or indeed was tried when the parties dispensed with a jury and took the case before Lord Coleridge alone, and it is not mentioned in his judgment. But, assuming it to be open to the plaintiffs at all, I am of opinion that the evidence wholly fails to support their contention. I gather from the evidence that, down to the time that the declaration was finally rejected, both the parties were standing upon their strict rights, and that the plaintiffs had due warning from the defendants that they at least were doing so, and I can see no ground for the imputation that the defendants wrongfully induced in the plaintiffs the belief that time was waived, or would be, or did anything which could be construed into a waiver or its equivalent. I revert again to the evidence. On the 2nd June the arrival of the *Borga* was advised by letter as follows:—"Memorandum. London, 2nd June 1877. From Moon, Bower, and Co. to Messrs. J. Sala and Co. We beg to advise the arrival of the *Borga* from Penang, in which vessel you are interested, as per contract dated 29th Dec." To that letter the defendants, on the 7th June, sent the following answer:—"London, 7th June 1877. *Borga*. We have your memo. of the 2nd inst., advising arrival of above vessel. By our previous memorandums, which we now confirm, you will find that we rejected your tender of pepper by this vessel." On the 26th June samples of the pepper which was included in the declaration of the 19th Jan. as altered by that of the 5th Feb., and all of which was a November shipment, were tendered. The defendants rejected the whole of these samples, and this action was then brought.

I have already stated my opinion that there was no waiver of the time within which the declaration was to be made, and no conduct of the defendants estopping them from setting up the breach of the stipulation in regard to time, and it follows that the declaration not being in time as regards 5 tons, the plaintiffs cannot maintain their action for the non-acceptance of the whole 25 tons.

The argument before us, however, was mainly directed to the question whether the plaintiffs can maintain their action in respect of the 20 tons. I am of opinion that they cannot do so.

The subject of the contract is the sale of a specific quantity of a given article, with a margin for a moderate excession or diminution of that quantity, under the words "about" and "more or less." The rule applicable to such a contract, if it were not qualified by other provisions, would be that, subject to the moderate margin, the sellers cannot call upon the buyers to accept any greater or less quantity of the article bargained for than the specified quantity. In the present case, if the 5 tons shipped or declared too late be excluded, the diminution in quantity is clearly beyond the margin. But the contract also provides that the shipment is to be "per sailing vessel or vessels," and that the name of the vessel or vessels, &c., is to be declared within sixty days of the bill of lading. Founding themselves upon these provisions, the plaintiffs contend that they were entitled to call upon the defendants to accept delivery of any substantial portion of the pepper, whatever might be their position or declared intention as regards the remainder, and they rely upon the decision in *Brandt* v. *Lawrence* (L. Rep. 1 Q. B. Div. 344) in support of that view. The defendants, on the other hand, contend that they were not bound to accept anything less than the whole of the pepper, subject to a moderate margin, except in the case of loss of vessel, or of vessel or pepper, especially provided for by the contract, or at least that under the circumstances of this case they were not so bound. I do not accede to the defendants' contention so far as it rests upon

the provisions of the contract relating to the loss of vessel, or of vessel and pepper, for those provisions are, in my opinion, inserted *alio intuitu*. I think they were intended to protect the sellers from any action for non-delivery caused by the happening of the contingency provided for. But I am of opinion that the defendants' contention is otherwise well founded.

Brandt v. *Lawrence* (*sup.*) was a case where Russian oats were sold under a contract by which the shipment was to be by steamer or steamers, in a particular month, conditionally upon ice at loading port not preventing it, in which event shipment was to be made immediately after the opening of the navigation. Payment was to be made in respect of any shipment by cash, and on receipt of or in exchange for shipping documents. Under this contract a portion of the oats, together with other oats, the subject of another contract, was shipped, in consequence of ice, after the specified month, but immediately after the navigation was opened, and was refused by the defendants on the ground that the shipment had been made too late. At the time of this refusal the sellers were acting in strict accordance with their contract, and there was nothing to indicate that the contract would not be performed by them in its entirety. Afterwards and beyond the time allowed by the contract the remainder of the oats were shipped, and were also—but in this case rightly—refused. In an action brought by the sellers for non-acceptance of both parcels of oats, the facts were proved as above stated, and, a verdict having been found for the plaintiffs in respect of the first shipment, a motion for a new trial was refused both in the Queen's Bench Division and on appeal to this court.

But in the present case the facts are very different. In the first place the declaration of the pepper named but one ship, and the pepper tendered did in fact arrive by one ship. In the second place there has not been at any time either a declaration or a tender of the 20 tons of pepper which the plaintiffs contend that the defendants are bound to accept, apart from the 5 tons, which upon this branch of the case they admit that the defendants were not bound to accept. The matter seems to stand thus: If the declaration of the 19th Jan. be relied upon, then the plaintiffs indicated by that declaration their intention of calling upon the defendants to accept under the contract of the 29th Dec. 1876, 25 tons of pepper, 5 tons of which were not of October or November shipment. If the declaration of the 5th Feb. be relied upon as severing those 5 tons from the remainder and cancelling the previous declaration made of them, then it is clear that it at the same time added another 5 tons, which the defendants were equally not bound to accept, inasmuch as the sixty days within which the declaration was to be made had expired; and even if these 5 tons had not been added the declaration of the 20 tons as a separate parcel would seem only to date from that day, and would therefore also be too late. But the plaintiffs endeavour to displace these positions by the argument that as the pepper tendered was shipped under three separate bills of lading, and was so declared, the declaration and tender, although never one in fact may be treated as separable in law, and consequently that the defendants were bound to accept the 20 tons, which upon this hypothesis were properly declared and tendered. I cannot assent to this argument.

In mercantile contracts like the present the making within a given time of a declaration or declarations upon which the buyers may act is an essential feature. And, further, although the sellers have an option to ship the article contracted to be sold either by one or more vessels, and the provision in the contract to that effect may give, as according to *Brandt* v. *Lawrence* (*sup.*) it does give, the sellers a right to call upon the buyers to accept any portion of the quantity contracted to be sold which has been shipped and declared in accordance with the contract, and as a step towards its entire performance, it does not appear to me by any means to follow that the quantity named in the contract is not still of the essence of the contract, and, if it be so, the case is in this respect distinguishable from *Simpson* v. *Crippin* (L. Rep. 8 Q.B. 14), and cases of that class, where each delivery of coal was really like a delivery under a separate contract to be paid for separately, and in respect of the non-delivery of which the parties might well be assumed to have contemplated a payment in damages rather than as a rescission of the whole contract. But however this may be, the present contract ought and must, in my opinion, at least involve this consequence, viz., that when the sellers elect to ship by the vessel the whole quantity contracted to be sold and declare their election to the buyers—still more when they follow up their declaration and election by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which, although physically separable and the subject of distinct bills of lading, yet has always been treated by the sellers as part of an entire whole, which the buyers, by the declaration, were told to treat, and, by the tender, were called upon to accept as one entire whole. The matter may be made more plain by reversing the position of the parties. Suppose a declaration, such as was made in this case, on the 19th Jan., and that the fact had been that all the three parcels had been shipped in accordance with the terms of the contract. Suppose also that, under such circumstances, the defendants, either at the time of declaration, or when the pepper was tendered, had expressed their willingness to take the 20 tons, but had absolutely refused to take the five; the plaintiffs might clearly have said: "We make this declaration or tender as a whole; and will only deliver the pepper comprised in it as a whole." If that be not so, where would the defendants' right of separation cease? They might, of course, take only one of the three parcels, and it is difficult to see on what logical or legal principle they might not demand to have some bags out of the one parcel and say, "We will pay for the non-acceptance of the remainder in damages." This would reduce the matter to a practical absurdity. But on the other hand, if the seller's rights would under the circumstances supposed, be such as I have suggested, viz., the right to have the pepper accepted as a whole, and the con-

sequent right of treating the contract as at an end if the buyers refused to accept it as a whole, surely the converse proposition must hold, viz., that when the shipment comprised in one declaration is in part good and in part bad, and, although the good and bad parts are separable, yet the sellers adhere to the declaration as a whole and tender the shipment as a whole, the buyers must have a right to reject unconditionally both the declaration and the whole of the goods tendered under it; and further, that the defendants would not be bound to accept the part of the shipment which in itself complied with the terms of the contract if after the declaration and tender, and after it was apparent that the sellers' contract could not be performed in its entirety by delivery of the whole of the goods contracted to be sold, the sellers separated the good portion of the shipment from the bad, and made a fresh tender of the former for acceptance.

Looking at the case from this point of view it is really untouched by either the contract cases to which I have referred, or by the decisions in *Brandt* v. *Lawrence* (*sup.*), and upon the grounds mentioned I arrive at the conclusion that the plaintiffs cannot maintain their action against the defendants in respect of any portion of the pepper which was the subject of their contract, and that the judgment of Lord Coleridge should therefore be affirmed.

Judgment affirmed.

Solicitor for plaintiffs, *John Rae.*

Solicitors for defendants, *Hollams, Son,* and *Coward.*

Dec. 17 *and* 19, 1878, *and March* 22, 1879.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Hayn, Roman, and Co. *v.* Culliford and Clark.

APPEAL FROM THE COMMON PLEAS DIVISION.

Ship—Damage to cargo by negligent stowage—Liability of shipowner—Bill of lading—Signature by agent.

Plaintiffs were consignors of sugar to be carried from Hamburg to London in defendants' steamship, and received bills of lading signed by "P. and K., agents." The ship was at the time under charter to P. and K., who were merchants at Hamburg, but plaintiffs had no knowledge of such charter.

The bill of lading accepted liability for "all accidents, loss, or damage . . . from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner, or consignee."

Plaintiffs' sugar was damaged owing to negligent stowage.

Held, that, if the bill of lading was a contract of carriage between plaintiffs and defendants, the exception did not apply, and that, if there was no contract of carriage between plaintiffs and defendants, the sugar being lawfully in the ship with the defendants' licence, the negligence was a breach of duty, and therefore in either case defendants were liable.

Judgment of Denman, J. affirmed.

The action was brought to recover damages for injury caused by negligent stowage to 280 bags of sugar belonging to the plaintiffs, which had been shipped on board the defendants' ship.

By a charter-party dated the 15th Nov. 1877, and made between the defendants, owners of the steamship *Cleanthes,* and Messrs. Pott and Korner, merchants, "by the intercession of the shipbroker W. Zoder," it was agreed that the ship, after discharging her inward cargo, should load from the said merchants a full and complete cargo of general lawful merchandise at Hamburg, and proceed to one wharf only in London as ordered by charterers' correspondents, and deliver the cargo on payment of freight (for sugar) at the rate of 7*s.* 6*d.* sterling in full, per ton, gross weight delivered—"it being agreed that for the payment of all freight, dead freight, and demurrage, the said master or owner shall have an absolute lien. . . on said cargo, which lien they shall be bound to exercise; the charterers' liability to cease when cargo is shipped and bills of lading signed; the captain shall sign bills of lading at rates as presented without prejudice to this charter-party." The charter-party was signed "H. W. Pott and Korner," and "By telegraphic authority of owners, W. Zoder as agent."

The plaintiffs, who were not aware of the existence of the charter-party, shipped the sugar under the following bill of lading.

Shipped in good order and well conditioned in and upon the steamship *Cleanthes* whereof is master P. Andrews, now lying at Hamburg, and bound for London, 280 bags of sugar, which are to be delivered in like good order and condition to Hayn, Roman, and Co. or their assigns, freight at the rate of 7*s.* 6*d.* sterling, *plus* 10 per cent. per ton gross weight, to be paid by consignees; the act of God, the Queen's enemies, pirates, robbers, restraints of princes, vermin, jettison, barratry, and collision, fire on board or on shore, and all accidents, loss or damage of whatsoever nature or kind, or howsoever occasioned from machinery, boilers, steam, and steam navigation, or from perils of the seas or rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted, it being agreed that the captain, officers, and crew of the vessel in the transmission of the goods, as between the shipper, owner, or consignee thereof, and the ship and shipowner, be considered the servants of such shipper, owner, or consignee. In witness whereof the master or agent of the ship has signed four bills of lading of this tenor and date. Dated in Hamburg, 19th Nov. 1877.

Pott and Korner, Agents.

At the trial, before Denman, J., it was proved or admitted that the damage to the sugar was occasioned by negligence in stowing oxide of zinc in casks above the sugar, and the jury assessed the damages at 501*l.* 6*s.*

All other questions were left for the decision of Denman, J., who reserved the case for further consideration, and, after hearing arguments, gave judgment for the plaintiffs. The evidence on which the learned judge came to the conclusion that there was a contract between the plaintiffs and the defendants for the carriage of the sugar is fully set out in his judgment, which is reported 39 L. T. Rep. N. S. 288.

The defendants appealed.

Dec. 17 *and* 19, 1878.—*Watkin Williams,* Q.C. and *C. Bowen* for the defendants.—The real question is, whether there is any evidence of a contract

of carriage between the plaintiffs as shippers and the defendants as shipowners, for otherwise on what ground can the plaintiffs put their case? The contract was made with Pott and Korner, the charterers, who signed the bill of lading. To make out a ratification so as to make the defendants liable on that ground, it must be shown that the contract purported to be made on their behalf, and there is nothing in this bill of lading to show that it was made on behalf of the ship. The cases which are cited in the court below do not establish any liability on the part of the defendants. Even if there was a contract, the defendants were discharged by the exception in the bill of lading.

Butt, Q.C. and *J. C. Mathew* for the plaintiffs.—The evidence is sufficient to show that the bill of lading was a contract between the plaintiffs and the defendants, on which the latter are liable, and the damage having been caused by negligent stowage, the defendants are not protected by the exceptive clause. The goods were lawfully on board with the defendants' consent, and in the defendants' custody, and therefore the defendants are liable for the injury caused by negligence.

[Bramwell, L.J. referred to

Marshall v. *The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655; 21 L. J. 34 C. P.]

The following cases were also cited:

Blaikie v. *Stembridge*, 6 C. B. N. S. 894, 911; 28 L. J. 329, C. P.; 29 L. J. 212, C.P.;

British Columbia Saw Mills Company v. *Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 499; 3 Mar. Law Cas. O. S. 65;

Good v. *London Steamship Owners' Association*, L. Rep. 6 C. P. 563;

Sandemann v. *Scurr*, 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86; 3 Mar. Law Cas. O. S. 446;

Peek v. *Larsen*, 25 L. T. Rep. N. S. 580; L. Rep. 12 Eq. 378; 1 Asp. Mar. Law Cas. 163;

Steel v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; L. Rep. 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 316;

Taylor v. *The Liverpool and Great Western Steamship Company*, 2 Asp. Mar. Law Cas. 275; 30 L.T. Rep. N. S. 714; L. Rep. 9 Q. B. 546;

Fletcher v. *Rylands*, 19 L. T. Rep. N. S. 220; L. Rep 3 H. L. 330;

Jones v. *The Festiniog Railway Company*, L. Rep. 3 Q. B. 733;

The St. Cloud, Br. & Lush. 4; 1 Mar. Law Cas. O. S. 309;

Cur. adv. vult.

March 22. 1879.—The judgment of the court (Bramwell, Brett, and Cotton, L.JJ.) was delivered by Bramwell, L.J.—This case comes before us in a very unsatisfactory way, so far as relates to one of the questions principally argued before us. We are not told how the goods come to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage. We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them, it is the one contained in or evidenced by the bill of lading. Now it is clear that, if that is the contract, the defendants are liable on the ordinary contract of a carrier, unless there is (and there is not) some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedore. But it is by these acts and defaults that the goods were damaged. If then there is a contract between the plaintiffs and the defendants, the defendants are liable. So also if there is not. For if so, the case is this: the goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, intentionally that it would injure the plaintiffs' goods, it is clear that they would be liable. But what difference does it make that they did it ignorantly? It may be asked where is the duty of care? I answer, that duty that exist in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance—an act and wrongful. Suppose A. lets B. a horse, B. with C.'s licence puts up at C.'s stables for reward to C. from B., C. turns into the stable loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A. if he omitted to feed him; so here justice is done, though indirectly. It is certain that, if the charterers sued on the charter in respect of the complaint in this action, there would be no defence, and it is certain they ought to sue if necessary for the benefit of the plaintiffs. The judgment must therefore be affirmed.

Judgment affirmed.

Solicitors for plaintiffs, *W. A. Crump* and *Son*.

Solicitors for defendants, *Hollams, Son*, and *Coward*.

March 1, 3, *and* 22, 1879.

(Before Brett, Cotton, and Thesiger, L.JJ.)

Postlethwaite *v.* Freeland.

Shipping — Charter-party—Construction of—Demurrage—Charterer's liability—Due diligence.

A charter-party stipulated that the cargo should be brought to and taken from alongside at merchant's risk and expense, and should be "discharged with all dispatch, according to the custom of the port." In an action by the shipowner against the charterer for demurrage, it was proved that when the ship arrived at the port of discharge, owing to the unusual number of vessels then lying there, all the available lighters in the port were being used for discharging cargoes, so that the ship was compelled to wait her turn for lighters, and there was considerable delay in commencing to unload her. Cargoes were usually discharged in the port by lighters, and no others could be procured within 150 miles, and it was usual for ships entering the port to wait their turn for unloading. The judge asked the jury whether there was a settled custom in the port as to discharging vessels laden like the one in question; and, if there was, whether she was discharged with all dispatch according to the custom. The jury having answered both questions in the affirmative, judgment was entered for defendant.

Held (affirming the decision of the Exchequer Division, Cotton, L.J. dissenting), that, on the construction of the charter party, the charterer was not bound to begin discharging cargo at once without reference to the means for discharging existing in the port at that time; and the practice as to ships being unloaded in turn was part of the custom of the port; and therefore that there was no misdirection.

APPEAL from a decision of the Exchequer Division (Kelly, C.B. and Hawkins, J.).

The action was to recover damages for breach of an agreement contained in a charter-party to discharge cargo. At the trial the jury found for the defendant, and judgment was entered accordingly.

An order *nisi* having been obtained for a new trial, the Exchequer Division discharged the order, and the plaintiffs appealed.

The material facts of the case will be found to be fully set out in the judgment of the Court of Appeal (*post*).

Cohen, Q.C. and *Bigham* for plaintiff.—There was a misdirection. The obligation under the charter-party was not that the charterers should use reasonable diligence only in the discharge of the vessel with reference to the means of discharge existing at the port at the time. It is admitted that, if that were the only obligation there was no misdirection. "According to the custom of the port" means merely "in the manner usually employed in the port." There could be no evidence of custom as to the number of lighters available; it must necessarily vary. The fact that no lighters were immediately available does not relieve the charterers, who are bound under the charter-party to provide means of discharge. Suppose the vessel arrived while a strike of dock labourers was going on, or that all the lighters had been destroyed or injured by a hurricane, the charterers would still be liable under their contract for demurrage. In *Ford* v. *Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; 3 Mar. Law Cas. O. S. 190, 468), the earlier cases are referred to, and the law summed up by Blackburn, J. The learned judge says: "The question depends upon what the contract implied by law is when there is a charter-party silent as to the time to be occupied in the discharge. We agree that, whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances; and if some unforseen cause, over which he has no control, prevents him from performing what he has undertaken within that time he is responsible for the damage." Here the charterers or consignees were bound to provide lighters and discharge the cargo. The shipowner had nothing whatever to perform with respect to the discharge. In *Tapscott* v. *Balfour* (1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46; 42 L. J. 16, C. P.), where the vessel got in dock, but could not be loaded at once because of the number of vessels already in dock, it was held that the charterers were liable for the delay from the time of her getting into dock. See also *Ashcroft* v. *The Crow Orchard Colliery Company Limited*, 2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. N. S. 266; L. Rep. 9 Q. B. 540; 43 L. J. 194, Q. B.

In *Wright* v. *The New Zealand Shipping Company* (*ante*, p. 118; and 40 L. T. Rep. N. S. 413) this court held, where the time for unloading was not named in the charter-party, that the charterer was bound to provide at the port of discharge sufficient appliances of the kind ordinarily in use at the port, and that it was no answer to a claim for delay in unloading to show that the delay was caused by the crowded state of the port. Lord Coleridge should have directed the jury that under the charter-party the charterers were bound to provide means for discharging the cargo when it arrived, and also that it must be discharged with due diligence according to the custom of the port with respect to the manner of discharge. The attention of the jury should also have been directed to the fact that four of the lighters were out of repair.

Watkin Williams, Q.C. and *Macleod* for defendant.—Very little assistance can be gained from the authorities on this point; the principle of them is admitted. If the defendant was under the obligation contended for by the other side, it is admitted that the fact that there were a great number of ships at the port, or that this particular one had to wait her turn, would afford no excuse for the delay in unloading. But under the charter-party the defendant is not bound to give an absolute dischage with reference to the ship's capability to discharge. The words "according to the custom of the port" have no meaning if the contention of the other side is right. The evidence shows the very great difficulty there was in discharging cargo. Part of the custom was that ships should wait for their turn to discharge. "According to the custom" therefore means according to what occurs when there are a great number of ships in the harbour.

Bigham replied. *Cur. adv. vult.*

March 22.—THESIGER, L.J.—The plaintiff in this action was the owner of a vessel called the *Cumberland Lassie*, and on the 28th April 1875 he chartered her to the defendants to carry a cargo of about 370 tons of steel rails and fastenings from Barrow-in-Furness to East London in South Africa and there discharge. The charter-party provided that the cargo should be brought to and taken from alongside at merchants' risk, and contained the following stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The action is brought to recover damages for the alleged breach of such stipulation.

The port of East London is situate upon a river having a bar at its mouth, and into which in consequence vessels of the burden of the *Cumberland Lassie* are unable to enter until the greater part of their cargo is discharged. The discharge is performed by lighters, which are worked to and from the ship in a somewhat unusual manner. There is one large warp or cable from the inside to the outside of the bar. From that warp there branch out minor warps, and to those minor warps vessels lading or unloading their cargoes attach their own cables. The lighters have neither sails nor oars, and are worked by being pulled along the warps and cables which I have

described. In 1875 the business of lading and unloading was mainly conducted by a company called the East London Loading and Shipping Company, to which the warps belonged, and which owned nine or ten lighters for working in conjunction with the warps. Four only of these lighters were suitable to the discharge of the cargo of the *Cumberland Lassie*. The custom or practice of the port, as regards the discharge of vessels, was as follows:—vessels upon arrival reported themselves at the port office, and in the order in which they reported themselves their turn, as it was called, for unloading came in rotation. As soon as a vessel came in turn, one lighter was sent to her every working day until such time as she was finally discharged, with the exception that when the mail steamers came in a preference was given to them. The *Cumberland Lassie* arrived at East London on the 31st Aug. 1875, and was ready to commence discharging her cargo on the following day. It happened, however, that at the end of 1874, or the beginning of 1875, the supply of iron rails to the Government at East London had commenced, and in consequence the number of vessels arriving at the port in the autumn of 1875 was increased, and when the *Cumberland Lassie* arrived there were already lying in the roadstead seven vessels laden with cargoes similar to her own. The Government obtained from Algoa Bay, situate at least 150 miles south of East London, three or four surf boats, two of which appear to have been brought to East London after the *Cumberland Lassie* arrived there, and all of which, with the exception of one under repair, were employed in discharging the vessels which arrived before the *Cumberland Lassie*. In the result, the turn for the discharge of that vessel did not come until the 6th Oct., when a lighter of the East London Landing and Shipping Company commenced to discharge the cargo. From that time it is not contended on the part of the plaintiff that there was any undue delay; but, inasmuch as twenty-four working days intervened between the date of the ship's being ready to discharge and the 6th Oct., the plaintiff seeks to recover damages in respect of the non-discharge of cargo during those twenty-four days. The evidence establishes that the time occupied in discharging the vessel was not greater than the average time occupied in discharging vessels of like tonnage during the autumn of 1875. At the trial Lord Coleridge left to the jury to say, first, whether there was any settled practice or custom between the months of April and November 1875 as to the unloading of sailing vessels laden as the *Cumberland Lassie* was laden in the port of East London; secondly, if there was, whether the *Cumberland Lassie* was unloaded with all dispatch according to the custom. The jury answered both questions in the affirmative, and the learned judge directed the verdict and judgment to be entered for the defendants. The plaintiff moved the Exchequer Division for a new trial on the ground of misdirection, and that the verdict was against evidence, and the conditional order for a new trial having been discharged, he appealed to this court.

The argument before us has really resolved itself into a question as to the construction which the clause in the charter-party "the cargo is to be discharged with all dispatch according to the custom of the port" when read in conjunction with the facts ought to bear. The plaintiff contends in substance that Lord Coleridge ought to have told the jury that as soon as the *Cumberland Lassie* was ready to discharge the defendants ought to have provided her with one lighter for every working day, except perhaps the days on which the lighters were engaged in discharging mail steamers. If the plaintiff is right in his contention I think it clear that the learned judge did misdirect the jury, for he certainly indicated to them that there was no such obligation upon the defendants to provide lighters; but I am of opinion that the plaintiff is not right in his contention. In order to support it his counsel treat the clause of the charter-party in question as if the words "with all dispatch" were unconnected with the words "according to the custom of the port," and they endeavour by that means to read the clause as running in this way, "the cargo is to be discharged according to the custom of the port, and with all dispatch." Reading the clause in this way, they argue, not without force, that the custom of the port was to regulate the mode of discharge by a single lighter worked by the warps and cable, but was not to regulate the time of commencing the discharge or the rate of dispatch, which it was contended was to be as fast as one lighter, commencing as soon as the vessel was ready to discharge, could on working days discharge the cargo. In my opinion, however, the words "according to the custom of the port," placed as they are in immediate juxtaposition with the words "with all dispatch," were intended to be read, and must be read, so as to qualify these latter words and, if that be so, it appears to me to follow that the practice or custom as to vessels coming on turn was one which regulated the dispatch of the *Cumberland Lassie* just as much as the practice or custom of unloading vessels by lighters worked along the warps or cables. Indeed, lighters, warps, and cables may in this case be looked on as forming one apparatus for unloading, and the plaintiff had no right to complain of the defendants, because this apparatus was, until the 6th Oct., occupied by vessels which arrived before the *Cumberland Lassie*, and over which the defendants had no control.

The decision in this court of *Wright* v. *The New Zealand Shipping Company* (*ante*, p. 118), to which we have been referred, is in no way inconsistent with this view. There the charter-party did not contain any express provision in reference to the discharge of the cargo, and the obligation of the charterer was therefore that implied by law—that is, to discharge within a reasonable time. The ordinary time for discharge of vessels of similar burthen with and loaded as the chartered vessel in that case was loaded, was proved to be thirty-five days; but, owing to a concourse of vessels annually at the particular time of the year at which the plaintiff's vessel happened to arrive, and due in great measure to arrivals of the defendants' own vessels, the lighters were inadequate in point of number, and the plaintiff's vessel was delayed for a much longer period than thirty-five days. Upon that state of facts it was held that the shipowner ought not to be the sufferer from a delay, against which the defendants might themselves have provided, in respect to which the charter party contained no

express stipulation, and the cause of which, although recurring at fixed intervals of time, was exceptional when compared with the general state of the port of discharge.

The cases of *Tapscott* v. *Balfour* (1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710); L. Rep. 8 C.P. 46) and *Ashcroft* v. *The Crow Orchard Colliery Company* (2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. N.S. 266; L. Rep. 9 Q. B. 540) are also distinguishable from the present. In the former the loading of a cargo of coals was to be in the usual and customary manner, nothing being said as to time, and it was held that the words applied to the mode of loading only, and that the charterer was responsible for delay, which arose from his vessels' inability to get under the tips, that inability again being due to the number of vessels waiting in turn to go under the tips before her, of which number, moreover, several were loaded by the agent employed by the charterer. It is also to be observed that in that case it was proved that, although loading from the tips was the most usual method of loading in the particular dock, yet it could be, and not unfrequently was, done from lighters, and Denman, J. in his judgment relies upon the fact as giving additional support to the view that the charterer, who might have obtained lighters, was responsible for the delay. In *Ashcroft* v. *The Crow Orchard Colliery* (*ubi sup.*) a cargo of coal was to be loaded with the usual dispatch of the port, or if longer detained the ship was to be paid forty shillings demurrage. It was there held that the charterers were liable for a detention outside the docks for an unusual time, that detention being due to the fact that the charterers themselves had, when the charter party was entered into, three ships loading in the docks, and ten other charters in their books having priority over the plaintiffs.

None of the decisions to which I have referred in any way impugned the authority of cases of the class of *Leideman* v. *Schultz* (23 L. J. 17 C. P.; 14 C. B. 38) and *Lawson* v. *Burness* (1 H. & C. 396) which were decided in favour of the charterer upon words in the charter party importing that he has only to be bound to take cargo in regular turns of loading. They are merely illustrations of the principle enunciated in *Ford* v. *Cotesworth* (19 L. T. Rep. N. S. 634; L. Rep. 4 Q. B. 127; 3 Mar. Law Cas. O. S. 190, 468), to which my judgment in this case is in no way opposed. That principle is that, under a charter-party which provides for the delivery of the cargo in the usual and customary manner, but which is silent as to the time to be occupied in the discharge, the law implies a contract that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him. Here the use of the warp and lighters in regular turn was part of the custom of the port by which the discharge with all dispatch was to be qualified and limited, and by that custom the control of the lighters as well as of the warp was no more in the hands of the charterers than it was in the hands of the shipowner.

For these reasons I am of opinion that the ruling of the learned judge at the trial was correct, that the findings were warranted by the evidence, and that this appeal should fail.

COTTON, L.J. read the following judgment:—This was an action by the owner of a sailing vessel called the *Cumberland Lassie* against the charterers for the detention of his ship. The action was tried before Lord Coleridge, and resulted in a verdict and judgment for the defendants, and this was an application by way of appeal from the Exchequer Division for a new trial, on the ground of misdirection. By the charter-party, which was dated the 28th April 1875, it was agreed that the *Cumberland Lassie* should take a cargo of rails from Barrow-in-Furness to East London in South Africa, and it was stipulated that the cargo should be brought to and taken from alongside at merchants' risk and expense; and further (which is the provision on which the question turns), that the cargo was to be discharged with all dispatch according to the custom of the port. It was for delay in accepting delivery of the cargo at the port of discharge that the action was brought. The ship arrived at East London on the 31st Aug. 1875. The harbour there is a bar harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargoes outside the bar is effected by means of lighters or other small vessels. The usual way by which in Sept. 1875 lighters were brought alongside the vessel to be unloaded was by means of a warp, consisting of a rope carried across the bar and fastened to buoys, and on the outside connected with the ropes branching from it; from the end of these branch warps the lighters were warped to the vessel to be unloaded by a rope provided by that vessel. The complaint of the plaintiff is, that for twenty-four working days after the *Cumberland Lassie* arrived at the port no lighter or other vessel was provided by the defendants, the charterers, to accept delivery of the cargo. The defendants admit the fact, but they say that, having regard to the terms of the charter-party and the facts proved, they are not liable for the delay. It was proved at the trial that, at the time when the *Cumberland Lassie* arrived at East London and was in course of unloading, the only lighters for unloading vessels outside the bar, with the exception of three boats belonging to the Government, belonged to a company which had purchased these lighters and the warp from the Government; that there was a practice or custom at the port that every sailing vessel should be taken in turn for unloading, according to the time of her arrival in port, and that when the turn of a vessel arrived it should have the services of one lighter only, and once only in the day; that the company had four lighters only capable of carrying iron rails; that mail steamers were, as against sailing vessels, entitled to preference in the use of the lighters, and that in regular turn the *Cumberland Lassie* was not entitled to the use of a lighter for discharge of her cargo before the twenty-four working days had expired. There was evidence that, having regard to the number of vessels in the port at the time when the *Cumberland Lassie* arrived and to the number of lighters then at the port available for unloading rails, the turn of the plaintiff's vessel to have a lighter for unloading the cargo did not arrive before the twenty-four days had expired. The defendants contend that the reference to the custom of the port contained in the provisions of the contract to which I have referred absolves the defendants from liability,

and so Lord Coleridge directed the jury; for he in his summing up in effect directed that, if they found that at the date of the charter-party and from that time till the time of the unloading there was a practice at the port as to the unloading, and if so, that the defendants used the existing appliances with due despatch in accordance with the practice, that then they should find for the defendants. If the delay of which the plaintiff complains was not attributable to what can be called the custom or practice of the port, this was a misdirection; for, in the absence of any reference to the custom of the port, and if there was no express stipulation in the contract to regulate in this respect the rights and liabilities of the plaintiff and defendants, it would be the duty of the charterers to provide at or shortly after the vessel was ready to discharge its cargo appliances of the kind ordinarily in use in the port for the purpose of taking delivery—that is, in the present case, lighters or other small vessels capable of crossing the bar.

Did then the reference to the custom of the port vary the defendants' liability in this respect? It was argued that it does so, because the custom or practice of the port was that vessels should be entitled to lighters in turn according to the times of their respective arrivals, and by treating the warp and lighters as one entire instrument for unloading vessels outside the bar. But there was no evidence that a larger number of lighters than were in use at the time in question in the port could not have crossed the bar daily by means of the warp; and, on the contrary, there was evidence that shortly afterwards a larger number of lighters were employed in unloading vessels, and crossed the bar by means of the warp. The delay therefore was attributable to the number of lighters at the port being insufficient for the number of vessels. The number of lighters cannot, in my opinion, be considered as a matter regulated by or dependent on the custom or practice of the port. It would not, I should think, be contended that, however the business of the port might increase, it could be said to be the custom or practice of the port that the only lighters for hire there should be such as the company were for the time being possessed of. In my opinion the defendants are not, by the qualifying reference in the charter-party to the custom of the port, protected from liability for delay caused by the number of lighters at the port being insufficient for the vessels for the time being in the port. It is said that this will make the words "according to the custom of the port" inoperative and strike them out of the contract. But, in my opinion, this is not the case. These words will qualify the words "with all dispatch" by excusing any delay caused, for example, by the preference given by the practice of the port to mail steamers, or by no work being done on those days which it is the practice of the port to observe as holidays.

It was much pressed in the course of the argument that it was impossible for the charterers to provide other lighters. If, however, the construction which I have put upon the contract is correct, the defendants cannot protect themselves from liability to pay damages to the plaintiffs for the delay by alleging that this is attributable to their inability to discharge an obligation which the defendants, as between themselves and the plaintiffs, had undertaken.

It was said that the number of the lighters was insufficient, in consequence of there being at the time an unusually large number of vessels which were waiting to discharge their cargo. In my opinion, if such was the case, it cannot excuse the defendants from liability; for, if such was the case, the delay would be caused by an accident, of which, as between themselves and the plaintiff, the defendants must bear the loss.

Brett, L.J. — The question in this case is whether there ought to be a new trial on the ground of misdirection. The action is for demurrage, and the answer is that under the charter-party discharge of the cargo was to be according to the custom of the port, and that it was properly discharged in accordance with the charter-party. Lord Coleridge asked the jury whether there was an established custom of the port, and whether, if so, the cargo was discharged in accordance with that custom; and the jury answered both questions in the affirmative. So far there is no symptom of a misdirection. But it is said that the judge misdirected the jury as to what might and what might not be a part of the custom of the port. The objection in reality is that the learned judge admitted evidence to show that certain things were part of the custom of the port which in their nature could not be so. It was shown by evidence that part of the custom was that vessels should be unloaded by certain lighters, that is to say, by those belonging to a certain company and those belonging to the Government, and that such lighters were only supplied to the ships in turn, and in a particular way. It was shown that this was the practice of the port, not only at the time when the ship arrived, but had been so for so long a time that it had become a recognised custom. But it was urged on behalf of the plaintiffs that this evidence was immaterial, and that the learned judge was wrong to admit it—that this evidence was, in fact, shut out by the terms of the charter-party.

Now, the charter-party provides that "the cargo is to be brought to and taken from alongside at merchants' risk and expense, that twelve running days (Sundays and holidays excepted) are to be allowed, and that the cargo is to be discharged with all dispatch according to the custom of the port." In other words, the cargo is to be discharged with all dispatch consistent with its being discharged in the way in which every ship is invariably discharged at that port. What, then is the manner in which the vessel is to be discharged? The ship cannot cross the bar, and must lie outside. The discharge must therefore take place by lighters, which are warped along a fixed cable across the bar, and, when they have crossed the bar, they are warped along smaller ropes to the ship's side, and in the same manner are warped in again. The port is 150 miles at least from any place whence any additional lighters can be procured; and to say that anyone could get more lighters for the purpose of unloading a particular ship is to say that which, from a business point of view, is impossible. Therefore, *à priori*, one would suppose that the unloading must be done by lighters belonging to that port only. Evidence was given which accords with that which one would naturally expect—that the un-

loading had to be done by lighters only, and not by such lighters as the owners of the cargo could procure at their own will and pleasure, but by the lighters belonging to the company and the Government. Now, the company and Government would only supply those lighters in one particular way, viz., at the rate of one lighter per day to the ships in turn, according as each arrived and was reported. Therefore, the process by which a ship had to be discharged was by placing itself on the turn and waiting till it received from the Government permission to have one lighter per day to discharge the cargo. So far from thinking that this cannot be a custom, I am of opinion that it is the only substantial custom of the port. If there was no custom whatever, and the charterer could have supplied himself with a hundred lighters at once, he must still use them by going along the fixed warp. That is a matter of necessity, and therefore the use of the fixed warp cannot be called an essential part of the custom; but an essential part of the custom was to wait till the vessel could get a lighter in her turn. Therefore, unless we hold that the defendants were bound to go to any distance to fetch lighters they used all diligence and every dispatch. I hold that it was an essential part of the custom that the charterers were not bound to get lighters from any other place in any other way, or at any other time, but only from the company and Government, at such times as they would allow; I am of opinion that that was a valid custom, that the learned judge was right to admit the evidence, that the verdict was right, that upon that finding no other judgment could be entered, and that consequently this judgment ought to be affirmed.

Judgment affirmed.

Solicitors: *Chester* and *Urquhart*, for *Bradshaw*, Barrow-in-Furness, for plaintiff; *Allen* and *Greenor*, for defendant.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. POYSER, Esq., Barrister-at-Law.

Saturday, June 14, 1879.

(Before COCKBURN, C.J. and LUSH, J.)

OAKLEY *v.* SPEEDY.

*Compulsory pilotage—Master of vessel on board—Criminal proceedings against master—Onus of proof—*17 *&* 18 *Vict. c.* 104, *ss.* 354, 370, 376, *and* 388—*Thames Conservancy Act* (29 *&* 30 *Vict. c.* 89), *bye-laws* 28 *and* 72.

In criminal proceedings against a master of a vessel who has a compulsory pilot on board, such master is not bound to prove that at the time of the act or omission the subject of such proceedings he was not interfering with the navigation of his vessel.

The respondent, the master of a vessel carrying passengers and within a district in which he was compelled to take a pilot on board, was summoned and charged by the appellant, acting on behalf of the Thames Conservancy Board, before the police magistrate at W., with not having navigated his vessel in a careful and proper manner; but the magistrate dismissed the summons on the ground that as the master had on board a pilot compulsorily in charge, he was exempt from liability, unless it was proved that he was actually navigating the vessel himself.

Held, that the summons was properly dismissed, for as there was a pilot compulsorily on board, it must be assumed that he was in charge of the vessel, since in criminal proceedings against the master for a breach of the rules and laws of navigation, it is incumbent on the prosecution to prove that at the happening of the accident the master actually took part in the management and navigation of the vessel.

THIS was a case stated by a stipendiary police magistrate under 20 & 21 Vict. c. 43. The following were the material parts:—

The defendant was charged at the police court of Woolwich, by a summons taken out at the instance of the complainant, acting on behalf of the conservators of the river Thames, that he the said Wm. Speedy, on Nov. 16, 1878, being master of the steam-vessel *Britannia*, did not navigate the said vessel while passing on the river Thames in a careful and proper manner as well with regard to the safety of such vessel as of other vessels on the river.

At the hearing of the said summons it was admitted on the part of the defendant that he was on the said 16th Nov. 1878, master of the said steam vessel *Britannia*; and it was proved on behalf of the complainant that on the afternoon of that day the said steamship was navigated on the river off Woolwich at a rate of speed by reason of which one of the mooring chains of the *Warspite*, moored at Charlton, was by the heavy wash carried away.

It was proved on behalf of the defendant that the *Britannia*, was on the said 16th Nov. 1878, on a voyage from Wapping, in the port of London, to Dundee, in Scotland, and that she had on board certain passengers, and that at the time of the said navigation a pilot duly licensed by the Trinity Corporation was compulsorily on board the *Britannia* to take charge of and navigate her to Gravesend. The navigation of the river Thames is regulated by the bye-laws made by the conservators of the said river in pursuance of the Thames Conservancy Acts, and the Thames Navigation Acts, and allowed by order in council, dated the 5th Feb. 1872.

The 28th of such bye-laws is as follows:

Every vessel shall at all times while passing on the river be navigated in a proper and careful manner, as well with regard to the safety of such vessel as of other vessels on the river.

The 72nd is:

Any person committing any breach of, or in any way infringing any of these bye-laws, shall be liable to a penalty of and shall forfeit a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts 1857 and 1864.

By 17 & 18 Vict. c. 104, s. 354, it is enacted that:

The master of every ship carrying passengers between any place in the United Kingdom, or the islands of Guernsey, Jersey, Sark, Alderney, and Man, and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority under the provisions of this or of any other Act, or upon any part thereof so situate, shall, unless he or his mate has a pilotage certificate enabling such master or mate to pilot the said ship within such district, granted under the provisions hereinbefore contained or such certificate as next hereinafter

mentioned, being a certificate applicable to such district and to such ship, employ a qualified pilot to pilot his ship.

Sect. 370 defines the "London district" as "comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness on the north and Dungeness on the south.

Sect. 376 enacts that "subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district and the Trinity House outpost districts as hereinbefore defined."

It was contended on the part of the defendant that, inasmuch as the *Brittannia* was being navigated at the time of the alleged offence by a pilot compulsorily acting in charge, and was under compulsory pilotage, he (the defendant) could not be convicted of committing the breach of the bye-law charged in the summons, and was exempt from liability thereof, in proof of which contention sect. 388 of the last-mentioned Act was quoted, which section is as follows:

No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

Being of opinion that such contention was correct, the magistrate dismissed the summons.

The question for the opinion of the court was whether the contention of the defendant was good in law.

Arbuthnot for the appellant.—The act complained of was running down the river at an undue rate of speed, and causing an accident. The master was rightly summoned, but the charge was incorrectly dismissed. I admit that there was a pilot compulsorily on board; but the onus of proving that the act complained of was caused by the pilot is cast on the master, who must relieve himself of the liability. The master shields himself under the 72nd bye-law and sect. 388 of the Merchant Shipping Act; but notwithstanding the exemption afforded by this section the Admiralty Court has always in cases in which it is the defence cast upon the master or owner of the ship the burden of proving that the loss or damage was due to the wrongful act of the pilot:

The Mobile, Sw. Ad. Rep. 127;
The Admiral Boxer, Sw. Ad. Rep. 193;
The Schwabbe, Lush. Ad. Rep. 239;
The Carrier Dove, Br. & Lush. Rep. 113.

The principle of these cases is applicable to the matter now before the court. [LUSH, J.—This is not an action, or within the exempting clause, but a penal matter; and is there not a presumption that, when a pilot is on board, he is in charge of the whole navigation of the ship? The cases you have cited are civil actions for loss or damage, and rest on the statutory exemption, and their decisions do not apply to criminal charges upon the bye-laws for improper navigation, as to which it is ordinarily to be presumed that the pilot in charge of the vessel at the time should be responsible.] This is a question of the *onus* of proof. We were not on board of the defendant's vessel, and cannot know whose fault it is that has caused the mishap, but the defendant does, and it is for this reason that the Admiralty Court casts upon the master the burden of showing that he was not to blame for the accident. LUSH, J.—By the terms of sect. 354 of the Merchant Shipping Act there ought to have been a pilot on board this vessel, and you admit there was. Now, can you presume that the master was interfering in the management and navigation of the ship without presuming that he was guilty of a wrongful act?] The master might actually have been in charge of the vessel at this moment, for the pilot might have gone below; yet the defendant says, "I was not navigating the vessel when the accident occurred; there was a pilot on board; the law took the navigation out of my hand." Now, if such statement is final, and the respondent's contention is good, those in whose charge is the proper ordering of the navigation of the Thames will find their hands fettered, and much mischief will ensue. [LUSH, J.—The last bye-law, number 72, of the conservancy bye-laws, lays it down that the person actually committing the wrongful act of careless navigation is liable. The owner clearly would not be liable in this case, yet he would have been liable *primâ facie* in a civil action for a collision, as in the cases cited to us. This clearly shows the distinction between the two classes of cases.]

Bucknill, for the respondent, was not called upon.

COCKBURN, C.J.—This appeal must be dismissed. The principle of the cases cited to us is not applicable to the case before us now, though I must confess the decisions go a very long way. The Act of Parliament in consideration of its being compulsory on owners and masters to take on board pilots in certain districts, affords them a certain exemption from liability for the default of such pilot, but it will not permit the owner or master to say, without contradiction, that the accident has been caused by the default of the pilot and not of the master. This, in my opinion, goes a very long way, and for this reason, that it seems to me that when the pilot takes up the navigation of the vessel, and gives his orders and the others are to obey him, the presumption is really the other way. Here, however, we are not dealing with the civil, but penal exemption of the master of a vessel, on board of which there is a pilot directed by the law to be taken. The 28th bye-law says, "every vessel on the river must be navigated with due care;" and its infraction is visited with a penalty. But now we must look to see how far, if the master is not navigating the vessel, he is responsible, and how far he has interfered with the navigation, when his authority is properly merged into that of the pilot. It is the duty of the master to repeat the orders of the pilot and to see them obeyed; now, if he did the reverse of what the pilot told him, and interfered in the working of the ship, he would be responsible. But this is not proved. Those who seek to impose a penal responsibility on the defendant must prove that he has committed the offence imputed to him, and that he wrongfully interfered with the management and navigation of this vessel.

LUSH, J.—I am of the same opinion. *Primâ facie*, in a civil action, the owner of a vessel in which is a pilot compulsorily taken on board, is bound by the acts of his servants, and he must

prove that the accident happened not through the fault of his servants, but of the pilot. The 72nd bye-law inflicts the penalty on the guilty person, not on the owner. When you summon a master of a vessel under this bye-law you must prove, to obtain a conviction, that he is the guilty party. If it is shown that he had a pilot compulsorily on board, and as the law presumes that the pilot had the charge of the vessel, you must prove that the master took part in the navigation. To take a cognate example, the master of a servant who has driven furiously may not be personally liable to punishment for an accident resulting therefrom, though he might be sued in a civil action for damages; but under the police regulations, the driver is made personally liable, and can be punished for his misconduct. In this case, the master having a pilot compulsorily on board, and so not being in command of the vessel, it is to be presumed that he took no share in the navigation. If he is to be personally fixed for a breach of the laws and rules of navigation, it is incumbent on those who would so fix him, to prove that because of some act of interference on his part the matter complained of occurred.

Appeal dismissed.

Solicitors for the appellant, *Elmslie, Forsyth,* and *Sedgwick.*

Solicitors for the respondent, *J.* and *A. Farnfield.*

COMMON PLEAS DIVISION.

Reported by A. H. BITTLESTON Esq., Barrister-at-Law.

Dec. 4, 1878, *and March* 18, 1879.

(Before DENMAN and LOPES, JJ.)

PELLAS AND COMPANY *v.* NEPTUNE MARINE INSURANCE COMPANY.

*Marine insurance—Money owing to underwriters by insured—Defence in action by assignee of the policy—*31 *&* 32 *Vict. c.* 86.

The 31 *&* 32 *Vict. c.* 86, *which enables assignees of marine policies to sue thereon in their own names, provides that "the defendant in any action shall be entitled to make any defence, which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected."*

Held, in an action by the assignees of a policy, that the underwriters were entitled, under this provision, to set up a counter-claim for money owing to them, at the time of the assignment, by the person by whom the policy has been effected.

THIS was an action upon a policy of marine insurance, tried before Lord Coleridge, C.J., at the Guildhall. The plaintiffs were merchants in London, and the defendants an insurance company, carrying on business at West Hartlepool. In April 1876 Harris and Co., of Newcastle, effected a policy of insurance for 300*l.* with the defendants on a cargo of coals shipped on board the ship *Towator*, bound from the Tyne to Genoa, and upon cash advances. This policy was assigned to various persons, and ultimately to the plaintiffs. The ship and coals were totally lost on the voyage to Genoa, and the defendants admitted a total loss; but they claimed to set off as against the plaintiffs' claim of 300*l.* the sum of 40*l.*, in respect of which Harris and Co. were at the date of the writ and at the time of the loss, and continued to be, indebted to the defendants for premiums on policies other than the policy claimed under. After deducting this 40*l.* the defendants paid the balance into court. Lord Coleridge decided against the plaintiffs on this question, and a rule for a new trial was subsequently obtained by them on the ground of misdirection of the learned judge in holding that the set-off could be maintained against the present plaintiffs.

Herschell, Q.C. and *A. L. Smith* now showed cause.—The substantial question in the case is whether the defendants can set up their claim against Harris, who is the person for whose benefit the policy was effected, in this action by the plaintiffs. That depends on the construction to be put upon 31 & 32 Vict. c. 86, s. 1. Supposing a man has insured his ship, and it is damaged, and the assurer lends 200*l.* to the assured, and then the assured assigns the policy to A. B., and A. B. sues the assurer; is the assurer entitled to deduct 200*l.* from the amount of the insurance? It is said on the other side that policies of insurance are, like bills of exchange, transferable from hand to hand, and that it would be very inconvenient if their negotiability was in any way interfered with. But there is no real hardship in requiring the assignee to give notice of assignment to the underwriter, or take the policy at his own risk; while, on the other hand, there would be a great hardship to the underwriter, if he were liable to lose the security for his debt, through the assignee not choosing to give notice of assignment to him. The balance of convenience, therefore, is in favour of the defendants; but they rely on the plain words of the statute.

Murphy, Q.C.—It is submitted, in the first place, that the intention of the Legislature was to enable assignees of marine policies to sue thereon as if they had been the original grantees. It cannot be thought that it was the intention of the Legislature to preserve a state of things that enabled the assignor to commit a fraud. Before the statute, it is admitted that the assignee of this or any other *chose in action* could only have sued in the name of the assignor, subject to all equities against the assignor. But the Act intended to give a complete relief. Surely the Act cannot have been passed only with the object of enabling "asignees of marine policies to sue thereon in their own names," taking those words literally. Is it an uncommon thing to find in an Act that greater relief is given than is mentioned in a short preamble? It is submitted that, to give a reasonable construction to the Act, the words "any defence" must be limited to mean a defence upon the policy itself. Then, secondly, a set-off could never have been pleaded in an action for unliquidated damages. The claim is here for a total loss, or, in the alternative, general average; that is an action for unliquidated damages: *Luckie* v. *Bushby* (13 C. B. 864), *King* v. *Walker* (2 H. & C. 885), which cases are referred to in Arnould's Marine Insurance, 5th edit., p. 219, where it is said: "In considering the law of set-off, it is as well to remember that the contract of marine insurance is still a contract sounding in unliquidated damages, even after an adjustment of a loss under the policy, and notwithstanding it be a valued policy." It is said that the Judicature

Acts have altered this. The Marine Policies Act can only refer to defences that could have been set up at the time that it was passed; the Judicature Acts, therefore, do not apply. Moreover, the Judicature Acts, dealing only with procedure, cannot be held to have effected a change in the law of Marine Insurance.

Herschell, Q.C. in reply.—In this case the damages are liquidated. Before action brought, it was agreed that there was a total loss, and that the amount of damages was 300*l*. The cases cited go upon the particular facts, and do not establish any general proposition. By the Judicature Act 1873, sect. 25, sub-sect. 6, "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other *chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action*, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal or other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always," &c. The debt to the defendant here is an equity which would have been entitled to priority over the right of the assignee if the Marine Policies Act had not passed. That Act says that the defendant shall be entitled to make any defence which he would have been entitled to make if the action had been brought in the name of the person by whom the policy had been effected; and by the Judicature Act 1875, Order XIX., r. 3, "A defendant in an action may set off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such," &c. It follows that the defendants here may set off this debt even if the claim be one for unliquidated damages.

Cur. adv. vult.

March 18.—The judgment of the court was delivered by LOPES, J.—The plaintiffs are merchants: the defendants, underwriters. The action is brought on a policy of insurance for the sum of 300*l*., effected in Jan. 1876, by Harris and Co., a firm at Newcastle, on a cargo of coals, and cash advances; shipped on board the *Toivatar* for a voyage from the Tyne to Genoa. The defendants, in consideration of the premium, underwrote the said policy, and became insurers to Harris and Co.

On the 22nd May 1876 the policy was assigned by Harris and Co. to one Questa, of Genoa, and on the 30th May 1876 the said policy was further assigned by Questa, to Castorina and Co., of Genoa, who, on the 10th May 1877, assigned to the plaintiffs. The *Toivatar*, with the said coals and cash advances, was, by the perils insured against, lost.

The defendants admitted that the plaintiffs were entitled to recover, and paid the 300*l*. into court, except the sum of 40*l*. which the defendants contended they were entitled to set off (the said 40*l*. being a debt due to the defendants from Harris and Co., incurred in Jan. 1876). The case was tried before the Chief Justice of the Common Pleas in London, who directed a verdict for the defendants. A rule was subsequently obtained for a new trial for misdirection, the ground being that the learned judge ought to have told the jury that the defendants could not set off this 40*l*. against the present plaintiffs.

The question we have to consider on the argument of this rule is whether, having regard to the provisions of the Act 31 & 32 Vict. c. 86, this set-off can be pleaded as a defence against the plaintiffs' who are assignees of the policy. The Act is entitled, "An Act to enable assignees of marine policies to sue thereon in their own names." Sect. 1 is as follows: "Whenever a policy of insurance on any ship or on any goods in a ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name, and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected."

It is contended on the part of the plaintiffs that "any defence" is confined to a defence arising on the policy itself, and cannot cover or include a defence like a set-off, or in fact any defence which does not arise upon the policy. We are unable to place this limited meaning on the word defence, used as it is in this Act of Parliament. It would be doing violence to the plain language used. Previously to the passing of the Act, an assignee of a marine policy could not sue in his own name, he must have sued in the name of his assignor. The Act was passed to remedy this evil, and according to our view the Legislature intended to leave the law in all other respects as it was. It was intended to enable the assignee to sue in his own name, but the defendant was to be entitled to make any defence to the action of the assignee, which he might have made to the action of the assignor. Before the Act, if the action had been brought, as it must have been, in the name of Harris and Co., the defendants could have set off this 40*l*. If the debt set off had accrued since the assignment, and the defendants had notice of the assignment, it might have been replied as an equitable replication; but the 40*l*. beyond all question could have been set off. We think the defendants here are entitled to set off the 40*l*.

A point was taken by the plaintiffs in the argument, which was not raised at the trial. It was, that the plaintiffs' claim was for unliquidated damages, and that the 40*l*. could not be set off against such a claim. We do not think it necessary to consider this point. The point ought to have been taken at the trial. If it had been, the learned judge would probably have amended the statement of defence, by permitting the defendants to add a counter-claim for this 40*l*. If it had been pleaded as a counter-claim, we think it would have come within the words "any defence" in the Act. Had the Act not been passed, plaintiffs could only have sued in Harris and Co.'s name. If Harris and Co. had been plaintiffs, defendants could under the Judicature Acts, have made this 40*l*. the subject of a counter-claim and

defence, and we think would have been within the meaning of the Act of Parliament.

Rule discharged.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Shum, Crossman,* and *Co.* for *Turnbull* and *Tilly,* West Hartlepool.

[Note by Reporter.—Cf. *Brice* v. *Bannister,* 38 L. T. Rep. N. S. 739; 47 L. J. 722, Q. B., and the remarks by Cockburn, L.C.J., on that case, in *Buck* v. *Robson,* 48 L. J. 250, Q.B.]

April 26 *and May* 12, 1879.

(Before Lindley, J.)

Dixon *v.* Whitworth; Dixon *v.* Sea Insurance Company.

Marine insurance—Insurable interest—Description in policy—Action to determine amount of salvage—Liability of assurers to repay salvage, but not costs of action—Sue and labour clause in policy, construction of.

D. entered into an agreement by which he was to receive 10,000*l. if he succeeded in transporting fron Egypt and erecting uninjured in London an obelisk belonging to the British nation. D. expended* 4000*l. in constructing a vessel or case for the obelisk, in properly stowing it therein, and in providing for its transport. He then insured the obelisk and the vessel it was in with one underwriter for* 2000*l., and with another for* 1000*l. The vessel and obelisk had to be cast off in a storm in the Bay of Biscay by the steamship that was towing them. Another steamer subsequently found them and towed them into Ferrol, where they were refitted, and were afterwards towed to London. The salvors brought an action in the Admiralty Division of the High Court, and were awarded* 2000*l. salvage, the value of the obelisk being estimated at* 25,000*l.*

D., having paid the sum awarded and the costs of the action, brought actions to recover these and other payments from the underwriters. The policies, which were against total loss only, contained a provision that the vessel and obelisk, "for so much as concerns the assured," should by agreement be valued at 4000*l., and a sue and labour clause in the ordinary form.*

Held, that D.'s insurable interest in the obelisk and vessel containing it was 4000*l., the amount of his expenditure at the time that he insured; that it was not necessary to describe the nature of that interest in the policies; that the underwriters were liable to repay D., in proportion to the sums they had insured, the* 2000*l. awarded as salvage, it being expenditure in respect of preservation from loss that would have fallen on them; that they were not liable to repay D. the costs of the Admiralty proceedings, the expense of refitting at Ferrol, and towage to London, as these were not charges incurred by D. to avoid a loss insured against; and that D. was entitled to receive from the underwriters with whom he had insured the whole of the* 2000*l. that he had paid to the salvors, in contributions proportionate to the amount that each had subscribed, notwithstanding that the estimated value of the obelisk that had been salved was far larger than the amount of his interest in it.*

These were consolidated actions tried before Lindley, J., and reserved by him for further consideration, The facts are fully stated in the judgment.

Butt, Q.C., *Gainsford Bruce* and *Hollams,* for the plaintiff.—The obelisk has been estimated by the Admiralty Division to be worth 25,000*l.*; the interest that the insured has in the cargo, not the cargo itself, is what is valued in the policy. In Arnold's Marine Insurance, 5th ed., I., 311, the principle is laid down as follows: "The presumption is that the valuation in the policy is, not the whole estimated value of the subject of insurance, but merely of the interest of the assured therein. Hence, where insurance was made on goods 'valued at 19,000*l.*,' of which the assured owned four-ninths, it was contended that the valuation was intended for the entire property, and accordingly that the interest of the assured was to be taken as four ninths of that sum; but the Court said, 'We must take it that the value insured is the value of the assured's interest' (*Feise* v. *Aguilar,* 3 Taunt. 506). So in respect of freight (*Allison* v. *Bristol Marine Insurance Company,* 3 Asp. Mar. Law Cas. 178; 1 App. Cas. 209"). It is clear from the correspondence in this case that the exact nature of Mr. Dixon's interest was disclosed to the underwriters before the policy was effected. The 4000*l.* is to be read not as the value of the obelisk, but of the plaintiff's interest in it. It is submitted that the assured is entitled to recover everything that he has paid. It may be contended, on the other side, that he has paid salvage for the uninsured portion of the whole value, and that that was not paid in the interest of the assurers, and cannot be recovered. But that is not so. He was forced to pay the whole salvage in order to avoid a total loss on this policy. There was so much salvage money claimed, for which the claimants had a lien on the ship, and there was no one to pay it in this case but the plaintiff. *Kidstone* v. *The Empire Insurance Company* (L. Rep. 1 C. P. 535, 2 C. P. 357; 15 L. T. Rep. N. S. 12; 16 Ib. 119; 2 Mar. Law Cas. O. S. 400 468) is an authority that the suing and labouring clause is an entirely separate contract, under which the assured may recover more than the whole amount for which he is insured. If by perils of the sea the thing insured has got out of the hands of the assured, and he has to pay a sum of money to get it back, he can recover the amount paid under the sue and labour clause:

Dent v. *Smith,* L. Rep. 4 Q. B. 414; 20 L. T. Rep. N. S. 868. 3 Mar. Law Cas. O. S. 351.

The vessel and the obelisk are cast away in the Bay of Biscay, are picked up by a steamer, and are taken in tow. It is conceded that, there having been no notice of abandonment, there was no constructive total loss of the vessel. But there would have been a total loss of the obelisk but for the services of the steamer. We can recover the costs of the salvage suit under the sue and labour clause, because it was the only way to avert a total loss. There was a lien on the ship and obelisk for the salvage. It would not have been reasonable for the assured to pay any amount of salvage demanded. Therefore, the only way to free the ship was to bring the suit. The test of what can be recovered is what it is reasonable to do to free the vessel and to avert the loss:

Lee v. *Southern Insurance Company,* L. Rep. 5 C. P. 397; 22 L. T. Rep. N. S. 443; 3 Mar. Law Cas. O. S. 393.

Would it have been more reasonable to pay an exorbitant demand than to dispute it? In *The Legatus* (Swab. 169) Dr. Lushington says: "With regard to the practice of this court, so far as I have any knowledge of it, it has been uniform. It has always been the custom, wherever an action for damage has been brought against another vessel, and where it has been necessary to have recourse to assistance in the nature of salvage, for the remuneration paid for that salvage service to form part of the claim for damage as well as the costs incurred on both sides in the salvage suit. It may be true that there never has been a case of this sort brought before the court, but I think that is so for a plain and obvious reason: the practice of the court has been such that it would have been considered a desperate attempt to disturb what had been so uniformly and so long done." [Lindley, J.—How is it that there is no authority to be found where underwriters have been held liable to indemnify the assured for the costs of a salvage action? Is it not that it is altogether outside the contract between them?] If we had paid the claim of the salvors without disputing it, they would have said that we had acted unreasonably. Then, the interest of the assured is sufficiently described in this policy:

Park on Insurance, 8th ed. I., 9;
Carruthers v. *Shedden*, 6 Taunt. 114;
Mackenzie v. *Whitworth*, L. Rep. 1 Ex. Div. 36.

We are entitled to recover the whole amount of salvage, as that is not a sum proportioned to the value of the vessel and cargo, but a payment for services rendered. The question of value is not of great importance in estimating salvage when the value is very great. In *The Amérique* (2 Asp. Mar. Law Cas. 460; L. Rep. 6 P. C. 468; 31 L. T. Rep. N. S. 854) Sir James Colville sums up the authorities on that point. He says: "It was argued on the authority of a case decided by Dr. Lushington 1866 (*The Syrian*, reported in 2 Mar. Law Cas. O. S. p. 387), that the value of the property salved is material only in so far as it supplies a fund adequate to the payment of a liberal remuneration for the services rendered; and that it ought not further to affect the measure of that remuneration. . . . . That the value of the property salved is, to some extent, to be treated as an ingredient in the calculation of the quantum of salvage remuneration, is a proposition which might be supported by a long series of decisions, beginning with those of Lord Stowell in *The William Beckford* (3 C. Rob. 355) and Sir John Nicholl in *The Industry* (3 Hagg. 208), and coming down to the present time. And their Lordships do not conceive that it was the intention of the learned judge who decided the case of *The Syrian* to run counter to, or even to qualify the decisions of his predecessors on this point. The rule seems to be that, though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered. And this is consistent with what is said by Lord Stowell in *The Blenden Hall* (1 Dodson, 421):—'In fixing a proportion of the value the court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for this obvious reason—that in property of small value a small proportion would not hold out a sufficient consideration; whereas in cases of considerable value a smaller proportion would afford no inadequate compensation.' Applying these principles, their Lordships, with the most anxious desire not to infringe the wholesome rule which allows great latitude to the discretion of the court of first instance in cases of this description, have been unable to resist the conclusion that the learned judge has given undue weight in this case to the value of the property salved, and has consequently awarded a sum which, having regard to the services rendered, their Lordships must pronounce to be excessive." The plaintiff was trustee of the needle, in possession of it, and the only person who would have lost anything if it had gone to the bottom; therefore he had the insurable interest in it:

Seagrave v. *Union Marine Insurance Company*, L. Rep. 1 C. P. 305; 14 L. T. Rep. N. S. 479; 2 Mar. Law Cas. O. S. 331;
Arnold's Marine Insurance, 5th ed. 1, c. 3.

They also cited

Holdsworth v. *Wise*, 7 B. & Cr. 794;
Stringer and others v. *The English and Scottish Marine Insurance Company*, L. Rep. 4 Q. B. 676; 3 Mar. Law Cas. O. S. 440.

Russell, Q.C. and *J. C. Matthew* for the defendants.—There are four questions in this case: (1) Whatever was the interest of the assured, was that interest properly described in the policy? (2) the policy being against total loss only, are the sums that are claimed recoverable under it? (3) what is the proportion of expenses incurred that the underwriters in question, if liable, ought to bear? (4) are the costs of the salvage action, refitting at Ferrol, &c., expenses properly to be taken into account in estimating that proportion? First, Mr. Dixon was not the owner of the obelisk; that is conceded. [Lindley, J.—Mr. Butt tried to persuade me that he was.] He could not deal with it in any way. He had entered into an agreement to bring it to London for 10,000*l*. He was to get that sum if it came to London, otherwise nothing. His interest was, therefore, that of the shipowner in the freight. The owner of the ship cannot describe his interest as in the freight; and the person interested in the freight cannot describe his interest as in the ship. [Lindley, J.—The mortgagee of a ship may describe his interest as in the ship.] Because he is really the owner. Whitworth's policy is for 1000*l*. "upon the goods and merchandizes in the good ship or vessel called *The Cleopatra* iron vessel containing the Cleopatra obelisk. . . . . The goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at 4000*l*. . . . . Vessel and obelisk being insured against the risk of total loss only." The Sea Insurance Company's policy is for 2000*l*. "upon any kind of goods and merchandizes, and also upon the body, &c., of and in the good ship or vessel called *The Cleopatra* iron vessel containing the Cleopatra obelisk. . . . . The said ship, &c., goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and the company in this policy are and shall be vessel and obelisk, valued at 4000*l*." The description in these policies is not sufficient to cover Mr. Dixon's insurable interest. Secondly, these policies being against total loss only, are the sums claimed recoverable? On

the authorities, before there can be any liability here, there must have been a rendering of services such as would avert liability from the underwriters; in other words, such as would avert a total loss;

Booth v. *Gair*, 15 C. B. N. S. 291; 9 L. T. Rep. N. S. 386; 1 Mar. Law Cas. O. S. 393.

Thirdly, in what proportion, if liable, are the defendants bound to contribute? The interest insured is not an interest in the ship, as has been already said, but in the ship's arriving at London. The argument upon the other side is that he had salved all, and as salvor of all had a claim upon all, whosesoever might be the property. It is quite conceded that if notice of abandonment had been given when the vessel was derelict, there would have been a constructive total loss; but it was not given. For whom has the salvor rendered services? For all who have an interest in the ship. There may be any number of interests in a ship, and it is clear that each of those interests must bear its quota of the salvage money. The plaintiff's interest is described in the policy as an interest to the amount of 4000*l.* Why should a man who only has insured 2000*l.* on a declared value of 4000*l.* be called upon to contribute upon the whole value of 25,000*l.*? It does not matter for this purpose who was the owner of this obelisk—whether Mr. Erasmus Wilson, the Board of Trade, or anyone else. Suppose a ship and its cargo, owned by one man, but insured with entirely different underwriters; and the ship and cargo were salved, and a claim made against the owner for salvage. Where is there any authority to show that a claim upon the underwriter who had insured the cargo for the whole amount of the salvage money would be good, and that he would have to look for indemnity to the underwriter who had insured the ship? The plaintiff can only throw on the underwriter that proportion of his loss which he has insured with him:

Lowndes on General Average, 2nd edit. p. 298.

In this case the premium is a 4 per cent. premium; the monument is of very large value; can it be supposed that the defendants would have incurred the risk that it is argued they did on such terms? Fourthly, what expenses can be properly taken into account, if the defendants are liable at all? If the defendants are liable at all it is admitted that they must pay their proportion of the amount awarded for salvage. But as to the costs of the salvage action it is submitted that the defendants are in no case liable to pay them. If the principle was that the underwriters were liable for all that was reasonably done to free the vessel, the defendants would be liable for these costs. That is not the principle. These costs were not the natural consequence of the perils insured against, and were outside the contract altogether:

Mors le Blanche v. *Wilson*, 8 L. Rep. C. P. 227;
Fisher v. *Val de Travers Asphalte Company*, L. Rep. 1 C. P. Div. 511; 35 L. T. Rep. N. S. 366;
Baxendale v. *London, Chatham, and Dover Railway Company*, L. Rep. 10 Exch. 35; 28 L. T. Rep. N. S. 849.

The expenses in connection with taking the vessel into Ferrol, refitting there, and towing her to London, are also not expenses for which the underwriters can be liable. They are not expenses to avert a total loss.

Cur. adv. vult.

May 12.—Lindley, J.—These are actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the celebrated Cleopatra obelisk on her voyage from Alexandria to this country.

The plaintiff is a civil engineer, and it appears from his evidence that he was desirous of seeing the obelisk brought over to England, and had a conversation with Mr. Erasmus Wilson on the subject. Ultimately, by an agreement dated the 31st Jan. 1877, and made between Mr. Wilson of the one part and the plaintiff, Mr. Dixon, of the other part, it was in effect agreed that Mr. Dixon should, at his own expense and risk, transport the obelisk to London and erect it there uninjured, and that, in the event of his succeeding, Mr. Wilson should pay him 10,000*l.* Mr. Dixon, however, was to incur no liability to Mr. Wilson in the event of failure in the enterprise. On the other hand, Mr. Dixon was to have no claim whatever against Mr. Wilson, except in the event of success. Further, it appears from Mr. Dixon's evidence that he did not anticipate any profit to himself from the transaction; in other words, it was not expected that the 10,000*l.* would more than cover the expenses. The only evidence before me respecting the ownership of the obelisk is the plaintiff's statement that there was a dispute about it, and the Khedive presented it to the British nation and handed it to him (the plaintiff) on their behalf. Having made the above agreement, Mr. Dixon commenced to prepare for the transport of the obelisk. He spent considerable sums of money and much labour in doing this, and he built the vessel called the *Cleopatra*. This was, in fact, little more than an iron case in which the obelisk was stowed, and in which it would float. The vessel had no other use, and was fit for no other purpose. The vessel was quite subordinate to its cargo, and the cost of its construction was for all practical purposes nothing more than part of the cost of transporting the obelisk. In Sept. 1877 the obelisk was in its case, or, in other words, was on board the *Cleopatra*, and was ready to be towed to England. On the 15th Sept. an agreement was entered into between the owners of the steamship *Olga* of the one part and Mr. Dixon of the other part for the towage of the *Cleopatra*, with the obelisk on board, from Alexandra to London for the sum of 900*l.* The expenses and liabilities which Mr. Dixon had incurred up to this time in constructing the vessel, in getting the obelisk on board, in properly stowing it there, and in providing for its transport, were estimated by him at 4000*l.*, and did in fact amount to about this sum. On the 20th and 21st Sept. 1877 the policies on which these actions were brought were effected by Messrs. Barr and Co. for Mr. Dixon. I will state their language and legal effect presently. The *Cleopatra* and the obelisk left Alexandria on the 21st Sept. 1877 in tow of the *Olga*. All went well until the 14th Oct., when a severe storm was encountered in the Bay of Biscay, and the *Olga* was compelled to cast the *Cleopatra* off. On the 15th the *Olga* took the crew of the *Cleopatra* on board, and afterwards lost sight of her, and, having vainly endeavoured to find her, gave up the search and came on to England without her. On the evening, however of the same day the steamer *Fitzmaurice* fell in with the *Cleopatra*, and, after great risk and labour, succeeded in saving her

and in towing her into Ferrol. The *Cleopatra* and obelisk afterwards reached London in safety. The Court of Admiralty awarded salvage to the *Fitzmaurice*. For the purpose of determining the amount to be awarded, the obelisk was estimated to be worth 25,000*l*., and the sum awarded to the salvors was fixed at 2000*l*. This sum the plaintiff paid. He also paid the costs of the proceedings in the Admiralty, and certain expenses in refitting the *Cleopatra* at Ferrol, and in towing her with the obelisk from that port to London.

The present actions are brought to recover contribution from the underwriters in respect of these salvage and other expenses. The policies on which the actions are brought are worded as follows: Whitworth's policy is for 1000*l*. "upon the goods and merchandizes in the good ship or vessel called the *Cleopatra* iron vessel containing the Cleopatra obelisk. The goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in the policy are and shall be valued at 4000*l*. Vessel and obelisk being assured against the risk of total loss only." The risks insured against are the ordinary sea risks, and the suing and labouring clause is in the ordinary form. The Sea Insurance Company's policy is for 2000*l*, "upon any kind of goods and merchandizes, and also upon the body, &c., of and in the good ship or vessel called the *Cleopatra* iron vessel containing the Cleopatra obelisk. The said ship, &c., goods, and merchandizes, &c., for so much as concerns the assured by agreement between the assured and the company in this policy are and shall be, vessel and obelisk, valued at 4000*l*." This policy also is against total loss only. The clauses relating to the risks insured against and suing and labouring are in the ordinary form. The actual wording of the suing and labouring clause was in both policies as follows: "And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants, and assigns to sue labour and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandizes, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." Although the language of the first policy is not quite clear as regards the subject-matter insured, I think the first policy is on both ship and cargo, and not on cargo only. The second policy is clearly on both.

The plaintiff's interest in the *Cleopatra* and obelisk were as follows: he was owner of the *Cleopatra*: he was not owner of the obelisk; but he had spent money upon it, had possession of it, and probably had a lien upon it for his expenditure. Taking the *Cleopatra* and obelisk together, the value of his interest in them at the date of the policy was 4000*l*. This was all he really had at risk, and all that was worth insuring. It is true that in certain events he might become entitled to 10,000*l*. under his agreement with Mr. Wilson; but this sum was only calculated to cover expenses, and Mr. Dixon, as a prudent man, would hardly incur further expense until the risks of the voyage were over. I regard the policies as being exactly what they purport to be, viz., policies on the obelisk and the vessel it was in: and I regard Mr. Dixon as having an insurable interest in them to the value of 4000*l*., and having insured that interest by the policies. The description in the policies is sufficient in my opinion, to cover that interest. *M'Kenzie* v. *Whitworth* (3 Asp. Mar. Law Cas. 81; L. Rep. 10 Eq. 142, and 1 Ex. Div. 36) shows that it is sufficient to specify the subject matter of insurance; and that it is not necessary to describe the assured's interest in it, unless his interest is such as to affect the risk insured against, which was not the case here. It was suggested that these policies ought to be regarded as analogous to policies on freight to be earned on the safe arrival of cargo; but in my judgment this is not the correct view. The analogy is too fanciful and far fetched to be of any practical use. The true effect of the policies is, in my opinion, what I have above described.

The first question which arises is whether the underwriters are bound to pay anything in respect of any of the expenses to recover which the actions are brought. These expenses are: (1) the 2000*l*. paid for salvage; (2) the costs of the proceedings in the Admiralty; (3) the expenses of refitting at Ferrol and of towing from that port to England. It will be convenient to consider each of these in turn.

1. As to the 2000*l*. paid for salvage. The policies are against the risk of total loss only. Neither the *Cleopatra* nor the obelisk was totally lost; both were in fact saved, and the defendants therefore contend that they are under no liability whatever. But, although there was no total loss, it is clear beyond all doubt that the *Cleopatra* and her cargo were in imminent danger of destruction, and were saved from total loss by the services of the salvors. The underwriters therefore have had the benefit of these services, and are bound, in my opinion, to indemnify the plaintiff against his liability in respect of them. It is true that the language of the suing and labouring clause does not in terms extend to any services except those rendered by the assured, their factors, servants, and assigns; and it is also true that the salvage services in this case were not rendered by Mr. Dixon, nor by any factor, servant, or assign of his, unless the salvors are to be regarded as having been his agents by necessity or by ratification. But, without discussing how far the salvors can properly be regarded as agents, I take it to be settled that the suing and labouring clause ought to be construed to cover expenditure which the assured necessarily became liable to pay by way of salvage in respect of preservation from loss which, if it had occurred, would have fallen on the underwriters. See *Lohre* v. *Aitcheson* (3 Asp. Mar. Law Cas. 445; 4 Ib. 10; 3 Q.B. Div. 566, &c.); *Kidstone* v. *Empire Marine Insurance Company* (L. Rep. 1 C. P. 535 and 2 Ib. 357; 15 L. T. Rep. N.S. 12; 16 Ib. 119; 2 Mar. Law Cas. O. S. 400, 468). In truth, Mr. Russell did not seriously contest this point, although he thought it his duty to submit it to the court for decision. The same case of *Lohre* v. *Aitcheson* (3 Mar Law Cas. 445; 4 Ib. 10; 2 Q.B. Div. 501 and 3 Ib. 558) shows that this clause is operative even although there is no total loss and nothing abandoned to the underwriters; and in my opinion they are bound by this clause to indemnify the plaintiff in proportion to the sums they respectively insured against his loss of the 2000*l*. awarded for salvage.

2. As regards the costs of the Admiralty proceedings, I am of opinion that the underwriters are not liable for these costs, or any part of them.

I quite accede to the view that they were necessarily and properly incurred in ascertaining the proper amount of salvage to be paid; and I agree in the observation that, in order to enable Mr. Dixon to get the obelisk out of the hands of the salvors, it was as necessary to pay or secure their costs as to pay or secure the salvage itself. But the costs which Mr. Dixon has had to pay are not, in my opinion, charges incurred by him to avoid a loss insured against, or at all events they are too remotely so to be covered by the words of the policies before me. The suing and labouring clause is silent about costs, and no authority has been produced in which costs have been recovered under it. I do not regard *Xenos* v. *Fox* (L. Rep. 3 C. P. 631 and 4 Ib. 665; 3 Mar. Law Cas. O. S. 146) as conclusive against the plaintiff on this point, but it certainly is rather against him than for him; and the fact that the suing and labouring clause did not cover such losses as are now usually provided for by the collision clause goes far to show that the costs which I am considering cannot be thrown on the underwriters. Their contract does not cover them.

3. As regards the expense of refitting at Ferrol and towage from that port to London, I am of opinion that these matters cannot be thrown on the underwriters. They were not incurred to avoid a total loss by perils of the sea of the obelisk or of his interest in it. They were not incurred until after the obelisk had been saved. It is true that Mr. Dixon would have lost the benefit of his agreement with Mr. Wilson if he had not got the obelisk home. But, as has been seen, he did not insure the benefit of that agreement; and as soon as the obelisk was saved the interest in it which he insured by the policy was saved also. These policies are against total loss only, and every loss sustained by the plaintiff in getting the obelisk home after it was safe at Ferrol must be borne by him. See *Great Indian Peninsular Railway* v. *Saunders* (1 Best & Sm. 41, and 2 Ib. 266).

I pass now to the next and last question, which arises, viz., whether the plaintiff is entitled to recover in respect of the whole 2000*l.*, or only in respect of some portion of that sum, viz., in respect of what as between himself and the other persons interested in the obelisk would be his proper proportion, supposing the obelisk to have been uninsured? This question depends on the true construction and effect of the suing and labouring clause, and curiously enough appears never yet to have been decided, at least in this country. The language of the clause is in favour of the plaintiff, and so, in my opinion, is its true effect. By it the underwriters agree to contribute in proportion to the amount subscribed to such charges as the assured shall be put to in preventing a loss which, if not prevented, would fall on the underwriters. There are no words to the effect that the assured shall only be repaid such proportion of those charges as in an equitable adjustment between himself and others would fall on him alone. The agreement is to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services, each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorises the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing. Further, it is now clearly established that this clause is a distinct and independent agreement, which, although occurring in and forming part of the policy, may entitle the assured to recover more than the amount underwritten. See *Lohre* v. *Aitcheson* (*sup*). Having regard to this principle, to the language and known object of the clause, I am of opinion that whatever services or charges of the assured fairly come within it must be paid for by the underwriters in proportion to their subscriptions. This view is in accordance with that adopted by Chancellor Kent in *Watson* v. *Marine Insurance Company* (7 Johns N. Y. 757); and although that decision is controverted by Mr. Phillips (s. 1742, note 5) and by Mr. Lowndes (Law of Average, p. 231, 4th ed.), I am of opinion that Chancellor Kent's view is more in accordance with the true intent and meaning of the suing and labouring clause than are the views of his critics. They do not, I think, attach sufficient importance to the clause being a distinct agreement to pay for services rendered to avoid a loss insured against. The underwriters will be at liberty, on paying Mr. Dixon, to enforce such rights, if any, as he may have against other persons in respect of their proper shares in the salvage expenses (see *Dickinson* v. *Jardine*, L. Rep. 3 C.P. 639; 3 Mar. Law Cas. O. S. 126); and, although in this particular case those rights will probably be of no avail, yet whatever they may be worth the underwriters will be entitled to force them.

In the result my judgment is for the plaintiff for 500*l.* against the defendant Whitworth, and for 1000*l.* against the defendants, the Sea Insurance Company, these sums being their respective shares of the 2000*l.* In each action the defendants must pay the costs.

Judgment for plaintiff, with costs.

Solicitors for plaintiff, *Hollams, Son,* and *Coward.*

Solicitors for defendant Whitworth, *Robinson, Hodding* and *Cameron.*

Solicitors for defendants Sea Insurance Company, *Gregory, Rowcliffe,* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Tuesday, May 13, 1879.

(Before Sir R. Phillimore.)

The Anders Knape.

APPEAL FROM INFERIOR COURT.

Salvage—Pilotage.

A person, whether a pilot or not, who takes charge of a vessel in distress, with the consent of her master is entitled to salvage reward, in the absence of an express contract to the contrary.

Semble, it is immaterial whether, under such circumstances as would entitle a person to salvage reward in any case, the person claiming salvage does or does not hold himself out rightly or wrongly as being a pilot, so long as he performs the service.

The Frederick, (1 *W. Rob.* 16) *approved.*

THIS was an appeal in an action of salvage from the decision of the City of London Court.

The facts were, that the *Anders Knape*, a Swedish Screw steamer, whilst on a voyage from Sweden to Cadiz, got ashore on the night of the 13th Feb. 1879, on the Long Sand; she got off without assistance the next morning, but with her rudder damaged, and anchored in eleven fathoms water.

The plaintiffs were the master and others belonging to the fishing smack *Faith*, and on the morning of the 14th they heard guns fired, and proceeded in consequence to the Long Sand, and soon after noon they fell in with the *Anders Knape*.

The master of the *Faith* went on board and took charge of the ship to bring her into Harwich. The contention for the plaintiffs was, that the master of the smack was not a pilot, and did not engage as such, and that the *Anders Knape* being in distress both by reason of the damaged condition of the rudder, and also from the ignorance of the locality, that the services rendered her were salvage services. The defendants contended that, at the time the plaintiffs came on board, the *Anders Knape* had a signal for a pilot flying, and that the smack exhibited a flag which led those on board the *Anders Knape* to suppose that she was a pilot boat, and that the person who ultimately turned out to be master of the *Faith* was engaged, in consequence of his own proceedings, as a pilot and for the purpose of piloting the ship into Harwich, and that therefore there was nothing to convert the service into a salvage service.

The flag which was produced by the master of the smack was red and white in two horizontal stripes, the upper one being white, and with a narrow border of blue. The regulation as to the flags to be carried by pilot boats and pilots is contained in the Merchant Shipping Act 1854 as follows:

Characteristics of Pilot Boats.

346. Every pilot boat or ship shall be distinguished by the following characteristics; (that is to say,) (1) . . . . (2.) . . . . (3.) When afloat, a flag at the mast-head or on a sprit or staff, or in some other equally conspicuous situation; such flag to be of large dimensions compared with the size of the boat or ship carrying the same, and to be of two colours, the upper horizontal half white, and the lower horizontal half red:

And it shall be the duty of the master of such boat or ship to attend to the following particulars: First, that the boat or ship possesses all the above characteristics; secondly, that the aforesaid flag is kept clean and distinct so as to be easily discerned at a proper distance; and lastly, that the names and numbers before mentioned are not at any time concealed; and if default is made in any of the above particulars he shall incur a penalty not exceeding 20*l.* for each default.

Qualified Pilot to display Flag, though not in Pilot Boat.

347. Whenever any qualified pilot is carried off in a boat or ship not in the pilotage service he shall exhibit a flag of the above description, in order to show that such boat or ship has a qualified pilot on board; and if he fails to do so, without reasonable cause, he shall incur a penalty not exceeding 50*l.*

Penalty on ordinary boat displaying Pilot-flag.

348. If any boat or ship, not having a licensed pilot on board, displays a flag of the above-mentioned description, there shall be incurred for every such offence a penalty not exceeding 50*l.*, to be recovered from the owner or from the master of such boat or ship.

There was great conflict of evidence as to the conversation which took place between the master of the *Faith*, and the captain of the *Anders Knape*, and as to whether the damage to the rudder of the *Anders Knape* was of such a nature as to materially interfere with her steering, and, if so, whether the master of the *Faith* was aware of the fact when he took the charge.

Bucknill for the plaintiffs.
Myburgh for the defendants.

Mr. Commissioner KERR, in delivering judgment, said that, on the facts, he was quite satisfied that it was pilotage and nothing else. The two flags are conclusive—one flag flying for a pilot, and another flag which is practically a pilot flag; one showing that a ship wanted a pilot, and the other flying a flag which must be taken for a pilot flag. The services were offered and accepted solely as those of a pilot. I think there ought to be some mode of preventing the use of a flag like that: it is a pilot flag, with two blue borders above and below. That is enough. It is to all intents and purposes a pilot flag, and the captain of the *Anders Knape* treated it as such. The suit is dismissed with costs.

From this decision the plaintiffs appealed, and the appeal came on for hearing in the Admiralty Division on May 13, 1879.

Clarkson for the appellants.—This is a salvage service. It was rendered in a place out of any pilotage district, and therefore it is immaterial whether the flag was similar to a pilot flag or not. That the ship was in need of assistance is obvious from the fact that she did not proceed on her voyage direct, but was brought into a port of refuge.

Myburgh for respondents.—The plaintiff held himself out as a pilot, and contracted to pilot the *Anders Knape* from the place where he boarded her into Harwich for pilotage reward, and therefore he cannot recover salvage.

Sir R. PHILLIMORE.—This is a case about which I admit I was exceedingly doubtful in the course of the argument. I have been referred to the case of *The Frederick* (1 W. Rob. 16) cited in *The Œolus* (Asp. Mar. Law Cas. 516; L. Rep. 4, Ad. & Ec. 31; 28 L. T. Rep. N. S. 41), where Dr. Lushington says: "It has been urged in the argument for the owners that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed that it is a settled doctrine of this Court, that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition. he would be subjected to no censure: and if he did take charge of her would be entitled to salvage remuneration." Now, the facts of this case are these: This foreign vessel had been on the sand, and had sustained some damage to her rudder. She was therefore in a condition in which salvage services might be rendered to her. The plaintiff in this case—the master of the *Faith*—says that he went on board this vessel, and was told by the captain that the rudder was broken, and that the ship had been aground. A considerable quantity of evidence is produced as to whether he contracted as a salvor, or whether he contracted as a pilot. It has been well put by Mr. Myburgh that in this case it might be contended that he contracted to act as

a pilot. But his own evidence is distinctly the other way. He says he told the captain that he was a fisherman, and that he told him he could conduct his ship into Harwich, that is to say, if he wished it; that he could help him to go into a port of refuge, where he could get the damage done to his vessel repaired. Supposing nothing had been said, supposing the master of the *Faith* had gone on board the *Anders Knape* without saying anything at all, and the captain had said, "I want to go to Harwich," and the master of the *Faith* had proceeded to put the vessel in a right direction, could it be doubted that he had performed a salvage service, looking to the state of the ship, and the fact that he had been asked to take her to a place where she could be repaired? I am of opinion that the facts of the case are brought within the judgment of Dr. Lushington in the case to which I have referred (*The Frederick*. 1 W. Rob. 16). I think that that was a case in which he would be "subject to no censure if he refused to take charge of the vessel, and if he did take charge of her he would be entitled to salvage remuneration," unless he had expressly contracted. I think that there was a salvage service, although I admit that the distinction is a nice one. I think that the judge of the court below was misled by the word pilotage; but, upon the whole, I am of opinion that a salvage service was rendered, and that the salvage remuneration should be awarded, and I shall award 30*l*. with the usual costs. There will be leave to appeal.

Solicitors for appellants, *Lowless* and *Co.*

Solicitors for respondents, *Stokes*, *Saunders*, and *Stokes*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by H. Peat, J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, April 24, 1879.

(Before JAMES, BRETT, and COTTON, L.JJ.

Ex parte ROSEVEAR CHINA CLAY COMPANY; *Re* COCK.

Stoppage in transitu—Contract to deliver goods free on board—Ship chartered by purchaser—Ultimate destination not stated.

Delivery of goods by a vendor on board a ship chartered by the purchaser is only constructive, and not actual, delivery to the purchaser, inasmuch as the contract with the master of the ship to carry the goods does not make him the agent of the purchaser, and so long as the goods remain in the hands of the master of the ship as carrier, the vendor's right of stoppage in transitu continues.

Till the goods are actually delivered to the purchaser or his agent the transitus is not at an end and it makes no difference that the ultimate destination of the goods has not been communicated by the purchaser to the vendor.

A contract was made for the sale of a quantity of china clay to be delivered free on board at a specified port, payment to be by the purchaser's acceptance. The purchaser chartered a ship and gave notice to the vendor, who then delivered the clay on board the ship at the specified port. Before the ship left the port the vendor, hearing that the purchaser was insolvent, gave notice to the master of the ship to stop the clay in transitu. No bill of lading had been signed, nor had the purchaser given any acceptance in payment of the contract price:

Held, that the clay was in the possession of the master of the ship only as carrier, and not as agent of the purchaser, that the transitus was therefore not at an end, and that the vendor had duly exercised his right of stoppage in transitu.

Decision of Bacon, C.J. reversed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

The facts of the case were as follows:

On the 20th Nov. 1877, David Cock, a china clay merchant, carrying on business at Roche, near St. Austell, wrote to the Rosevear China Clay Company, a letter of which the material parts were as follows:

Your favour respecting china clay to hand. I have this morning been on the works and took several samples of what is now in stock. I regret very much to assert that in consequence of what appears to me to have been put in the clay by way of adulteration will prevent me from purchasing. It might, and probably would be ruinous to all my connection. There are about 100 tons of the old stock which has not been so treated, and which I would purchase at 15*s*. per ton f. o. b. Fowey, payment to be by four months' acceptance, from date of bill of lading. Same to be shipped during this month, or if not bill to date 1st Dec.

On the 27th Nov. the secretary of the company replied:

We now offer you the balance old Rosevear make, 80 to 100 tons f. o. b. Par or Fowey, four months draft dated from 1st Dec., whether shipped or not. Please say if you confirm this.

On the 30th Nov. Cock replied confirming.

On the 1st Dec. the secretary wrote to Cock as follows:

I am in receipt of yours of the 30th ult., which is two days over return of post. This delay of your confirmation of the purchase has left the matter open for others. But as we have not definitely closed, if you are prepared to have the clay offered you taken on board within fourteen days from the date of my offer, and accept our draft from the 1st Dec. at four months next, we will withdraw from confirming sale to another party, but you must reply here definitely 4th inst., or the matter falls through.

On the 12th Dec. Cock wrote to the Company:

I have a vessel of 215 tons which will load at Fowey on Friday next, so now I can take your 100 tons of Rosevear clay upon your terms as per your last letter. Let me know not later than Friday morning if I am to have the clay or not.

On the 13th Dec. a clerk of the company replied:

In reply to yours of the 12th inst, I beg to say, in the absence of Mr. Carr (the secretary), who is away from home, we will send you the 80 to 100 tons china clay (old Rosevear make) as per conditions mentioned in Mr. Carr's letter to you of Nov. 27 and Dec. 1. I have instructed Capt. Dyer of this port to send on same to Fowey at once.

On 27th Dec. the secretary of the company wrote to Cock:

Mr. Dyer has handed account to-day by letter which makes 108 tons 2 qrs. 2 cwt. clay as shipped for your account, value 81*l*. 1*s*. 10*d*. There is an old balance due to us of 11*l*. 7*s*. 8*d*. Do you wish this added to the draft 81*l*. 1*s*. 10*d*. If so, I have no objection, and will send draft for your acceptance in a day or two.

Cock had on the 5th Dec. entered into a verbal agreement to charter a ship called the *Forester* to call at Fowey and convey the clay for him, with other clay, to Glasgow, where he had consigned it to an agent for sale. No charter-party was signed.

On the 29th Dec. the company delivered 100 tons of the clay on board the *Forester* at Fowey.

No bill of lading was signed.

On the 31st Dec. the company having heard that Cock, who had committed an act of bankruptcy by absconding, was insolvent, gave notice to the master of the *Forester*, which was still at Fowey, to stop the clay *in transitu*.

The master afterwards signed a bill of lading in favour of the company, and by their directions the clay was taken to Runcorn instead of to Glasgow, and was there sold on their account.

Cock was afterwards adjudicated a bankrupt in the Truro County Court.

The trustee in the bankruptcy claimed the clay on the ground that the transitus was at an end when the clay was shipped on board the *Forester* and that therefore the notice to stop *in transitu* came too late.

The trustee applied to the County Court for an order that the company should pay over to him the invoice price of the clay. On the hearing of the application the bankrupt was examined and deposed that he was in the habit of buying and sending clay all over the country; that he did not inform the Rosevear Company of the destination of the clay; that he never used to reveal the ultimate destination of cargoes; and that he communicated the name of the vessel to the vendors on the 12th Dec.

The invoice of the clay and the bill of exchange for Cock's acceptance were posted by the secretary of the company on the 29th Dec.; but the bill was never accepted.

The County Court judge refused the trustee's application, being of opinion that it was the intention of both the parties that the property in the clay should not pass to the purchaser until the bill of exchange for the price had been accepted by him; and that, even if the property did pass, the clay never came into the possession of the purchaser, that the transitus was not at an end when the clay was placed on board the ship, and that consequently the company had a right of stoppage *in transitu*, which right they had effectually exercised.

From this decision the trustee appealed.

On the hearing before the Chief Judge in Bankruptcy, the following cases were cited:

Valpy v. *Gibson*, 4 C. B. 837;
Ex parte Gibbes, Re Whitworth, 33 L. T. Rep. N. S. 479; L. Rep. 1 Ch. Div. 101;
Berndtson v. *Strang*, 16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; 3 Ch. 588;
Bloxaman v. *Sanders*, 4 B. & C. 941;
Mirabita v. *The Imperial Ottoman Bank*, 3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. N. S. 597; L. Rep. 3 Exch. Div. 164;
Ogg v. *Shuter*, 3 Asp. Mar. Law Cas. 77; 33 L. T. Rep. N. S. 492; L. Rep. 1 C. P. Div. 47.

Bacon, C.J. delivered judgment as follows:—I cannot see what the bill of lading has to do with this question. (His Lordship alludes to the argument that no bill of lading having been signed so as to make the goods deliverable to any one, the vendors retain a *jus disponendi*, in support of which proposition, *Ogg* v. *Shuter* had been cited.) No doubt the vendors might, if they had thought fit, have taken a bill of lading, which would have secured, not the possession of, but a right to the property mentioned in the bill of lading; but they did not. Their omission to do so cannot be used in their favour. The transaction is as plain a one as ever was stated. A man wants to buy china clay, a heavy commodity or thing which he cannot carry in his own waggons, and does not mean to do so, but he tells the company that he will get a ship to transport this clay which he buys of them. He afterwards gives them the name of the ship, and directs them to deliver the clay which he has bought on board that ship. If it had been a warehouse instead of a ship, could there have been any doubt that after the clay had been carried to the warehouse the transitus would have been at an end? I have no doubt that the transitus, such as it was, ended when the clay arrived upon the quay at Fowey and was put into the ship *Forester*, which the bankrupt had hired for the very purpose of carrying it. *Valpy* v. *Gibson* is directly in point on the part of the case I am now considering. In that case there was that which was a little more remarkable, and which probably gave rise to some argument. The vessel in which the goods were to be shipped was destined for Valparaiso, and the vendors of the goods wanted some patterns or cards of theirs to be sent along with the goods, and, knowing well enough that the ship was going to Valparaiso, they gave a direction to that effect when they delivered the goods. The court decided that, when the goods were delivered on board the ship, which had been hired for the purpose of transport by the purchaser, there was an end of the transit. Delivery "free on board" only means "the price shall be that which we stipulate for, and you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish. I cannot think that any question arises. The fact that the bill of exchange had not been accepted does not alter the case in the slightest degree. On the 29th Dec. the china clay, which had been bought and sold, was by the vendors put on board the ship; they never thought of taking a bill of lading, or of retaining any right over it, but they delivered it to the man who had bought it of them. There is no doubt upon the facts of the case, and there can be no doubt whatever about the law. There was no transit, except from the quarry to the ship's side; the transit was ended so soon as the clay was on board the ship, and the right to stop it was therefore entirely gone. None of the cases which have been referred to give any kind of colour to the contention raised on the part of the vendors to have this clay treated as still belonging to them, although they had delivered it free on board in the manner, and at the price stipulated for in the contract between the parties. However, the learned judge of the County Court took a very different view of the subject. He seems to have bestowed a great deal of attention upon it, and to have considered many cases, the bearing of which on the question before me I have not been able to perceive; but as he gave a very deliberate and considered judgment, which is entitled to all respect, and as, moreover, he invited the parties to take the case up to the

highest court, I am content that it should go there. But I should be sorry if it went with any expression of doubt on my part. I am clear that this is a case in which the vendor's right of stoppage *in transitu* ceased to exist the moment the clay was put on board the ship.

From this decision the Rosevear China Clay Company appealed.

Winslow, Q.C. and *E. C. Willis*, for the appellants.—In the ordinary course of business the vendors would have applied to the master of the ship for a bill of lading, and they would have taken it to their own order. They would then have sent it to the purchaser with the bill of exchange for its acceptance. He could not have retained the bill of lading without accepting the bill of exchange; if he had done so, no property in the goods would have passed to him:

Shepherd v. *Harrison*, 1 Asp. Mar. Law Cas. 60; 24 L. T. Rep. N. S. 857; L. Rep. 5 E. & I. 116.

The vendors cannot be in a worse position, because no bill of lading was signed. Therefore the property in the clay never passed to the purchaser. [Brett, L.J.—What right had the vendors to the bill of lading? They were to deliver free on board for the purchaser. James, L.J.—What privity was there between the vendors and the master of the ship? The bargain to charter the ship was made between the purchaser and the shipowner.] The shippers of the goods would nevertheless be entitled to have the bill of lading made out to them:

Craven v. *Ryder*, 6 Taunt. 433;
Abbott on Shipping, 11th edit. p. 279.

[Brett, L.J.—In *Craven* v. *Ryder*, the ship was either a general ship, or it was chartered by the vendor.] In *Turner* v. *The Trustees of the Liverpool Dock* (6 Ex. 543) it was held that the property in goods did not pass to the purchaser, though they were delivered on board his own ship, because by the terms of the bill of lading the vendors reserve to themselves a *jus disponendi* which the master of the ship acknowledged by signing the bill of lading making the goods deliverable to their order. [Brett, L.J.—It was held in that case that if the goods had been delivered on board the purchaser's own ship, without any restriction, that would have been a delivery to the purchaser; but the master had assented to the vendor's restrictions. In the present case the question is whether there was any intention when the clay was delivered on board the ship to take a bill of lading to the vendors.] You cannot assume that it was intended to deliver the clay to the purchaser's order, when he had not accepted the bill of exchange; the inference would be the other way. At all events, whether the property in the clay passed to the purchaser or not, the right of stoppage *in transitu* remained. The transitus was not at an end when the clay was put on board the ship at Fowey; it would not have been at an end till the clay was delivered to the purchaser's agent in Glasgow. The master of a ship, which has been chartered by a purchaser to carry goods for him is not his agent or servant, and the goods are in the master's possession only as carrier, and so long as the possession is of that nature the vendor's right to stop *in transitu* continues:

Berndtson v. *Strang*, 16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; 3 Ch. 588, 590;
Gibson v. *Carruthers*, 8 M. & W. 321 328;
Benjamin on Sales, 2nd edit. p. 698.

Northmore Lawrence (with him *De Gex*, Q.C.) for the trustee.—The vendors did not reserve their right, as they might have done. The contract was to deliver free on board at Fowey, and when that was done the transitus was at an end. If the ship had been the purchaser's own ship the delivery on board would have been delivery to him, and *Schotsmanus* v. *The Lancashire and Yorkshire Railway Company* (16 L. T. Rep. N. S. 189; L. Rep. 2 Ch. 332), shows that the transitus would then have been at an end. What difference can it make that the ship was only chartered by the purchaser? On demand, the master would have been bound to give the clay to the purchaser, subject only to his lien for freight. *Valpy* v. *Gibson* (4 C. B. 837) shows that the fact that there is to be a subsequent transit prescribed by the purchaser does not prevent there being a complete delivery to the purchaser. *Ex parte Gibbes. Re Whitworth* (33 L. T. Rep. N, S. 479; L. Rep. 1 Ch. Div. 101), shows that the right of stoppage *in transitu* is gone when the transitus prescribed by the vendor is at an end. Here the vendors had nothing to do with the further destination of the clay after they had delivered it on board at Fowey. That distinguishes the present case from *Berndtson* v. *Strang*, and other cases in which the ultimate destination of the goods was communicated to the vendor when the contract for sale was entered into. In such cases the vendor has in contemplation the transit to the ultimate destination, and delivers to the carrier as carrier.

No reply.

James, L.J.—With all respect for the decision of the Chief Judge, I am of opinion that this case cannot be distinguished from the authorities which have been referred to, and in particular from that of *Berndtson* v. *Strang* (*ubi sup.*) The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary. It is admitted that if it had been mentioned in the original contract for sale that the goods were to be carried to Glasgow the present case could not have been distinguished from *Berndtson* v. *Strang*, but it is said that the fact that no ultimate destination was mentioned makes a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain or was changed after the contract for sale, can make no difference. The principle is this, that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right, which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier. I am of opinion that in the present case, although the vendors' liability was at an end when they had delivered the clay on board the ship, which indeed is the case in most instances of stoppage *in transitu*, that did not deprive them of the right to stop *in transitu* so long as the clay was in the possession of the master of the ship as a carrier. To use the language of Lord Cranworth (then

Rolfe, B.) in the case of *Gibson* v. *Carruthers* (8 M. & W. 321, 328), "I consider it to be of the very essence of that doctrine that during the transitus the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession;" and that language was adopted by Wood, V.C., and by Lord Cairns in *Berndtson* v. *Strang* (16 L. T. Rep. N. S. 583; L. Rep. 4 Eq. 481; L. Rep. 3 Ch. 588, 590.) In the present case the clay was delivered to a third person, intermediate between the vendors and the purchaser, and therefore the vendors still had a right of stoppage *in transitu*.

Brett, L.J.—It seems to me that there was a binding contract between the vendors and the vendee, though by it alone the property in the clay did not pass to the vendee. But as soon as the clay was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the vendee, and at the same time, as between the vendors and the vendee, there was a delivery of the clay to the latter. But it was a constructive, not an actual delivery. If by the contract the vendors had been bound to deliver to the vendee at Fowey, and the clay had been there delivered to him or to his agent, and he or his agent had there shipped it, I should have thought that after that there would have been no transit. But the contract was to deliver at Fowey on board a ship, and to deliver free on board, that is, the vendors undertook the delivery of the goods. The ship was to be chartered by the vendee, it is true, and he must charter the ship to carry the clay to some port. The distinction taken by Mr. Northmore Lawrence is an ingenious one, but it seems to me that it can make no difference whether the destination of the goods is communicated at the time of the contract for sale, or whether the destination is to be named after the contract, but before the shipment. Here the purchaser entered into an agreement with the owner of the ship that the ship should take the clay to Glasgow, and the vendors were bound to put the clay on board that ship to be carried to Glasgow. It was not the purchaser's own ship, but that of the shipowner, and the clay when delivered on board was to be carried to Glasgow. The question is whether the transit was at an end before the arrival of the ship at Glasgow. It seems to me that several decided cases show that it was not. In *James* v. *Griffin* (1 M. & W. 20; 2 M. & W. 623) Parke B. laid down the law thus (at page 632): "Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, or take possession of and keep the goods for him, and therefore to replace the vendor in the same situation as if he had not parted with the actual possession." The distinction there taken is between a constructive and an actual delivery to the vendee, and Parke, B. says that if there is only a constructive delivery to the vendee the transit is not over; it is not at an end until the goods have been actually delivered to the vendee or his agent. Then in the case of *Berndtson* v. *Strang* (*ubi sup.*) the test put by Lord Cairns is whether the goods have been delivered only to a carrier, although he may have been named by the purchaser. There the ship had been chartered by the purchaser, and therefore when the goods were placed on board there was a constructive delivery to him. Yet, because the goods were in the hands of the shipowner as carrier, it was held that the transit was not over until that carriage was over. So too in Smith's Leading Cases, in the notes to *Lickbarrow* v. *Mason* (vol. 1, p. 818, 7th edit.) it is said: "The rule to be collected from all the cases is, that the goods are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee." In the present case the clay was placed on board the ship for the purpose of being carried to Glasgow; it was in the actual possession of the shipowner and only in the constructive possession of the purchaser. Therefore the right of stoppage *in transitu* existed. If the purchaser had been the owner of the ship, the vendors would have had no such right, unless they had reserved it by express stipulation. But in the actual state of things, I think that, both on principle and on the authorities, the transit was not over, and the right to stop *in transitu* remained.

Cotton, L.J.—I am of the same opinion. Assuming that there was a binding contract for the sale of the clay, I thing that the right to stop *in transitu* existed when the notice was given. The right of an unpaid vendor continues until the goods have come into the actual possession of the purchaser, treating for this purpose the possession of his agent or servant as his possession. The rule was stated by Lord Cairns in *Berndtson* v. *Strang*, and I think it is clearly established that so long as goods are in the hands of a carrier as carrier, they are not in the actual possession of the purchaser, whoever may have nominated the carrier. The contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him whether he be the vendor or the purchaser of the goods. Here the verbal agreement which the purchaser entered into to charter the ship did not make the captain the agent or servant of the purchaser; he was only a carrier. But Mr. Northmore Lawrence ingeniously raised the point that there can be no stoppage *in transitu* unless there is a transit, and he said that the contract being only to deliver the clay on board the ship, and no further destination having been communicated to the vendors the transit was at an end so soon as the clay was delivered on board the ship. The cases no doubt show that there is no right to stop *in transitu* if the goods have once come into the possession of the purchaser, even though the vendor has afterwards regained the possession of them. The argument must come to this: it must be shown that the goods have come into the hands of the purchaser, and that the shipment has been then made by him. Here the contract was that the goods were to be placed on board by the vendors, not by the purchaser. The purchaser was to indicate where the goods were to go, and only when they had reached that destination would they come into the actual possession of the purchaser. If the contract had been to deliver the clay to an agent of the purchaser at Fowey, it

would have been a very different matter. The case would then have been like that of *Valpy* v. *Gibson* (4 C. B. 837), in which the shipment was made by the purchaser, not by the vendor.

Appeal accordingly allowed with costs.

Solicitors for the appellants, *Ingledew, Ince*, and *Greening*, agents for *Ingledew, Ince*, and *Vachell*, Cardiff.

Solicitors for the respondents, *Gregory, Rowcliffes*, and *Rawle*, agents for *Hoop, Hockin*, and *Marrack*, Truro.

May 21 *and* 24, 1879.

(Before Jessel, M.R., James, Brett, and Cotton, L.JJ.)

The Cassiopeia.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Amended writ—Default cause—In rem—Service.

After a vessel has been sold under an order of the Judge of the Admiralty Division, and the proceeds are in the registry, no owner having appeared, the writ in an action against those proceeds, whether original or amended subsequent to the sale, must be personally served on the registrar.

An amended writ must in all cases be served in the same way as an original writ would be under similar circumstances. Where a writ is served on the registrar, to render the service good, the provisions of Order IX., r. 13 *must be strictly adhered to.*

This was an appeal from an order made by the Judge of the Admiralty Division refusing to sign judgment in a cause *in rem* by default.

The facts were, that a cause *in rem* was instituted against the *Cassiopeia*, a British colonial vessel, for necessaries supplied to her, and the writ was served on the ship in the usual way (Order IX., r. 10), but no appearance was entered for the owners.

At the time the writ was served the *Cassiopeia* was already under arrest in another action *in rem*, in which there was no appearance; a decree was obtained by default in the earlier action subsequent to the service of the writ in the later one, and under the decree the ship was sold and the proceeds of the sale brought into court. The plaintiffs in the second action then amended the indorsement on their writ of summons by adding to their claim for necessaries a claim as mortgagees of the ship; the mortgage was a security for the payment due for necessaries.

May 15.—*W. G. F. Phillimore*, for the plaintiffs in the second action, moved for judgment by default, under the Admiralty Rules of 1871 (L. Rep. 3 A. & E. 3 *ad fin. The Polymede*. 3 Asp. Mar. Law Cas. 124; L. Rep. 1 P. D. 121; 34 L. T. Rep. N. S. 367), for his claim as mortgagee in the amended indorsement against the fund in court. [Sir R. Phillimore.—Has the amended writ been served on the owners?] No, there is no neeessity; the claim for mortgage is the same as that for necessaries stated in a different way; the owners, by not appearing in the necessaries suit, show that they have no defence against our claim. [Sir R. Phillimore.—The owners may have a defence to your claim on the mortgage, though they have not when you claim for necessaries.] Where there is default of appearance, it is sufficient service to file in the registry: (Order XIX., r. 1) If there had been an appearance in the action, I should have been obliged to serve the amended writ after getting leave to amend under Order XXVII., r. 11 (see also Order III., r. 2), and the amendment may be made without prejudice to a pending motion:

Caldwell v. *Pagham Harbour Reclamation Company*, 2 Ch. Div. 221.

[Sir R. Phillimore.—There may be other claimants against the fund in court, and they were entitled to notice of this claim.] If there were they would have objected to our claim for necessaries and have entered a caveat.

Sir R. Phillimore.—I am not satisfied that there should not be a fresh service of the writ in this case, and therefore I refuse to grant the prayer of the motion for judgment.

From this decision the plaintiffs appealed.

May 21.—The appeal came on for hearing before Jessel, M.R., James, and Brett, L.JJ.

W. G. F. Phillimore for plaintiffs.—At the time the amendment was made in the writ the ship had already been sold, and therefore it was impossible and useless to serve the amended writ on her; the proceeds were in the registry, and the amended writ was served by being filed there.

Jessel, M.R.—In this case the service on the registrar was sufficient, the ship having been sold under order of the court, though in general an amended writ should be served in the same way that an original writ is.

James and Brett, L.JJ. concurred.

May 26.—The case came before the court (James, Brett, and Cotton, L.JJ.) again, the registrar of the Admiralty Division having refused to draw up the order for judgment on the ground that it was made on the supposition that the amended writ had been served on him (the registrar), when in fact it had only been filed in the registry, and also because it was informal, having no date of service indorsed on it in accordance with Order IX., r. 13.

Phillimore for the plaintiffs.—Order IX., r. 13, does not apply to actions *in rem*; it is taken from sect. 15 of the Common Law Procedure Act 1852, and applies only where personal service is necessary:

Dymond v. *Croft*, 34 L. T. Rep. N. S. 786; 3 Ch. Div. 512.

[Brett, L.J.—That case was a case of substituted service, this is one in which the practice has been to serve the registrar as holder of the proceeds.] The service on the registrar is mere matter of custom, it is not required by any rule. [By the Court.—The practice is well established.] Our service of the amended writ in the registry was practically service on the registrar. [Brett, L.J.—Delivering a writ to a clerk to file is not service on the registrar. James, L.J.—An amended writ is like a new writ issued at the date of amendment, and should be served in the same way.] Not in all respects if a writ is amended after subsequent steps in the action have been taken; it is not necessary to go through all these steps *de novo*, the order is to amend the writ and all subsequent proceedings. [James, L.J.—But

this amendment is a change both of the nature of the action and of the character of the plaintiffs.]

E. C. Clarkson, for other parties, was not called on.

Brett, L.J.—I am of opinion that the registrar was right in refusing to draw up the judgment. The service was not sufficient. When a writ is so amended as to introduce a new claim against the proceeds of the sale of a ship, it must be served on the registrar in the same way as an original writ in the like case. This amended writ was not served on the registrar, it was only filed in the registry. No intimation of the service was made. Delivery for the purpose of filing cannot be construed to be service. Moreover, the provisions of Order IX., r. 13, were not complied with.

James and Cotton, L.JJ. concurred.

Solicitors for plaintiffs, *Speechley, Mumford, and Co.*, agents for *J. W. Carr.*

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, Esq., Barrister-at-Law.

May 26 and 27, 1879.

(Before Bramwell, Baggallay, and Thesiger, LL.J.)

Davies v. M'Veagh.

APPEAL FROM THE EXCHEQUER DIVISION.

Ship—Charter-party—Arrival at place of landing—Commencement of running days—Demurrage—Liability of charterer.

A charter-party provided for the loading of a cargo, "the vessel to be loaded and discharged in nineteen running days, or, if longer detained, to be paid 4l. per day demurrage." On the 20th Nov. the vessel was admitted into dock at the port of loading, but owing to the dock regulations was unable to obtain a berth where she could load until the 5th Dec.; she finished loading on the 6th Dec. The captain refused to sign a bill of lading, unless containing the words "sixteen days consumed in loading, leaving three running days for discharging." The charterer at first refused to take this bill of lading, but ultimately took it, in order to obtain the cargo, and paid 80l., which was demanded by the captain for twenty days demurrage. This action was brought by the charterer against the shipowner to recover the 80l. and damages for detention of the cargo.

Held (affirming the judgment of Brett, L.J.), that the running days had commenced when the vessel first got into dock, that plaintiff and not defendant was responsible for the delay occasioned by the dock regulations, and therefore that plaintiff was not entitled to recover.

The plaintiff sued to recover the sum of 80*l.*, which he had paid to the defendant under protest, and also claimed damages for delay in delivery of a cargo of coal which had been shipped on board a schooner belonging to the defendant under the following circumstances:—The plaintiff, a coal merchant at Runcorn, and the defendant, the owner of the schooner *Pleiades*, entered into a charter-party in the terms following:

Liverpool, 19th Nov. 1877.

I hereby engage with Joseph Davies, Esq., to receive and load on board my vessel, the *Pleiades*, of Belfast, being tight, staunch, and strong, and every way fitted for the voyage, a full and complete cargo of coal, about 375 tons to 390 tons, and proceed to Dublin, Burgh Quay or so near thereunto as she may safely get and deliver the same, per bills of lading, on being paid freight at the rate of 6*s.* per ton of 20 cwt., and three guineas gratuity. The vessel to be loaded and discharged in nineteen running days, or if longer detained to be paid 4*l.* per day demurrage (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage, always excepted). Ship to have a lien on the cargo for all freight, dead freight, and demurrage.

Penalty for non-performance of this agreement, estimated amount of freight.

(Signed) Thomas M'Veagh.

I hereby engage to load said vessel on the above terms. Vessel to load in B. Moore or Wellington Docks, High Level. (Signed) Joseph Davies.

Nov. 19, 1877.

The docks alluded to in the charter-party, Bramley Moore Dock and Wellington Dock, were two adjacent docks at Liverpool, which were approached through the Wellington half-tide basin. On the 19th Nov. 1877 the *Pleiades* completed the unloading of her inward cargo in the half-tide basin, and on the following day she was admitted into the Wellington Dock as a matter of favour, because, being empty, she would be in danger outside, but in consequence of the regulations of the dock authorities, who had control over the movements of vessels in the docks, she could not obtain a berth at the end of the dock, where there was a high level railway and platform, with tips for loading coal, until the 5th Dec. She then loaded a cargo of coal, and the loading was completed on the 6th Dec. The plaintiff refused to take a bill of lading containing the words, "sixteen days have been consumed in loading the said vessel in Liverpool, leaving three running days for discharging at Dublin," and the captain refused to sign any other. The *Pleiades* sailed, and arrived at Dublin on the 23rd Dec., but the captain refused delivery of the cargo unless a bill of lading containing the clause above set out were produced, and the vessel remained unloaded until the plaintiff signed a bill of lading in the form above mentioned, and paid 80*l.* demurrage, which the captain claimed for twenty days detention. This payment was made under protest, and the plaintiff claimed the sum of 80*l.* in addition to damages for delay in delivery of the cargo.

The trial took place at the Liverpool Spring Assizes, 1878, before Brett, L.J., who on proof of the above facts gave judgment for the defendant.

The plaintiff appealed.

Gully, Q.C. (*J. C. Mathew* with him) for the plaintiff.—The plaintiff was not bound to pay demurrage, and therefore is entitled to recover, for the nineteen running days named in the charter-party did not commence until the 5th Dec., when the *Pleiades* first obtained a berth where she could load a cargo of coals.

C. Russell, Q C. and *French* for the defendant.—The running days commenced upon the 20th Nov., the day on which the discharge of the inward cargo was completed. The defendant had then done all that he was bound to do by the terms of the charter-party, and any loss which may have been occasioned by the action of the dock authorities ought to fall upon the plaintiff.

Gully, Q.C., replied.

The following authorities were referred to in the course of the argument:

Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46; 27 L. T. Rep. N. S. 710; 42 L. J. 16, C. P.;
Brown v. *Johnson*, 10 M. & W. 331;
Ashcroft v. *Crow Orchard Colliery Company*, 2 Asp. Mar. Law. Cas. 397; L. Rep. 9 Q. B. 540; 31 L. T. Rep. N. S. 266; 43 L. J. 194, Q.B.;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 197; L. Rep. 1 Q. B. Div. 244; 34 L. T. Rep. N. S. 526; 45 L. J. 511, Q. B.;
Kearon v. *Pearson*, 7 H. & N 386; 31 L. J. 1, Ex.;
Randall v. *Lynch*, 2 Camp. 352;
Kell v. *Anderson*, 10 M. & W. 498.

Bramwell, L.J.—I am of opinion that the appeal in this case ought to be dismissed, and the judgment of Brett, L.J. affirmed. Where cargo is to be taken on board a vessel at a place of loading which is specified in the charter-party, the responsibility must rest upon the charterer, not upon the shipowner, if the berth so specified is not in a fit state to receive the vessel on her arrival at the appointed time. In the present case the vessel arrived at her place of loading, as soon as she was admitted into the Wellington Dock. Definitions are always dangerous, and I am not anxious to state one which hereafter may be questioned; but it seems to me that it may be laid down that a vessel has reached her place of loading, as distinguished from the spot of loading, as soon as she has entered the port from which her outward voyage is to commence. I am not afraid of the consequences, even if this definition is pushed to a great extent. Suppose the vessel had got into the Mersey, and the captain had then given notice to the plaintiff that he was ready to enter the dock and take the cargo on board; I think that in such a case the plaintiff could not have contended that the vessel was not at the place of loading, and that the nineteen days had not begun to run. Or suppose the vessel had once got into the dock, and the dock authorities had sent her out again, as far as the defence to this action is concerned, I think it would be the same as if she had remained in dock. I do not think it necessary to discuss the matter further, or to go into the authorities at length, but it seems to me the decision in *Tapscott* v. *Balfour* (*ubi sup.*), which has been cited as an authority favourable to the plaintiff, is not intended to be opposed to what I say now; if it is, it is also opposed to the case of *Ashcroft* v. *The Crow Orchard Colliery Company* (*ubi sup.*). I wish further to add that I am supported in the view which I have taken by the cases of *Brown* v. *Johnson* and *Randall* v. *Lynch* (*ubi sup.*). In *Kell* v. *Anderson* (*ubi sup.*) the vessel at the time of the alleged detention had not in point of law completed her voyage.

Baggallay, L.J. concurred.

Thesiger, L.J.—I am of the same opinion; I do not think it is very material whether the time for loading and discharging is definite or indefinite, although the fact that the time was not strictly defined seems to have been partly the ground of the decision in *Tapscott* v. *Balfour* (*ubi sup.*). But in *Ashcroft* v. *The Crow Orchard Colliery Company* (*ubi sup.*) the language of the charter was indefinite, and yet the charterers were held liable for the delay. Here the vessel was ready to receive cargo at the latest on the 20th Nov. I think the plaintiff was responsible for the delay which occurred after that day, and that the verdict for the defendant was right, and the judgment ought to be affirmed. *Judgment affirmed.*

Solicitor for plaintiff, *H. G. Field* for *Fitty*, Liverpool.

Solicitors for defendant, *Crowder*, *Vizard*, and *Anstie*, for *J. M'Quiggin*, Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. Poyser, Esq., Barrister-at-Law.

June 18 *and* 20, 1879.

(Before Cockburn, C.J., Lush and Manisty, JJ.)

Adamson and another *v.* The Newcastle Steamship Freight Insurance Association.

Shipping—Charter-party—Marginal clause that in "the event of war, blockade, or prohibition of export preventing loading, this charter to be cancelled"—Contract void or voidable.

In a charter-party made between the plaintiffs and J. A. C. there was a marginal memorandum that in the event of "war, blockade, or prohibition of export preventing loading, this charter to be cancelled." There was a prohibition of export by the Government of R. which did prevent loading of the chartered vessel, but the charter-party was not cancelled by the plaintiffs and the charterer.

Held (by Cockburn, C.J. and Manisty, J., dissentiente Lush, J.). that the charter-party was put an end to ipso facto by the happening of any or either of the contingencies mentioned in the memorandum to the charter-party.

This was a case stated for the opinion of the court in an action on a policy of insurance on the freight of the ship *Edgar* effected by the plaintiffs with the defendant.

Benjamin,, Q.C., *Cohen*, Q.C., and *Aspinall*, for the plaintiffs.

The *SolicitorGeneral* and *Wood Hill* for the defendants.

The facts and arguments are sufficiently stated in the considered judgments of the learned judges.

The following cases were cited:

Jones v. *Carter*, 15 M. & W. 718;
Naylor v. *Taylor*, 9 B. & C. 718;
Barber v. *Fleming*, L. Rep. 5 Q. B. 59; 39 L. J. Q. B. 25;
Geipel v. *Smith*, 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. N. S. 361; L. Rep. 7 Q. B. 404; 41 L. J. 153 Q. B.;
Rankin v. *Potter*, 2 Asp. Mar. Law Cas. 6 5; 29 L. T. Rep. N. S. 142; L. Rep. 9 H. of L. 83; 42 L. J. 169 C. P.

Cur. adv. vult.

July 3.—Manisty, J.—This was an action on a policy of insurance on the freight of the ship *Edgar*, effected by the plaintiffs with the defendant on the 24th Feb. 1877, from noon of the 20th Feb. 1877 until noon of the 20th Feb. 1878, at all times and in all places. The perils insured against were, among others, perils of the seas and restraints and detainments of kings and princes, and the interest insured was "owner's freight at risk on board the ship or chartered when in ballast."

By a charter-party dated prior to the policy

of insurance, viz., on the 17th Feb. 1877, the plaintiffs chartered the *Edgar* to one T. A. Cicognani, by which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take), should proceed to Galatz, for orders to load there or at Braila or Ismalia, and there load a full and complete cargo of grain or seed, and being so loaded should therewith proceed to Malta for orders, &c.: and by a memorandum in the margin of the charter-party it was agreed as follows; "In the event of war, blockade, or prohibition of export preventing loading this charter-party to be cancelled."

On the 24th April 1877 Russia declared war against Turkey, and on the 31st April Her Majesty issued a proclamation of neutrality. On the 1st May 1877 the *Edgar* sailed from the Tyne from Genoa with a cargo of coal under a charter-party. She arrived at Genoa on the 14th May 1877, and after discharging cargo she took in ballast for the purpose of proceeding to Galatz. Before the *Edgar* arrived at Genoa the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charter-party of the 17th Feb. 1877. Nevertheless the *Edgar*, by order of the plaintiffs, sailed from Genoa in ballast on the 21st May 1877 towards Constantinople to fulfil the charter-party of the 17th Feb. 1877. Before doing so the plaintiffs requested the charterer (Cicognani) to cancel the charter-party, but he refused to do so and insisted upon holding the plaintiffs to it. The *Edgar* arrived at Constantinople on the 28th May, when it was found that the loading ports were still closed, and that there was no reasonable probability of their being open in time for the *Edgar* to load the chartered cargo. She did not therefore proceed further towards Galatz, but obtained at Constantinople a homeward cargo for England, the freight of which was less than the freight she would have earned had she obtained the chartered cargo. This action is brought to recover the difference, and the questions submitted to us are (1) whether the charter-party became as a matter of law void (by which I understand the parties to mean whether, according to the true construction of the charter-party, it came to an end) on the closing of the ports of loading in the charter-party mentioned, without any election to cancel it having been made either by the shipowners or the charterers? (2) Whether the charter-party was as a matter of law void and rescinded before the *Edgar* sailed in ballast from Genoa.

I am of opinion that both questions should be answered in the affirmative. I think that the act of closing the ports by the Russian Government was a "prohibition of export preventing loading" within the meaning of the memorandum in the margin of the charter-party, and that upon the happening of that event (which was before the *Edgar* reached Genoa) the charter-party came to an end without any election by either party.

It is contended on the part of the plaintiffs that the charter-party was voidable only at the option of either party, that neither party having elected to avoid it the charter-party continued in force, and that consequently the *Edgar* having sailed from Genoa for Galatz in ballast, there was a loss in chartered freight when the ship was in ballast. This construction necessitates the introduction into the charter-party of the words "at the option of either party" after the words "to be cancelled," which would not only violate the rule of construction that words should never be added, unless it be absolutely necessary to add them in order to give effect to the plain and manifest intention of the parties; but would, as it seems to me, defeat the plainly expressed intention of the parties, and might give rise to questions of considerable difficulty. One such question would be when was the option to be exercised? I suppose each party would be allowed a reasonable time for making up his mind whether he would or would not abandon the adventure. The authorities seem to show that in the event of a restraint of princes, the obligation of a shipowner (in the absence of any special provision) is to wait a reasonable time for the purpose of ascertaining whether the restraint is likely to be of such a duration as to render it impossible commercially to carry out the contract, and what is a reasonable time must depend upon the circumstances of each particular case.

It was suggested in the course of the argument for the plaintiffs that under the circumstances of the present case the master was justified in sailing from Genoa and proceeding as far as Constantinople before abandoning the adventure, and that consequently the chartered voyage had continued, and the policy had attached; whereas on the part of the defendants it was contended that in the absence of the clause in question the duty of the master would have been to wait a reasonable time at Genoa for the purpose of ascertaining if the prohibition was likely to be removed, and that if he had done so the chartered voyage never would have been commenced. The plaintiffs construction of the charter-party would involve this question, the defendants construction excludes it. Other questions of more or less difficulty and nicety would be open as between the shipowner and charterer if the plaintiffs construction of the charter-party be adopted all of which are excluded by the defendants construction of it.

If the parties really intended that the charter-party should only be voidable at the option of either of them, it was very easy for them to say so, and it is worthy of note that when they did so mean they did so say. The charter-party included two ships; as to one of them it was stipulated that if it did not arrive at her loading port on or before the 15th June, the charterers were to have the power to cancel the charter. As to the other, it was stipulated that if it did not arrive at the port of loading by the 30th June "charter for that steamer to be cancelled." If the words "to be cancelled" in the memorandum as to the prohibition of export are to be read as meaning "to be cancelled at the option of either party," the same words in the stipulation to which I had just adverted would, I suppose, have to be read in like manner, and I cannot for a moment believe that such was the intention of the parties. Of course it was open to the parties to agree that the second ship should be loaded notwithstanding she did not arrive at her port of loading by the 30th of June, but that would have been matter of new agreement. So the parties might have agreed at Genoa that notwithstanding the prohibition of export from the ports of lading, the *Edgar* should proceed to Constantinople or to Galatz, or any-

where else, but that would have been a new agreement *dehors* the charter-party. I think it much safer to adhere to the words which the parties have used, and to give effect to them according to their plain and ordinary signification than to put a construction upon them which necessitates the introduction of additional words.

For these reasons I am of opinion that the questions put to us should be answered in the affirmative.

COCKBURN, C.J.—I concur in this judgment. On the first argument I was disposed to think that the effects of the memorandum was to make the charter, not void, but voidable at the option of either party; so that, if both parties were concerned in waiving the right to cancel, the charter would continue in force. But, on further consideration, I have arrived at the opposite conclusion, and am of opinion that the meaning and effect of the memorandum was, in order to prevent all further question or delay, to put an end, *ipso facto* to the charter-party, on the happening of the contingency.

LUSH, J.—I regret that I am unable to concur with the Lord Chief Justice and my brother Manisty as to the construction to be put upon the memorandum to the charter-party. If there had been but one contingency provided for, and that one was "prohibition of export preventing loading" there would have been no difficulty, and it would have been immaterial whether the words "to be cancelled" were read as importing "shall be cancelled," or only "may be cancelled," in other words, whether in the happening of the event the charter was to be treated as absolutely void, or only voidable. But two other circumstances are mentioned, viz., "the event of war," and "blockade." A declaration of war may long precede a blockade or a closing of the ports; the seat of hostilities may be far off, or hostilities may terminate before reaching such a stage. The meaning put upon the words in their application to one of the specified events, must be put upon them in their application to each event.

The charter must of course be construed without reference to the policy of insurance, and as if the contention arose between the charterer and the shipowner. Suppose the shipowner in this case, instead of stopping at Constantinople, had gone on to one of the loading ports with the intention of carrying out the charter, and had, when he arrived there, found that the prohibition had been or was shortly to be withdrawn, but that he could command higher freights on a homeward voyage, was to be at liberty then to change his mind and to fall back upon the declaration of war, which took place and which he knew of before he started from Genoa? If the memorandum means that upon that event the charter is to be treated as actually cancelled, he may, and it would be a good defence to an action by the charterer for refusing to receive the cargo, say that the charter had ceased to be in force. Or, supposing the charterer found when the ship arrived at the port that he could ship at a lower rate than the chartered freight, he might set up the same plea as an excuse for not shipping the cargo. I cannot think the parties intended to place themselves in this position. Nor do I think that a verbal agreement by the one not to treat it as cancelled would have any binding force. By the hypothesis, the charter is void, and nothing short of a written agreement would have the effect of reviving it, which would be to make a new charter. The word "charter" imports a writing. A verbal charter is a thing unknown to maritime commerce. There may be an agreement on the one hand to load, and another to carry, but the security and the special provisions and exceptions always found in a charter would be wanting.

The alternative construction would answer every purpose intended by the parties, and be free from inconvenience. If it is voidable only the charter would remain in force until one of the parties elected to avoid it, but it would be optional to either of them to put an end to it upon the happening of either of the specified events, provided he did so within a reasonable time, and before the other party altered his position upon the faith of his having waived it. If, for example, after the vessel had arrived at Constantinople, the master had found that the ports were open, it would have been too late after what occurred at Genoa for him to quote the declaration of war as a ground of declaring the charter at an end. It is objected that this construction requires the memorandum to be enlarged by reading the words "at the option of either of the parties." But this seems to me necessarily implied. The memorandum is the language of both parties, and amounts to an agreement that in certain events the charter may be cancelled. It cannot mean that if they both concur they may cancel it. That they can do at any time without any previous agreement, the words read in this sense would have no effect. They must, as it seems to give them any operation at all, mean that either may cancel. Express words are found in another part of the charter, but that is where an option is given to one party only. Nor do I think that writing or any other manual act is necessary in order to cancel. It is sufficient that the party elects to exercise his option and notifies his election to the other party.

A further objection is that this construction makes the memorandum useless. But its purpose will appear if we consider what the rights and obligations of the parties would have been without it. Supposing for example the master had reached the loading port, and had then received information that it was likely to be soon opened, he would have had to stay there a reasonable time to see if that event happened. If he went away and the prohibition were taken off a few days afterwards, the charterer might say he had not waited long enough. The charterer might be in the same dilemma if the shipowner wished to stay, and he wanted to dispose of his goods on shore. The object of the memorandum was to avoid these harrassing questions, and to enable each party as soon as the event happened which might defer the voyage to put an end to it, and to all possible litigation upon such a question.

For these reasons I am of opinion that the charter continued in force up to the time when the loading became impracticable, and consequently that the assured had an interest in the chartered freight which he lost by the "restraint of princes."

Judgment for the defendants.

Solicitor for the plaintiffs, *H. C. Coote*, for *H. A. Adamson*, North Shields.

Solicitors for the defendants, *Williamson, Hill,* and *Co.*, for *Ingledew* and *Daggett*, Newcastle-upon-Tyne.

Tuesday, March 4, 1879.

(Before COCKBURN, C.J., MELLOR and MANISTY, JJ.)

ATTWOOD AND OTHERS *v.* SELLAR AND CO.

General average—Expense of warehousing cargo, and leaving port of refuge—Usage of average adjusters—Usage to be binding must be in accordance with law.

The fundamental principle upon which the doctrine of general average rests is, that all loss which arises from extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo must be borne proportionably by all who are interested. The expenses therefore of entering and quitting a port of refuge, and of unshipping, warehousing, and reshipping cargo, which have been necessitated by a general average act, and incurred in the common interest of all concerned, and in the prosecution of the common adventure, are the subject of general average contribution. (*a*)

The plaintiffs' ship the S.S. sailed from S. to L. with a general cargo. Encountering a storm, a general average sacrifice was made by cutting away the fore-topmast, whereby the S. S. was compelled to put into C. to repair in order to enable it to prosecute the voyage. To do the repairs it became necessary to unship a portion of the cargo, and to warehouse it, and upon completion of the repairs to reship it. Expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The voyage was completed, and the cargo safely discharged at L.

The plaintiffs, as shipowners, claimed contribution by way of general average, from the defendants, the owners of the cargo, on account of the above expenses. The defendants, relying upon the practice of British average adjusters for from seventy to eighty years, declined to contribute to any expenses incurred after the discharge of the portion of the cargo, on the ground that the expense of warehousing was particular average on the cargo, and that of the reshipment, port charges, pilotage, &c. was particular average on the freight.

Held (*dissentiente Manisty, J.*), *that the plaintiffs were entitled to recover for the whole of the expenses claimed, as they were extraordinary expenses incurred for the preservation of the ship and cargo.*

Held, also, that the usage of the average adjusters could not override the law of the country as it had not been made a term in the contract between the parties.

Held, by Manisty, J., that the defendants' construction was correct, as the usage of average adjusters for so great a time must be taken to have existed from all time, and to have been acquiesced in so as to have become the practice and usage of shippers and shipowners.

(*a*) In the present case the ship was compelled to put into a port of refuge in consequence of a loss, itself a general average loss, but the reasoning of the majority of the court would seem to apply equally to a ship compelled to put into port by a loss caused directly by the perils of the seas, and not by any act of the master or crew, and to show that port of refuge expenses are general average even in the lattercase.—ED.

THIS was an action by the plaintiffs, as owners of the *Sullivan Swain*, to recover 13*l.* 14*s.* 9*d.* in respect of a general average contribution from the defendants as owners and consignees of certain goods on board the said vessel.

In pursuance of an order of Master Hodgson, dated the 29th Dec. 1877, the following case had been stated for the opinion of the court.

CASE.

1. The plaintiffs are the owners of the ship *Sullivan Swain*, and the defendants are owners and consignees of goods shipped on board the said vessel on the voyage hereinafter mentioned.

2. The said vessel sailed from Savannah for Liverpool on the 10th Feb. 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary and was made, the master being compelled to cut away the fore-topmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st Feb. 1877 to repair the said damage.

3. In order to effect the said repairs and to enable the vessel to proceed on her voyage it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping the same, and further expenses were incurred at Charleston for pilotage and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The said vessel afterwards completed her voyage and discharged her cargo at Liverpool.

4. It is, and for from seventy to eighty years past has been, the practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, the expense for warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all, are not of frequent occurrence, but such cases and cases where the substantial cause of the putting into port is a general average sacrifice are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an Association of Average Adjusters which holds meetings from time to time, at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March 1876 one eminent average adjuster formed the opinion that the practice as above described was wrong, and that all such expenses as hereinbefore described up to the time when the ship was again at sea and had resumed her voyage ought to be charged to general average, and since March 1876 the said average adjuster has made up his adjustments in two or three cases of the kind in accordance with his said opinion, but the practice of British average adjusters, as above described, has remained unaltered.

7. The case of the said ship *Sullivan Swain* was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said average adjustment which has been so prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are so liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly, and the defendants contend, firstly, that apart from the said practice general average expenditure ceases in such cases when the cargo has been discharged from the ship; and secondly, that the said practice of average adjusters is a valid and binding custom regulating the treatment of the said expenses, and the contribution to be paid by the defendants. Either party is to be at liberty to refer to the average adjustment.

The question for the opinion of the court is:

Whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters as stated in this case.

If the court should be of opinion that the plaintiffs are so entitled in accordance with the plaintiffs' contention as in the 8th paragraph of this case stated, judgment is to be entered for the plaintiffs for the amount shown to be due by the said average adjustment with costs. If the court shall be of opinion that the plaintiffs are entitled to recover a contribution in excess of what would be so payable as aforesaid upon any other principle and to any other extent than as claimed by the plaintiffs as aforesaid, then judgment is to be entered for the plaintiffs for an amount to be ascertained in accordance with the principle laid down by the court, and in such case the court is respectfully requested to deal with the costs in such manner as to the court shall seem right.

If the court shall be of opinion in the negative, judgment is to be entered for the defendants with costs.

Cohen, Q.C. (*J. C. Mathew* with him) for the plaintiffs.

R. E. Webster, Q.C. (*Fullarton* with him) for the defendants.

The points raised during the arguments are fully dealt with in the judgment of the court.

The following cases and authorities were cited and referred to:

Benson v. *Chapman*, 2 H. of L. Cas. 696;
Benson v. *Duncan*, 3 Exch. 644; 12 L. T. Rep. O. S. 516;
Corturier v. *Hastie*, 8 Exch. 40; 19 L. T. Rep. O. S. 114;
Cox v. *The Mayor of London*, 1 H. & C. 338; 6 L. T. Rep. N. S. 497;
De Cuadra v. *Swann*, 16 C. B. N. S. 772;
Hall v. *Janson*, 4 E. & B. 500; 24 L. T. Rep. O. S. 289;
Hallett v. *Wigram*, 9 C. B. 580; 15 L. T. Rep. O. S. 137;
Job v. *Langton*, 6 E. & B. 779; 27 L. T. Rep. O. S. 218;
Kirchner v. *Venus*, 12 Moo. P.C. 361; 33 L. T. Rep. O. S. 81;
Lohre v. *Aitchison*, 3 Asp. Mar. Law Cas. 445; L. Rep. 2 Q. B. Div. 501; L. Rep. 3 Q. B. Div. 558; 36 L. T. Rep. N. S. 794; 38 L. T. Rep. N. S. 802;
Mollett v. *Robinson*, L. Rep. 5 C. P. 646; L. Rep. 7 C. P. 84; 23 L. T. Rep. N. S. 185; 26 L. T. Rep. N. S. 207;
Moran v. *Jones*, 7 E. & B. 523; 29 L. T. Rep. O. S. 86;
Norden Steamship Company v. *Dempsey*, L. Rep. 1 C. P. Div. 654;
Plummer v. *Wildman*, 3 M. & S. 482;
Power v. *Whitmore*, 4 M. & S. 141;
Shipton v. *Thornton*, 9 A. & E. 314;
Simonds v. *White*, 2 B. & C. 805;
Stewart v. *Pacific Steamship Company*, 2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 88: 28 L. T. Rep. N. S. 742;
Walthew v. *Mavrojani*, L. Rep. 5 Ex. 116; 22 L. T. Rep. N. S. 310; 3 Mar. Law Cas. O. S. 382;
Worms v. *Storey*, 11 Exch. 427; 26 L. T. Rep. O. S. 106;
Abbott on Shipping, 3rd edit. p. 335; 5th edit., p. 347;
Arnould on Insurance, 2nd edit., p. 920;
Benecke Princ. of Indemnity, p. 191;
Duer on Insurance, p. 179.
Lowndes General Average, pp. 196, 267, 280, 286, 287, 364;
Park on Insurance, p. 291;
Phillips on Insurance, p. 1326, sect. 135.

Cur. adv. vult.

May 16,—The following written judgments were delivered:

MANISTY, J.—This was an action brought by the plaintiffs as owners of the American ship *Sullivan Swain*, to recover from the defendants, as owners and shippers of goods on board the vessel at Savannah, a small sum of money (13*l.* 14*s.* 9*d.*), as a general average contribution under the following circumstances.

The ship sailed from Savannah for Liverpool on the 10th Feb. 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary and was made by cutting away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston to repair. In order to effect the repairs and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and reshipping it. Further expenses were also incurred at Charleston for pilotage and other charges in respect of the ship leaving Charleston and proceeding on her voyage. The vessel completed her voyage and discharged her cargo at Liverpool. The facts are more fully stated in a special case, and the question to be decided is, whether the plaintiffs are entitled to have the expenses of warehousing that portion of the cargo which was discharged at Charleston, and the expense of reshipment of it and the pilotage, port charges, and other expenses, incurred at Charleston, in respect of the ship leaving that port and proceeding on her voyage to Liverpool, or any, and if so which, of such expenses brought into general average. The plaintiffs contend that they are entitled to have them all

brought into general average. The defendants contend that by the law and usage in England, none of the expenses in question are the subject of general average, but are particular average, the expense of warehousing being particular average on cargo, and the expense of reshipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed upon her voyage being particular average on freight. It is found as a fact in the case that it is, and for from seventy to eighty years has been, the practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, and the pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. Recently, according to the statement in the special case, one eminent average adjuster formed the opinion that this practice is wrong, and this action is brought to have the matter judicially decided. It is necessary, therefore, to consider what is the law of England with respect to the adjustment of the loss in question, it being admitted that the loss must be adjusted according to that law.

The principle of general average, or general contribution, is, as is well known, derived from the ancient laws of the Rhodian Republic. It was imported into the Roman law and forms a head (*De lege Rhodia de jactu*) in the Digest of Justinian, with an express recognition of its origin. It has since been adopted by all commercial nations, but with so many variations, in different nations, as to the application of the principle, that as has often been remarked both by judges and text writers, no principle of maritime law has been followed by more variations in practice. In one point it would seem that all nations agree, namely, that in the absence of any particular instrument or contract the place at which the average is (as between owner of ship and owner of goods) to be adjusted is the place of the ship's destination or delivery of her cargo. As regards the law of England, it was laid down in the year 1824 in the considered judgment of the Court of King's Bench, delivered by Abbot, C.J., in the case of *Simonds* v. *White* (2 B. & C. 805) that "the shipper of goods tacitly, if not expressly, assents to general average as a known maritime usage which may, according to the events of the voyage, be either beneficial or disadvantageous to him—and by assenting to general average he must be understood also to assent to its adjustment, and to its adjustment at the usual and proper place, and to all this it seems to us to be only an obvious consequence to add that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." Assuming this to be, as I think it is, a correct exposition of the law of England, it seems to me to go far towards deciding this case in favour of the defendants.

But it is said on the part of the plaintiffs that the special case does not find what has been the usage and practice of shippers and shipowners in England, but only what has been the practice of British average adjusters. I am of opinion that, in the absence of any evidence to the contrary, the usage and practice of average adjusters for so great a length of time must be deemed and taken to have existed from all time, and to have been acquiesced in, and so to have become the usage and practice of shippers and shipowners: (see *Stewart* v. *West India Pacific Steam Ship Company*, 2 Asp. Mar. Law Cas. 32.) I am at a loss to comprehend how the law of any particular nation as to general average can be arrived at except by ascertaining what has been, as a matter of fact, the usage and practice in such particular nation with regard to it.

A great many cases were cited in the course of the argument, commencing with *Plummer* v. *Wildman* (3 M. & S. 482), which was decided in the year 1815, and ending with *Stewart* v. *West India and Pacific Steam Ship Company* (*ubi sup.*), decided in 1873. I do not propose to notice many of those cases. Some have been expressly or impliedly overruled; some were actions on policies of insurance or bills of lading containing special provisions, others contain dicta not altogether consistent with the usage found by the case. But it seems to me that *Simonds* v. *White* (2 B. & C. 805), *Job* v. *Langton* (6 E. & B. 779), and *Walthew* v. *Mavrojani* (3 Mar. Law Cas. O. S. 382), coupled with the finding in the present case as to what has hitherto been the usage and practice of British average adjusters, are very strong if not conclusive authorities in favour of the defendants. I have already adverted at some length to the judgment in *Simonds* v. *White* (2 B. & C. 805). In *Job* v. *Langton* (*ubi sup.*) it was held that expenses incurred, after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair, were not chargeable to general average but to ship alone. I notice this case not only because it is an authority in favour of the present defendants, so far as general principles are concerned, but also because Lord Campbell, C.J., in delivering the considered judgment of the court (consisting of himself and Coleridge, Erle, and Crompton, JJ.), says: "There is no mercantile usage stated to guide us. We must therefore resort to the general principles on which this head of insurance law rests; from which I infer that if a mercantile usage had been stated the court would have been guided by it. In *Walthew* v. *Mavrojani* (*ubi sup.*) (which was decided in the Exchequer Chamber in the year 1870 by six eminent judges, affirming a judgment of the Court of Exchequer) the question was whether the expense of getting a ship off a bank on which she had been stranded by a storm was general average, seeing that before the expense was incurred the cargo had been discharged and warehoused. The court held that it was not general average, inasmuch as, although the expense was incurred with the view and for the purpose of prosecuting the voyage, it was incurred after the cargo was in a place of safety and when the ship only was in peril. Bovill, C.J. says: "The American courts have enlarged the limit of general average and have included within the description of extraordinary expenses incurred for the common benefit the expenses of repairs rendered necessary by extraordinary perils, and made at an intermediate port for the purpose of prosecuting the voyage, and have in some other

respects deviated from what we consider the strict rule, but the English courts have held strictly that unless there be a common risk and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of ship and cargo, a claim to general average is not established." And a little further on the same learned judge says: "To ground a claim for general average there must be a danger, actual or impending, common to both ship and cargo; here the cargo was safe, and the ship only in peril; it was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made or extraordinary expense incurred to save both ship and cargo or for the common benefit of both." In the same case the same learned judge says: "The claim has been put on the ground that the adventure was not complete, and that until it was terminated there was a common interest that it should be carried out; but that argument is in direct contradiction to the principle laid down with respect to repairs which are equally necessary to enable the ship to complete the adventure, but which are not matters for general average." In these observations, which are very pertinent to the present case, I entirely agree.

Mr. Cohen, in his able argument, says these are cases in which the cause of the extraordinary expenditure was an ordinary peril of the sea unaccompanied by a general average cause, such as the cutting away of the mast, and he says that the existence of a general average cause distinguishes those cases from the present. Let us consider that proposition practically. One ship meets with a storm so severe that it is deemed necessary for the safety of ship and cargo to run for an intermediate port, and it succeeds in reaching it without any voluntary sacrifice of any part of the ship or cargo. Another ship meets with a similar storm, and finds it necessary to run for an intermediate port, but, in order to reach it, is obliged to make a voluntary sacrifice of part of the ship, say, a mainmast or part of the cargo. Why should there be any distinction in the two cases with respect to what it is to be deemed general and what is to be deemed particular average after the cargo is landed in a place of safety? The cases are identical, save and except as regards the loss caused by the voluntary sacrifice of part of the ship or cargo. I am unable to see any principle upon which to rest the distinction suggested by Mr. Cohen; and it is, so far as I know, unsupported by authority. Certainly none has been cited in support of it.

Mr. Cohen further contended that it ought not to be presumed that foreigners contract with reference to the custom and practice of England in regard to general and particular average, and that inasmuch as the *Sullivan Sawin* was an American ship, and the cargo was shipped at Savannah, the shippers were not bound by the usage in England. That contention is in direct contradiction to the law as laid down in *Simonds* v. *White*, which, so far as I know, has never been questioned.

There is only one other argument put forward on behalf of the plaintiffs which I think it necessary to advert to. It is said that the court should adopt the principle contended for by the plaintiffs, in order that the law of England may be comformable to foreign law. The answer to this argument is, that the adoption of the principle contended for would unsettle the usage and practice which has hitherto existed and been acted upon in England, while it would still leave the usage and practice of many other nations at variance with that of England and of each other. I think it is much safer to adhere to a usage which has been acted upon, for aught that appears to the contrary, ever since England adopted the law of general average, than to introduce a new usage for no other reason, that I can perceive, than that such new usage would be more consonant with strictly logical principles. Such an alteration ought, in my opinion, to be effected, if at all, by legislation, and not by a decision of a court of law. Moreover, it is very immaterial what usage any particular nation may have adopted with respect to particular or general average, so long as that usage has been uniformly acted upon, and so become well known to all concerned.

For these reasons I am of opinion that the defendants are entitled to judgment.

The judgment of Cockburn, C.J. and Mellor, J. was delivered by

COCKBURN, C.J.—This was a case of general average, arising under the following circumstances.

The plaintiffs' ship, the *Sullivan Sawin*, sailed from Savannah for Liverpool with a general cargo. Encountering a storm, the master found it necessary to cut away the foretopmost, and the mast in falling caused such further damage as rendered it necessary to put into Charleston to repair the ship, in order to enable it to prosecute the voyage. To repair the vessel, it became necessary to unship a portion of the cargo, and to land and warehouse it, and the repairs of the ship having been completed, the goods had to be reshipped. Expenses were also incurred on account of pilotage and other charges on the ship leaving the port in order to proceed on her voyage. The voyage was completed, and the cargo safely discharged and delivered at Liverpool, its proper destination. The plaintiffs, the shipowners, claim contribution by way of general average from the defendants, the owners of the cargo, in respect not only of the expense of entering the port and of discharging the cargo, but also that of warehousing and reshipping the latter, as well as in respect of expenses incurred in the way of port charges and pilotage on the occasion of the vessel again putting to sea. The defendants, while they admit their liability to contribute up to the discharge of the cargo, deny any liability beyond that stage, taking their stand on the usage of average adjusters in this country, according to which the expense of entering the port of refuge and discharging the cargo has, under such circumstances, been treated as general average; but the expense of warehousing the cargo has been treated as particular average on the cargo, and that of the reshipment, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight. That such has been the practice of average adjusters in this country for from seventy to eighty years is undoubted; but the plaintiffs deny the validity of this practice, as being inconsistent with the principles of law relating to average.

Two questions present themselves: first, what, independently of this practice of average ad-

justers, is the principle or rule of law applicable to the case? Second, whether, assuming the practice to be inconsistent with what otherwise should be the law, having subsisted for so long a time, it must be taken to give the rule properly applicable to such a case. No claim being made by the plaintiffs of general average in respect of anything expended on the ship itself—the claim as stated in the case being limited to the expense of discharging a portion of the cargo, and of warehousing and reshipping it, and to expenses incurred for pilotage and other charges on the ship leaving port—the question which presented itself in *Power* v. *Whitmore* (4 M. & S. 141), and in *Hallet* v. *Wigram* (9 C. B. 580), as to how far repairs done to a ship—even to the extent of such temporary repairs only as would be necessary to enable it to proceed on the voyage—may be the subject of general average, does not arise. Nor are we called upon to consider how far, when a vessel has been stranded, and the goods have been taken out of her and safely landed, the expenses of getting the vessel off can be made matter of general average; or to undertake the difficult task of attempting to reconcile the apparently conflicting decisions of this court in *Job* v. *Langton* (6 E. & B. 779), and *Moran* v. *Jones* (7 E. & B. 523); or to consider whether there are any exceptional circumstances, the possibility of which was suggested in *Walthew* v. *Mavrojani* (3 Mar. Law Cas. O. S. 382), sufficient to take the case out of the narrow rule of the English courts, laid down and acted upon in the last-mentioned case, as compared with the more liberal one of the courts of the United States and of the other leading maritime nations. That the expenses which, according to the practice of average adjusters, are thus treated as particular average, should, according to legal principles, be made the subject of general average, appears to me to flow necessarily from the fundamental principle on which the whole doctrine of general average rests, namely, that all loss which arises from extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo must be borne proportionably by all who are interested.

The contract between the goods owner and the shipowner, on a charter-party or a bill of lading, being for the conveyance of the goods to a given port, there occurs in the course of the voyage a state of things which is not provided for by the contract. A storm arises; the vessel is in danger; but a port is within reach, to which, in the common interest of all concerned, it would be prudent to take refuge. Or it becomes necessary to cut away a mast, and, as a consequence of so doing, to seek an intermediate port in order to replace it. Or the ship sustains damage from the violence of winds or waves, which renders it necessary, for the common safety of ship and cargo, and for the further prosecution of the adventure, to seek a port at which repairs which have become necessary for the safe prosecution of the voyage may be effected. The result is that, in theory at least, a new arrangement not contemplated or provided for by the original contract takes place between the parties, who in theory, as formerly in fact, must be supposed to be present, each in the practice of modern times represented by the master, to whom the interests of both are committed. If we could suppose both parties to be actually present, and under a sense of imminent danger to concur in the necessity of seeking a port of refuge, but to be discussing the question as to how the expenses incidental to such a course shall be borne, what arrangement could be more reasonable or just than that these expenses being extraordinary expenses incurred for the common benefit, should be borne in common on the same principle as that which has been established from the earliest times in the case of actual jettison?

Applying this principle with reference, in the first place, to the expenses incurred by the ship, it is admitted on all hands that the expenses of entering the port of refuge should be carried to general average. Logically, it would seem to follow that, as the coming out of port is—at least where the common adventure is intended to be, and is afterwards further prosecuted—the necessary consequence of going in, the expenses incidental to the latter stage of the proceeding should stand on the same footing as the former. The further prosecution of the voyage was in the contemplation of the parties or of the master, as representing them, in going in: the coming out, therefore, as essential to the further prosecution of the voyage, must equally have been in view when the resolution to go in was formed. But it is said—and it is upon this ground that the difference between these two sets of expenses is alleged to be founded—first, that it is the shipowner's duty under his contract to keep the ship in a navigable state, and consequently to repair any damage she may have sustained; second, that when the ship has been repaired, it is the owner's duty under his contract to reship the goods, and to set forth again on the voyage, and to that end to incur the cost of quitting the port, and of employing a pilot or a tug if necessary. The whole of this reasoning appears to me to be based on an assumption altogether fallacious. The shipowner is not bound to repair for the purpose of carrying on the cargo; nor having repaired, does he become bound to reship the cargo and complete the voyage under the original contract, but if bound at all to do so, is bound only under that contract as modified by the altered circumstances of the case. The contract, it should be remembered, expressly exempts the shipowner from performance of his obligations under it when performance is prevented by perils of the seas. The ship having become incapacitated from prosecuting the voyage, and performance of the contract having been prevented by the excepted cause, the shipowner is under no obligation, so far as the goods owner is concerned, to repair. He cannot, it is true, expose the goods of the freighter to further peril by persisting in carrying them on, if, having the opportunity of putting into a port of refuge, he cannot, or will not, repair the ship, but, if he chooses to forego his right to freight, he may repair or not as may best suit his interest.

"Under a charter-party containing such an exception," says Parke, B., in delivering the judgment of the court in *Worms* v. *Storey* (11 Ex. 427), "if the vessel sails in a seaworthy state, and in the course of the voyage is damaged by perils of the sea, the owner is not bound to repair it; but if he does not choose to repair, he ought not to go to sea

with the vessel in an unseaworthy state, and so cause a loss of the goods; he ought either to repair or stop." It is true the liability to repair was not the question immediately before the court, the cause of action stated in the declaration, and on which there was a demurrer, being that the shipowner, after having put into a port where the ship might have been repaired, had put to sea again with the vessel in an unseaworthy state, and had thus occasioned the loss of the plaintiff's goods. The question was, however, one which the court had incidentally to consider, inasmuch as, if the shipowner had been under an obligation to repair, the proceeding to sea when the ship was unseaworthy would have been *à fortiori* actionable. But the view of the Court of Exchequer is supported by other considerations. By the express condition of the contract performance by the shipowner is dispensed with if prevented by perils of the seas. If it were true that under such circumstances he was nevertheless bound to repair, it would follow that he would be bound to do so without regard to the amount of the cost involved, or to the degree to which the expenses might involve him in loss. Yet it is well settled that where the cost of the repairs will exceed the value of the vessel when repaired, together with the freight, the owner is not bound to repair in order to carry on the cargo; and that the master, as his agent, will be justified, as against the goods owner, in abandoning the voyage: (see *De Cuadra* v. *Swann*, 16 C. B. N. S. 772), where the law on this head was made the subject of learned and elaborate argument. Some confusion may have arisen from the vague language in which the duty of the master to repair, after having gone into a port of refuge, is spoken of. Thus, in *Benson* v. *Chapman* (2 H. of L. 696), it is said in general terms that "the duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight, if possible." But however general the language here used, it is plain, on reference to the facts of the case, that the proposition thus stated related only to the duty of the master towards his owner. In the case of *Benson* v. *Duncan* (3 Ex. 644) in the Exchequer Chamber, Patteson, J., in delivering the judgment of the court, says: "In ordering the repairs of the ship the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship or his agent can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning the freight, which the master is bound to enable him to do if he can." The true rule is correctly stated in Maude and Pollock on shipping, p. 438: "The owner of the cargo cannot insist on the repairs being done, for the shipowner is absolved from his contract to carry if prevented by the perils of the seas; but, on the other hand, it is the duty of the master, as the agent of the shipowner, to repair the ship if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight if possible."

But does the converse of the proposition equally hold? Though the shipowner or his master is not bound to repair, is he released, having done so, from the obligation to carry on the goods, or does the obligation to fulfil the original contract thereupon revive? At first sight it would seem to follow, from the position, that the owner is absolved from his contract by the damage to the ship, and therefore is free from any obligation to repair, that he becomes released *in toto*, and therefore would be free, if he chose to sacrifice the freight, to decline to carry on the goods. But, though not arising directly out of the original contract to carry, the obligation presents itself under a different form. In the contract of affreightment there is an implied undertaking on the part of the shipowner, in consideration of his being intrusted with the custody of the goods, that if the further prosecution of the voyage should be interrupted by disaster to the ship, if he cannot, or does not choose to tranship the cargo and send it on in another vessel in order to earn the freight, he will do his best to protect the interest of the goods owner; and therefore, if the circumstances will admit of it, must find another vessel and forward the goods to their destination. Upon which assumption it may be contended that, as the ship, having been repaired and rendered fit to resume the voyage, is available for the purpose, the master will be bound, as the best course to promote the interest of the goods owner, to reship the goods on board his owner's ship. But the question is by no means free from difficulty. In the first place, it is not settled that the master, though he has the right to tranship, is bound to do so as the agent of his owner. The opinions of the foreign jurists, which will be found collected in Parsons on Shipping, Vol. I., in a note at p. 234, are altogether conflicting; and although we learn from the work just referred to that it is now well settled in the courts of the United States that the master is bound to tranship if there be a vessel or other means of transport to the place to which the cargo should go within reasonable reach, there has been no decision to that effect in a court of this country. The question presented itself in *Shipton* v. *Thornton* (9 A. & E. 314), but it became unnecessary to decide it. But even if we assume that it would be the duty of the master, as becoming *ex necessitate* the agent of the shipper, to tranship the cargo, it must not be forgotten that he continues the agent of his owner; and in the latter capacity, if he can find a more remunerative employment for the ship, or earn a higher rate of freight, he may be justified in declining to carry on the goods.

But even if this point were, like the foregoing, assumed in favour of the goods owner, the case of the latter in the present case would be no further advanced. For the whole argument in his favour rests on the fallacious assumption that the rights and obligations of the parties remain as they existed under the original contract. But this is to overlook the fact that, by the interruption of the voyage, the absolution of the shipowner from the further performance of it, and the new arrangement which must be taken to have been come to between the parties on deciding to enter the port of refuge, the original contract has been

essentially modified; in fact, a new one has been engrafted on it. Let us see what is involved in the arrangement so made. In legal theory we must suppose the parties to be present. In contemplation of law, the master, as representing both, makes for them both the agreement which it is reasonable to suppose, that, if present, they would have made for themselves. The common purpose is twofold. The first and immediate purpose is that of saving ship and cargo, by bringing both into harbour. The second is that of repairing the ship with a view to the further prosecution of the voyage if such repairs should prove reasonably practicable, with certain reservations on the part both of the shipowner and the goods owner, which possibly may lead to the abandonment of the further prosecution of the voyage. The second of these purposes involves several subordinate operations and expenses incidental thereto. The state of the ship and the degree of damage she has sustained have first to be ascertained. To effect this, as well as to do the necessary repairs, it may be necessary to unship the cargo. To preserve the goods from harm they will have to be warehoused. The repairs to the ship having been completed, the cargo must be reshipped. Lastly, all things having been completed, the ship will have to leave the port to put to sea. In respect of each of these stages expenses will have to be incurred, for which, as being altogether *dehors* the original contract, that contract wholly fails to provide. They are extraordinary expenses incurred for the preservation of ship and cargo, and in furtherance of the common adventure, under circumstances in which the ship and cargo would otherwise have perished, or the common adventure would have been abruptly brought to a termination.

Upon whom should the expenses of these different operations fall? The practice of the average adjusters makes the unloading of the cargo matter of general average, and, as it seems to me, on principle rightly so. On what ground the distinction between the cost of unshipping the cargo, and of warehousing it, which is thrown on it as particular average, and that of reshipping which is treated as particular average, on the freight, is founded, I wholly fail to perceive. Looking to the common purpose for which all these operations are performed, it seems only reasonable and just that the expenses should be borne rateably by all parties concerned—in other words, be treated as general average—so far, at all events, as the common purpose has been effected.

It is true that it not unfrequently happens that, the primary purpose of putting into port having been accomplished, the ulterior purpose, that of further prosecuting the voyage, fails. There may be no means in the port of refuge for repairing the vessel. The cost of repairing may be so great as not to make it worth the owner's while to repair in order to earn the freight. As regards the alternative of transhipment, there may be no opportunity to tranship; or only at an increased rate of freight, on which account the shipowner may decline to tranship, except on account of the goods owner. On the other hand, the cargo may be of a perishable nature, or it may be so damaged that it cannot be carried on further without becoming worthless; or the repairs to be done to the ship will take so long a time that in the interest of the goods owner the master would not be justified in detaining the goods, but acting as the agent of the latter, becomes bound to forego the right of carrying on the goods and so earning the freight, and must deal with them in the interest of the owner alone. In such cases it may well be that only the expense of putting into the port of distress could properly be made matter of general average, and that expenses thus incurred, from which no benefit results to the common adventure, should be treated as particular average to ship or goods, as the case may be. But we are here dealing with a case in which every expense has been incurred with a view to, and has resulted in, the further prosecution of the common adventure. The ship and cargo have been saved from destruction by being brought into port; the ship has been repaired, the cargo, having in the meantime been preserved by being warehoused, has been reshipped; the voyage has been resumed, and brought to a safe conclusion, and the goods have been delivered: in a word, the common purpose, the fulfilment of the contract of affreightment, has been effected. But how has this result been brought about? By the series of operations which have taken place from the ship's going into port to her putting to sea again inclusively. But the whole of these operations were necessary to the resumption of the voyage; the expenses of carrying them out were each of them incurred in furtherance of the common purpose. Not being expenses within the scope of the original contract, but extraordinary expenses incurred for the common benefit of ship and cargo, the conclusion appears to me irresistible that, with the exception of the cost of repairs to the ship, all these expenses should be charged to general average. As regards the cost of unloading and reloading, Lord Campbell, in *Hall* v. *Janson* (4 E. & B. 500), says: "The expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight." This reasoning, in which I entirely concur, applies equally to expenses incurred in leaving the port, which like the expense of unloading, warehousing, and reloading, are expenses incurred in furtherance of the common enterprise, and must be taken, like them, to have been contemplated from the moment the resolution was taken to enter the port, as the necessary consequence of doing so. All such expenses, being extraordinary expenses, that is to say expenses arising out of a state of things not provided for by the original contract, must be matter of general average.

The exclusion of the cost of repairs to the ship from general average will not conflict with this conclusion, as it rests on exceptional grounds, namely, that the benefit of the repair enures to the owner beyond the scope of the voyage, and that it would therefore be unjust to the goods owner, whose interest is limited to the voyage, to make him contribute to the cost. A distinction has, indeed, been taken between general repairs and such temporary repairs as are necessary to enable the ship to complete the voyage. By the American law,

as well as by that of many other maritime nations, such temporary repairs have been made the subject of general average, and this — assuming always that such repairs are of a temporary character only, and add nothing to the permanent value of the vessel—would certainly appear to be consistent with principle. It is, however, unnecessary to pronounce any opinion on this point, since, as has been already observed, no claim is made in this action for repairs. Nor is it necessary to consider whether, as the unseaworthiness of the vessel was caused by the jettison of the mast, and by damage occasioned by its fall—it being an admitted principle that consequential damage immediately caused by jettison is to be treated as jettison — the damage so caused might not have been made the foundation of a claim for general average, as no such claim is here made.

We have next to consider whether the practice of average adjusters in this country, which is said to have existed for seventy or eighty years, if thus found to be at variance with legal principles, shall nevertheless prevail, and must be considered as having settled the law. I am not aware of any principle on which the affirmative of this proposition can be maintained, or of any authority by which it can be upheld. It is not a usage of trade by which the terms of a contract may be interpreted or modified. It is not a custom which can be presumed to have had a legal origin. It is not the inveterata praxis of a court or courts having judicial authority, and which must therefore be taken to be the law though inconsistent with general principles. The authority of average adjusters may be said to be of an anomalous character. By the consent of shipowners and merchants they act as a sort of arbitrators in the settlement of matters of average; but they are bound, in the adjustment of such claims, to follow the law, and in the practice they have adopted they have not acted or intended to act on or give effect to any mercantile usage, but have intended to give effect to what they believed to be the law; but they have mistaken it. What was said by Pollock, C.B., in *Cox* v. *Mayor of London* (*ubi sup.*), is here in point. In that case a plea had been pleaded to a declaration in prohibition, alleging an immemorial custom, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties are citizens or resident in the city, and neither the original debt nor that due from the garnishee had accrued within it. The plea having been demurred to, the Lord Chief Baron in giving judgment says: "In holding this plea bad we neither overrule nor dissent from any former decision, for in no previous instance has the custom here stated been brought before any court, by plea or certificate, and held to be good. The Superior Courts have at all times investigated the customs under which justice has been administered by local jurisdictions, and unless they are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal," The terms in which the Chief Baron thus stated the law were expressly approved of by Lord Cranworth in giving judgment in the House of Lords on appeal. The law so stated appears to me to be *à fortiori* applicable to the present case. If a custom prevailing in a court, which, though an inferior court, is still a court of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjusters. When a practice of this kind is brought to the test of legal decision and is found to be erroneous and inconsistent with law, it cannot be permitted to override the law and acquire the force of law.

Three cases are relied on in opposition to the view expounded in the foregoing reasoning, and on which it may be desirable to make one or two observations, namely, *Simonds* v. *White* (2 B. & C. 805), *Stewart* v. *Pacific Steam Ship Company* (2 Asp. Mar. Law Cas. 32), and *Walthew* v. *Mavrojani* (3 Mar. Law Cas. O. S. 382). Neither of these cases appear to me to be in point to the one before us. The point to be decided in the first of these cases was whether the average which had to be adjusted should be determined according to the law of Russia or that of this country. Lord Ellenborough, C.J., after stating that this was the question, says that the shipper must be taken to assent to the adjustment "according to the usage and law of the place at which the adjustment is to be made."

So far as relates to the place of adjustment we are of course bound by this decision, and are therefore not at liberty to give effect to Mr. Cohen's argument, even if otherwise disposed to do so. But, if any stress is sought to be laid on what Lord Ellenborough says as to "usage," it is to be observed that he is speaking (as is manifest from the language of the judgment throughout) of a usage consentaneous with the law. It would be to give a mistaken effect to his language to suppose he was referring to a usage at variance with the law.

The case of *Stewart* v. *Pacific Steam Ship Company* (2 Asp. Mar. Law Cas. 32), far from supporting the defendants' case, appears to me a strong authority the other way. There, by the terms of the bill of lading, average, if any, was "to be adjusted according to British usage." A fire having broken out in the ship, water was poured in to extinguish it, and bark shipped on board by the plaintiffs was seriously damaged thereby. The plaintiffs claimed as for general average, but it appeared that it was the practice of average adjusters in this country to treat such damage as particular average. The court expressly declared the practice to be at variance with the law applicable to such a case, and would assuredly have given judgment in favour of the plaintiffs, had not the latter by the terms of the bill of lading expressly agreed to make the custom a part of the contract. "If," says Quain, J., in delivering the judgment of the court, "the present case depended wholly on the common law applicable to general average, we think the plaintiffs would be entitled to recover." But, "as the parties have agreed to make the custom a part of their contract, the case must be decided according to the custom, and the result is that our judgment must be for the defendant." To which the learned judge added: "It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it." There being no such term in the present contract, I see no reason for treating the practice with more consideration than the practice then before the court

received at its hands in that case. *Walthew* v. *Mavrojani* (3 Mar. Law Cas. O. S. 382) was a case altogether differing from the present. It was a case of stranding; and the question was whether expenses incurred for the purpose of getting the ship off, after the goods had been taken out of her and removed to a place of safety, could be made the subject of general average, and it was held that they could not. But of the six judges who so held in the Exchequer Chamber, Bovill, C.J., Mellor, Montague Smith, Lush, and Hannen, JJ., base their judgment on the ground that, while it was essential to the owner of the ship to get his ship off, so as to be able to resume the voyage and earn the freight, it was indifferent to the goods owner, the goods being in safety, whether they were carried on in the same ship or in another. "It is not shown," says the Chief Justice, "that any advantage resulted to the goods from their being carried on in that ship rather than any other." "It was indifferent to the owners of the cargo whether the ship floated or not, and there was therefore no sacrifice made, or extraordinary expense incurred to save both ship and cargo, or for the common benefit of both." "I draw the inference," says Montague Smith, J., "that it was indifferent to the owner whether the goods went forward to England in the *Southern Belle* —the ship in question—or any other." Hannen, J. says: "It is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. But the expenses in question were not such, for it is indifferent to the owner of goods whether his goods are taken on by the same ship, except where they would not otherwise be carried on at all, or only at a greater expense." Even Brett, J., who appears to have been disposed to lay down the rule more generally treats these expenses as incurred solely for the benefit of the shipowner. In like manner, in the earlier case of *Hallet* v. *Wigram* (9 C. B. 580), in which a claim for contribution had been made where part of the cargo had been sold to raise money for the repair of the ship, which had put back by reason of damage sustained by ordinary perils of the sea, Wilde, C.J. in giving judgment says: "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas show that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent." These two decisions are no doubt sufficient authority for saying that, according to English law, expenses incurred for the benefit of the ship alone, without any concomitant benefit to the cargo—such as the expense of getting off a stranded vessel after the goods have been discharged, or of repairing a vessel in a port of refuge in the absence of special circumstances such as were referred to in *Walthew* v. *Mavrojani*,— will not give a claim to general average. But they are inapplicable to a case like the present. There is nothing here to show that the goods could have been sent on in another vessel. And, what is of more importance, the expenses were all incurred in furtherance of the common purpose, and for the benefit of the cargo as well as the ship: of the ship, as an opportunity was thus afforded of repairing it and enabling it to take on the cargo; of the cargo, as it was thus enabled to be carried on to its destination.

I am therefore of opinion that our judgment must be for the plaintiffs; and, as my brother Mellor concurs in this view and in the reasons on which it is founded, there will be judgment for the plaintiffs. *Judgment for plaintiffs.*

Solicitors for plaintiffs, *Field, Roscoe,* and *Co.*, for *Bateman* and *Co.*, Liverpool.

Solicitors for defendants, *Parker* and *Clarke*, for *Stone* and *Fletcher*, Liverpool.

COMMON PLEAS DIVISION.

Reported by A. H. BITTLESTON and J. A. FOOTE Esqrs., Barristers-at-Law.

Saturday, May 3, 1879.

(Before LINDLEY, J.)

SCARAMANGA AND CO. *v.* STAMP AND GORDON.

Assisting ship in distress—Deviation from course —Not in order to save life—Loss of cargo— Liability of shipowner.

The owner of a ship is liable to the freightors for loss of cargo occasioned by perils of the sea on a deviation from her course for the purpose of saving a ship in distress and her cargo, notwithstanding that the perils occasioning the loss are among the perils excepted in the charter-party, if such deviation was not necessary in order to save life.

THIS was an action tried before Lindley, J., and reserved by him for further consideration. The facts are fully stated in the judgment.

Herschell, Q.C., *Cohen*, Q.C., and *Crump* for the defendants.

Butt, Q.C., *Mathew*, and *Lodge*, for the plaintiffs, were not called upon.

LINDLEY, J.—I have had an opportunity of looking into the few authorities which are to be found upon this subject, with the exception of the case that has been mentioned by Mr. Herschell, and which I cannot find; and I will now read the few remarks which I have to make with reference to the points which have been urged by Mr. Herschell. This was an action brought on a charter-party by the freightors of a cargo of wheat against the owners of the steamship *Olmpias* for the loss of the cargo. By the terms of the charter-party the *Olmpias* was to proceed with the wheat on board from Cronstadt to the Mediterranean. The excepted perils were the usual perils of the sea. The *Olmpias* left Crondstadt on the 21st Nov. 1877. She passed the Scagger Rae on the 28th; and on the 30th, whilst in her proper course, she sighted and went to the assistance of another ship, in distress, called the *Arian*, and on the same day the master of the *Olmpias* entered into an agreement to tow the *Arian* to the Texel for a sum of 1000*l*. In pursuance of this agreement the master of the *Olmpias* took the *Arian* in tow, and proceeded with her towards the Dutch coast. On the night of the 2nd Dec. 1877 the *Olmpias* got ashore near the Terschelling Light, and she and her cargo were ultimately lost. It is for this loss of the cargo that the plaintiff sues the defendants.

Inasmuch as the loss was caused proximately by perils of the seas, and by the terms of the charter-party the defendants are exempted from liability for

loss occasioned by such perils, it is incumbent on the plaintiff to prove the existence of circumstances which deprive the defendants of the benefit of this exemption. The plaintiffs accordingly relied on two grounds as sufficient for this purpose. First, they contended that the loss of the ship and cargo was really attributable to the negligence of the master of the *Olmpias*. If this proposition had been established the plaintiff would have been entitled to succeed; for it is settled that, as between a freightor of cargo and the owner of a ship the latter is liable for loss really attributable to the negligence of the master, although immediately caused by perils of the seas: (see *Grill* v. *The General Iron Screw Company*, L. Rep. 1 C. P. 600; 14 L. T. Rep. N. S. 711; and *The Chasca*, 4 L. Rep. A. & E. 446; 32 L. T. Rep. N. S. 838). The jury, however, have decided this point in favour of the defendants, and for the present, at all events, the verdict must be treated as conclusive. Secondly, the plaintiff contended that the *Olmpias* deviated from the course, and that, as the loss occurred after such deviation, the plaintiffs were entitled to recover, whether there was negligence on the part of the master or not, and whether the deviation was or was not the cause of the loss of the cargo.

The fact of deviation was hardly open to serious controversy in the face of the evidence adduced at the trial, and especially of the captains' agreement on the 30th Nov. and his own letter of the 4th Dec. 1877, in which he said in effect that he should not have been where he was had it not been for the agreement. It is true that there was great conflict of testimony as to the proper course of the *Olmpias* from the Hohlman Light, on the Danish coast, to the English coast; one set of witnesses saying that she ought not to have gone near the Texel, but should have made for Oxfordness Light, and the other set saying that she should have sighted the Texel Light and then made for the Channel between the Hinder and Galloper Lightships. But notwithstanding this difference of opinion none of the defendants' witnessess went the length of saying "that there was no deviation on the part of the *Olmpias*;" and it appeared that there was so little real controversy on this point, that I did not think it necessary to frame a distinct question as to the facts of deviation to be answered by the jury. The fact of deviation therefore being established, it follows that the plaintiffs are entitled to succeed, unless the deviation took place under such circumstances as rendered it justifiable: (see *Davis v. Garrett*, 6 Bing. 716, which shows that the plaintiff need not prove that the deviation caused the loss.)

The defendants, however, although scarcely denying the fact of deviation, contended that the *Olmpias* was justified in deviating, inasmuch as she deviated solely in order to assist a ship in distress. That the *Arian* was in distress, and in fact in immediate danger, was hardly, if at all, disputed. But in answer to questions put by me to the jury they found, first, that it was not reasonably necessary to take the *Arian* to the Texel in order to save the lives of those on board her; but, secondly that it was reasonably necessary so to do in order to save her and her cargo. Upon these findings the plaintiff claims to be entitled to the judgment of the court, and I am of opinion that he is so entitled.

On the grounds of humanity it may be taken as established that a master of a ship is at liberty to deviate from his course in order to save, and so far as may be necessary to save, persons found by him when prosecuting his voyage to be in danger of their lives. There is no temptation to abuse this liberty, for salvage is not payable for the mere preservation of life; and owners of ships, owners of cargoes, and insurers may well be treated as impliedly assenting to a departure, for such a purpose, from the contract not to deviate, which, although not expressed, is always implied in contracts of freightment and insurance. The reason for holding the master justified in deviating to save life are overwhelming. To deny him this liberty would be to shock the moral sense of every right-minded person, and to ignore the clear moral duty of assisting fellow-creatures in distress.

But the jury having negatived the necessity for deviating in order to save life, the defendants are driven to contend that the deviation of the *Olmpias* was justified, inasmuch as it was necessary to save the *Arian* and her cargo. No authority was cited, nor indeed is any to be found in support of this contention; but general principles of expediency were appealed to, and I therefore will shortly state why in my opinion the liberty to deviate ought not to be extended to cases such as I am now considering.

The reasons in favour of an extension of the liberty are as follows: First, it is for the benefit not only of insured owners of ships and cargoes in peril, but also of their insurers, if any, that such ships and cargoes shall be saved, and that no obstacles shall be thrown by judicial decision in the way of those who are ready and willing to save ships and cargoes in distress; secondly, the interest of owners of ships and cargoes and their insurers is in fact the interest of the public; and therefore it is for the interest of maritime commerce in general, and of the public in general, that the masters of ships should be at liberty to succour other ships in distress without fear of loss of freight or liability for loss of cargo or loss of claim on insurance. Up to a certain point the principles here suggested may be conceded; indeed, they are recognised by the laws of all civilised countries. The whole law of salvage is based upon them, for salvage is awarded to those who, being under no obligation to exert themselves to save ships and cargoes in peril, do so exert themselves successfully. The question I have to decide is, whether by the laws of this country the owner of a ship deviating to save property is exonerated from the ordinary consequences of deviation? In order to answer this question it will be convenient to consider the interests of the various parties immediately affected by such deviation. First, as regards the mariners, their right to salvage is a sufficient inducement to them to succour ships in distress. Secondly, the owner of the succouring ship shares the salvage, and the salvage awarded is always proportionate to the risk run, and one of the risks run by the owner of the succouring ship is possible loss of freight, loss of benefit of insurance, and possible liability for loss of cargo. This remuneration therefore in the shape of salvage, if any is earned, indemnifies him against all risks incurred by him by the deviation of his ship. Thirdly, the owner of cargo, if the cargo be lost after a deviation, has his remedy against the shipowner. The owner of cargo has therefore really no inte-

rest in the question under discussion, unless the shipowner be insolvent, which is too rare an event to influence a general ruling, and which, when it occurs, may be exceptionally dealt with. Fourthly, unless under very special circumstances, the owner of cargo on board the saving ship does not share salvage; and it will be most unjust to hold that the risk to his cargo might be increased by salvage services when he obtains no benefit whatever from the salvage awarded for them. Fifthly, the same observation applies to the underwriters of the saving ship and her cargo. Their risk is increased by the supposed deviation, but they do not share the salvage awarded for it. Sixthly, the interests of the owners of the saved ship and cargo, and of the respective underwriters thereof, are protected by the inducement afforded by salvage to those who hazard their lives and ships to save ships and cargoes in peril of destruction.

The above considerations show that the owner of the deviating ship is only exposed to risk without remuneration when no salvage is earned, but to protect him in these cases at the expense of owners of cargo and underwriters, namely, by increasing their risks without even the hope of remuneration, would be in the highest degree unjust to them. Moreover, it would be most dangerous to hold that masters of ships may for reward, or the hope of reward, deviate with impunity in order to save property. Such a doctrine would open wide the door for the entrance of fraud—would tempt masters to enter into secret agreements for their own benefit, and to conceal them if all went well, and, if not, then to set up as an excuse for their conduct a deviation to save the property of others. The reasons against an extension of the doctrine of permitted deviation to save property appear to me far to outweigh the reasons in its favour. To permit deviation to save life is an anomaly justified by reasons which have no application whatever to deviation to save property, and on principle therefore I decline to extend the doctrine as desired by the defendant. I do this the more readily, as the propriety of so extending it has been considered before now, and been uniformly negatived by those who have had to consider it. I have, in order to decide this case, availed myself of every assistance within my reach. Every text writer that I have consulted—including Arnold, Phillips, Kent, and Parsons—is in favour of the conclusion at which I have arrived; and the reasoning of Washington, J. in *Bond* v. *The Brig Cora* (Washington C. C. 80), in favour of the same view, appears to me unanswerable. Still, as this is the first case in this country in which the point I have to decide has arisen and requires a distinct decision, I have thought it desirable to give the reasons for my opinion at greater length than I should otherwise have done.

I was informed at the trial that this was in substance an action by underwriters against underwriters, and that the particular underwriters who bring this action are acting contrary to the views and wishes of other persons in the same interest as themselves. Be it so. It is nevertheless plain that all I have to deal with are the rights of the plaintiff as owner of the cargo against the defendants as owners of the ship *Olmpias*. Those rights depend on the charter-party, for the bills of lading do not vary from it, and are to the same effect; I have nothing to do with any policies, and know nothing of their language. By the charter-party the defendants became liable to the plaiutiff for the loss of his cargo unless such loss was within one of the excepted perils. The excepted perils, although covering perils of the sea, do not cover such perils if subsequent to an unauthorised deviation: (see *Davis* v. *Garrett*, 6 Bing. 716.) The deviation was in this case, in my opinion, unauthorised, and I therefore give judgment for the plaintiff for such a sum as may be found to be due by a referee, it having been arranged that the actual figures shall be referred to a gentleman to be agreed upon. The costs of the action must be borne by the defendants.

Walters, Budd, and *Watson,* for the plaintiff.

W. S. Crump and *Son,* for the defendants.

Friday, May 23, 1879.

(Before DENMAN, J.)

WAGSTAFF *v.* ANDERSON AND OTHERS.

Charter-party—Sale of cargo—Act of master—Agency.

The plaintiffs were the owners of a cargo shipped in a vessel of which the defendants were the charterers, and sued for damages for wrongful sale and conversion by the master. The defendants, on the 24th June 1872, *had written to the plaintiff's brokers offering them "room" in the vessel in question for a certain cargo for Callao on certain terms; and on the 25th June the defendants chartered the vessel for a voyage from London to Callao. The charter-party provided that the ship should receive on board, at such berth as the charterers might appoint, all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods; that the master and owner should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading as the charterers might require; that the ship should be addressed to the charterers' nominees at Callao, and should, when loaded, proceed to that port and deliver cargo; and that the charterers' responsibility, except for freight, should cease upon the vessel being loaded. On the 26th June it was agreed "between the defendants, acting for the owners of the ship, and the plaintiffs, that the former shall receive on board" a cargo in accordance with the offer of the 24th June at a specified freight from London to Callao.*

The cargo was shipped, the master signed bills of lading to deliver to plaintiffs' order, and the ship sailed for Callao: but being driven by stress of weather into Monte Video, where she was condemned, the master improperly sold the cargo, which was the conversion complained of.

Held, that the defendants had not contracted with the plaintiffs for the carriage of the goods, nor had they agreed to occupy the position of shipowners so as to be responsible for the master's acts after the ship had sailed, and that, inasmuch as he was not their servant or agent, they were not liable.

FURTHER CONSIDERATION.

Action by the owners of a cargo of stone and cement shipped in the vessel *F. K. Dumas,* from London to Callao, against the charterers, to

recover damages for a wrongful conversion of the cargo by an unauthorised sale at Monte Video.

The facts are fully stated in the judgment.

Watkin Williams, Q.C. and *Hannen* for the plaintiffs.—We admit that the charter-party did not amount to an actual demise of the ship; but the defendants had hired the exclusive use of it, and were therefore practically the "owners" for the voyage. The contract of the 26th June, together with the bills of lading, which the master must be taken to have signed as the agent of the defendants, amounts therefore to a contract for carriage, and the defendants are liable for the act of the master, who was their servant:

Newbery v. *Colvin*, 1 Cl. & F. 283;
Major v. *White* 7 C. & P. 41;
Marquand v. *Banner*, 6 E. & B. 282;
Schuster v. *M'Kellar*, 7 E. & B. 704.

And though the sale by the master at Monte Video has been found by the jury to be unjustifiable in this particular instance, being without authority (*Acatos* v. *Burns*, L. Rep. 3 Ex. Div. 282) (*a*); yet there are cases where such a sale would be justifiable. The act therefore falls within the general scope of the master's authority, and is one for which his principals are liable:

Ewbank v. *Nutting*, 7 C.B. 797;
Wilson v. *Millar*, 2 Stark. 1;
Mitcheson v. *Oliver*, 5 E. & B. 301;
Shipton v. *Thornton*, 9 A. & E. 314.

The damages must be the value of the goods sold with interest:

British Columbia, &c., Company v. *Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 507; 3 Mar. Law Cas. O. S. 65.

Cohen, Q.C. (with him *Butt*, Q.C. and *J. C. Mathew* contra).—The contract between the plaintiffs and defendants was not a contract for carriage, but only an agreement by the defendants that "room" should be found for the goods on board the ship, and that they should be there received, so as to become the subject of bills of lading to be signed by the master on behalf of the owners. The plaintiffs were left to make their own arrangement with the master, as the agent of the owners, for carriage, the freight only being agreed upon. The defendants were not the owners, nor in the position of the owners; and the master was not their agent. Lastly, even if the master was the agent of the defendants for some purposes, he was not so for the purpose of selling the goods at Monte Video, and that act being without the scope of his authority, cannot be binding upon the defendants. They cited

Machlachlan on Shipping, 2nd edit. p. 387;
Sandeman v. *Scurr*, 15 L. T. Rep. N. S. 608; L. Rep. 2 Q. B. 86; 2 Mar. Law Cas. O. S. 446;
The Gratitudine, 3 Christ. Rob. 240;
Quarman v. *Burnett*, 6 M. & W. 499;
Trorson v. *Dent*, 8 Moo. P. C. 419;
Worms v. *Storey*, 11 Ex. 427;
Hingston v. *Wendt*, 3 Asp. Mar. Law Cas. 126; 34 L. T. Rep. N. S. 181; L. Rep. 1 Q. B. Div. 367;
Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O. S. 26, 283;
Wilson v. *Dixon*, 2 B. & Ald. 2;
Notara v. *Henderson*, 1 Asp. Mar. Law Cas. 278 26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225.

Watkin Williams, Q.C. in reply.

May 23.—DENMAN, J. delivered judgment as follows:—The plaintiffs in this case were the well-known contractors, Messrs. Brassey and Co., and they sued for the value of a cargo of stone and cement which had been shipped on board the ship *F. K. Dumas*, in London, for Callao, and sold in Monte Video under the circumstances afterwards mentioned. The defendants were the charterers of the ship under a charter-party of the 25th June 1872, which, amongst other things, provided as follows. It was agreed between the master, on the part of the owners of the good ship *F. K. Dumas*, and the defendants, that the ship should perform a voyage from London to Callao; that she should be maintained in her class by the owners while under the charter; that she should receive on board, at such loading berth as the charterers might appoint, all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern, as if the ship was loaded in her berth by and for the owners, independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party; that the ship should be addressed to the charterers' nominee at the port of discharge; that the ship, being loaded, should proceed to Callao and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted. The total freight to be paid for the use and hire of the ship was agreed at the sum of 2500*l.*, to be paid as follows against captain's order, viz., by charterers' acceptance payable at ninety days from the ship's final sailing from Gravesend, or in cash at 5 per cent. discount at captain's option; but the owners were to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one-third of the amount of the charter; and the charterers' responsibility, except for freight, was to cease on the vessel being loaded.

On the 26th June the defendants Moss and Mitchell, whose acts, it was admitted, were binding upon the other defendants as well as themselves, entered into the agreement with the plaintiffs, set out in the statement of claim, as follows: "It is this day mutually agreed between Messrs. Moss and Mitchell, acting for the owners of the *F. K. Dumas*, and the plaintiffs, that the former shall receive on board in the London Docks 1000 tons of cement in casks and stone in blocks, at the rate of 30*s.* per ton freight from London to Callao; the ship to receive the cement, &c., about the 25th July, and sail about the 25th Aug. The barges as they come alongside shall be immediately discharged, or Moss and Mitchell undertake to pay demurrage on barges. The cargo to be received at Callao as customary; freight to be paid, one-half on signing bills of lading, less two months discount at 5 per cent. per annum, and the remainder on final discharge at Callao. Penalty for non-performance of this agreement, 1500*l.*"

Before entering into the charter-party of the

(*a*) In this case the Court of Appeal decided that the master of a vessel cannot at an intermediate port sell goods which are damaged and cannot be carried forward, without communicating with the owners of the goods, and receiving their instructions if it is possible to do so, taking into consideration the state of the goods and the necessity existing for immediate action.—ED.

25th June, the defendants had written to Messrs. Smith, Sundius, and Co., the plaintiff's brokers, offering "room" in the ship *F. K. Dumas* to Callao for 750 tons of cement, and 250 tons of stone at the same rate as that mentioned in the agreement of the 26th.

About 1000 tons of stone and cement were shipped, and the vessel sailed in due course. Before sailing, viz., on the 29th Aug., 1872, the master signed bills of lading for the cement and stone, "to be delivered at Callao, the act of God excepted, unto order or to plaintiffs' assigns, on paying freight for the goods, 786*l.* 17*s.* 4*d.*"

The sum of 780*l.* 6*s.* 1*d.* (the half freight, minus the discount of five per cent. for two months) was paid by the plaintiffs to the defendants before the ship sailed, leaving the residue, which was the sum mentioned in the bill of lading, to be paid at Callao. The vessel having sailed, met with bad weather about the 30th Oct., and was obliged to put into Monte Video. A survey took place, and on the 4th Dec. the cargo was discharged by order of the surveyors, and the stone and cement were landed and warehoused. The ship was condemned on the 17th Jan. 1873; and it was admitted that she was properly condemned. A portion of the cargo was sent on to Callao in other vessels; but the master, having made inquiry as to the possibility of obtaining vessels to carry on the stone and cement, without communicating with the plaintiffs, sold the cement on the 7th Feb., and the stone on the 28th.

It was agreed at the trial that the only questions for the jury were: first, whether the sale was justified; and secondly, the amount of damages; and that, if any other question of fact remained, it should be disposed of by me after argument on further consideration. The jury found that the master was not justified in selling, and assessed the damages at 1445*l.*, and said that if they were entitled to give interest from the date of the sale until the time of the verdict, they should do so. The 1445*l.* was the value of the goods at the time of the sale; and I think that if the plaintiffs were entitled to recover, they were also entitled to the five per cent. (that is, to 450*l.*) as damages for the conversion, according to the principle explained in the case of *British Columbia Sawmill Company* v. *Nettleship* (*ubi sup.*)

The defendants proposed at the trial to give evidence of a custom that loading brokers are not liable after the goods are received on board; and it was agreed, that if I should be of opinion that evidence of such a custom would be admissible, I should, before giving judgment, either take further evidence as to the existence of such a custom myself, or appoint some one to report to me after taking evidence thereon. This contention was not seriously pressed in the argument on further consideration, and I remain of the opinion I expressed at the trial, that such evidence was not admissible, and that the case must be decided according to the view to be taken of the relation between the parties to be gathered from the documents in the case, and of the proper inferences to be drawn from the facts proved at the trial.

The defendants' counsel at the trial put in a great many documents to show that the plaintiffs were for many weeks in correspondence with Smith, Sundius, and Co. about their claim upon the underwriters in respect of the stone and cement in question; but I lay no stress upon this evidence, as it might well be that the plaintiffs, or Smith Sundius and Co., might be doubtful as to their rights in a case of this description; and the only real question in the case is whether, under the circumstances which have occurred, they were entitled to sue the defendants for the unjustifiable sale of their goods by the master, or whether the master alone or the shipowner, was the proper person to sue, which depends, not upon what the plaintiffs, or Smith, Sundius, and Co. thought, but upon what was the relation of the master to the defendants at the time of the sale.

The case was argued very fully, and very powerfully before me; and a great number of authorities were cited, many of which, however, it is unnecessary to consider, upon the view which I take of the real relation between the parties in this case. On the part of the plaintiffs it was contended that though the charter-party of the 25th June did not amount to an actual demise of the ship, yet, inasmuch as the defendants had hired the exclusive use of the ship, they were practically the owners of the ship for the voyage, and that the words in the contract of the 26th June, "acting for the owners of the ship" meant "acting for the defendants;" and that the contract of the 26th June, therefore, coupled with the bill of lading, amounted to a contract between the plaintiffs as shippers of the goods and the defendants as carriers from London to Callao; and that the master in selling the goods acted as the servant or agent of the defendants, and that they were therefore responsible for his acts. It was contended that, inasmuch as the master, though the sale itself was unjustifiable, was acting within the general scope of his authority as agent for the defendants; and inasmuch as there are certain cases in which a sale of the cargo is justifiable, therefore the sale, though unjustifiable in the particular case, was one for which the defendants were liable upon the principle acted upon in *Ewbank* v. *Nutting* (*ubi sup.*) and other cases. For the defendants it was contended that the contract between the parties was not a contract for carriage, but only an agreement on the part of the defendants that the goods should be received on board the ship, and that room for them should there be found, so that they might be the subject of a bill of lading, to be signed by the captain on behalf of the owners of the ship without any undertaking on the part of the defendants in relation to the actual conveyance of the goods, or the dealing with them on the voyage between London and Callao. It was also contended that even the shipowner would not be liable for the unjustifiable sale of the goods by the master, and that even if the master was the agent of the defendants for some purposes in dealing with the goods at Monte Video, he was not acting as their agent in selling them so as to make them liable for his act. To this it was answered that looking at the conduct of all parties, it ought to be held as a fact, or concluded from the facts, that the master was throughout acting for the defendants, both in carrying and in dealing with the goods at

Monte Video; and stress was laid upon the fact that what he had done was done in the interests of the defendants, and had to some extent been recognised by them as an act done for their benefit.

It was agreed that I should draw any inferences of fact, or find any question of fact not found by the jury; and it was suggested that it might be a question of fact whether the master signed the bills of lading as agent for the defendants or for the shipowners. If this be a question of fact for me, I find it for the defendants; and I am of opinion that, notwithstanding the interest the defendants had in the due prosecution of the voyage and conveyance of the goods to their destination, the master in selling the goods was not acting as the servant or agent of the defendants either in fact or in law. Looking at the letter of the 24th June 1872, which is headed in print, "Messrs. Moss, Mitchell, and Co., ship and insurance brokers," and sent to Smith, Sundius, and Co., the plaintiff's brokers (in which they merely offer "room" in the ship *F. K. Dumas* at certain rates of freight), and at the terms of the letter of the 25th June, constituting the contract between the plaintiffs and the defendant, I do not think that the latter document binds the defendants to any of the terms of the bill of lading, so far as relates to the carriage of the goods, or to the duty of the master after the goods are once received on board. It appears to me that it merely amounts to a contract that the owner of the ship shall receive the goods on board and enter into a contract by bills of lading to carry them at certain rates of freight and that the ship shall sail on or about a certain day named, and that the defendants will pay certain demurrage if the barges are delayed: All the other stipulations are on the part of the plaintiffs, who are left to make their own contract with the shipowners through the master for the carriage of the goods, and who in fact did take bills of lading in the ordinary form from the master, not purporting to act in any other capacity than as master of the ship. If I am right in the above view of the case, it follows that, inasmuch as the master was not the agent or servant of the defendants at all, except to receive the goods on board, and to sign bills of lading which should be binding on his owners as to the carriage of the goods, the defendants cannot be held liable for the conversion of the goods at Monte Video.

It was argued for the plaintiffs, that by the very fact of having entered into a charter such as that of the 25th June, the defendants became the virtual owners of the ship for the voyage; and the cases of *Newbery* v. *Colvin*, *Major* v. *White*, *Marquand* v. *Banner*, and *Schuster* v. *M'Kellar*, (*ubi sup.*) were relied upon, and it was argued from thence that the master became the agent of the charterers for arranging all matters relating to the carrying or not carrying on the goods, even to the extent of selling them, if necessary. But it appears to me that the very terms of the charter-party in this case are against any such liability on the part of the charterers; for the responsibility of the master and owners "to all whom it may concern" for proper attention to the cargo is expressly reserved by the charter-party, and it is provided that the charterers' responsibility under it, except for freight, shall cease on the vessel being loaded.

Such being my opinion as to the relation created between the plaintiffs and the defendants in this case, it becomes unnecessary to consider the question whether the sale, being within the general scope of the master's authority, was binding on the shipowners. The defendants, in my opinion, never agreed to occupy the position of shipowners so as to be responsible for the master's acts after the ship had sailed and before the completion of the voyage, but left the plaintiff's rights to be wholly regulated by the bills of lading, except in the particulars above explained.

I therefore give judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Parker* and *Co.*

Solicitors for the defendants, *Hollams, Son*, and *Coward.*

Friday, May 2, 1879.

(Before DENMAN and LINDLEY, JJ.)

MORTEO AND ANOTHER (apps.) *v.* JULIAN (resp.).

APPEAL FROM INFERIOR COURT.

"*Pilotage dues*"—*Pilot carried out to sea*—*Compensation for detention*—*Not recoverable from ship's broker*—*The Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 357, 363.

The Merchant Shipping Act 1854 *provides for the "rights, privileges, and remuneration of pilots." Under this heading is a provision* (*sect.* 357), *that every pilot without his consent taken out to sea beyond the pilotage limits "shall be entitled, over and above his pilotage, to the sum of* 10*s.* 6*d. a day;" and another* (*sect.* 363), *that a ship's broker at the port where the services of a qualified pilot are obtained, shall be liable to pay "pilotage dues" for her.*

Held, that the sum of 10*s.* 6*d. a day due to a pilot who had been carried out to sea, under sect.* 357, *was not a pilotage due under sect.* 363, *and could not, therefore, be recovered from the ship's broker.*

SPECIAL CASE stated by justices for the borough of Cardiff under 20 & 21 Vict. c. 43.

The appellants, Messrs. Morteo and Penco, are a firm of shipbrokers at Cardiff, and the respondent is David Julian, a Bristol Channel licensed pilot.

In the month of December last, the master of the Genoese vessel *Voltre* being about to proceed with the vessel from Cardiff to Genoa, employed the respondent to pilot the *Voltre* from Cardiff docks as far as Lundy Island.

The respondent piloted the vessel first from Cardiff to Penarth Roads, and thence as far as Lundy Island.

The respondent did not leave the *Voltre* when she arrived off Lundy Island, which is the extremity of the limits of the Bristol Channel pilotage district, but the master of the *Voltre*, against the will of the respondent, took him to sea beyond such limits, and eventually landed him at Genoa in Italy.

At Genoa the master of the *Voltre* paid the respondent the pilotage dues for piloting the *Voltre* from Cardiff outwards to Lundy Island, and also paid him a reasonable sum for his travelling expenses from Genoa back to Cardiff.

The respondent claimed from the master of the *Voltre* when at Genoa compensation for his detention on board the vessel from the time she passed Lundy Island until his arrival back at Cardiff but this he was not paid.

The appellants acted as brokers for the *Voltre* when the vessel was at Cardiff in December, and they paid the pilotage inwards and the vessel's dock dues incurred at Cardiff.

The time which elapsed from the time the vessel left Lundy Island as aforesaid, until the respondent returned to Cardiff from Genoa was fifty-two days.

The respondent instituted proceedings before the justices at Cardiff, and claimed an allowance for the fifty-two days under the provisions of sect. 357 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), 27*l.* 6*s.*, being at the rate of 10*s.* 6*d.* per day.

The respondent claimed the said sum against the appellant under sect. 363 of the said Act.

The respondent, before commencing proceedings against the appellants, gave them the notice required to be given by sect. 363 of the said Act.

It was submitted for the appellants that the allowance claimed by the respondent was in the nature of compensation due to the pilot for the fifty-two days during which he was detained outside the pilotage district not acting as pilot, and that this and his reasonable travelling expenses, though recoverable from the master and owners of the *Voltre* under sect. 357 of the said Act. were not recoverable from the apellants (under sect. 363 of the said Act), and that the appellants were only liable under the provisions of sect. 363 of the said Act for pilotage outwards from Cardiff to the extremity of the Bristol Channel pilotage district.

We, the said justices, looking at the words which occur in the said 357th section, that the pilot should be entitled over and above his pilotage to the allowance for enforced detention; looking also to the general scope of the 357th and 363rd and 364th sections, were of opinion that the said allowance was of the nature of pilotage dues, and that the same remedy was intended by the Act to be given to the pilot for the recovery of both.

An order was according made for the payment by the appellants of the amount claimed by the respondent.

The question for the opinion of the court is: Whether the said allowance for detention is recoverable in the same manner as pilotage dues under sect. 363, against the agents of the ship.

If the court should be of opinion that the same is recoverable, then the order made by the justices is to stand; if otherwise, the same is to be quashed.

17 & 18 Vict. c. 104 (Merchant Shipping Act 1854), Part V., s. 357, is as follows:

No pilot, except under circumstances of unavoidable necessity, shall, without his consent, be taken to sea, or beyond the limits for which he is licensed, in any ship whatever; and every pilot so taken under circumstances of unavoidable necessity or without his consent, shall be entitled, over and above his pilotage, to the sum of ten shillings and sixpence per day, to be computed from and inclusive of the day on which such ship passes the limit to which he was engaged to pilot her up to, and inclusive of the day of his being returned in the said ship to the place where he was taken on board, or up to and inclusive of such day as will allow him, if discharged from the ship, sufficient time to return thereto, and in such last-mentioned case he shall be entitled to his reasonable travelling expenses.

Sect. 363:

The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained (that is to say), the owner or master, or such consignees or agents thereof as have paid or made themselves liable to pay any other charge on account of such ship in the port of her arrival or discharge, as to pilotage inwards, and in the port from which she clears out as to pilotage outwards; and in default of payment such pilotage dues may be recovered in the same manner as penalties of the like amount may be recovered by virtue of this Act; but such recovery shall not take place until a previous demand thereof has been made in writing, and the dues demanded have remained unpaid for seven days after the time of such demand being made.

By sect. 518, penalties not exceeding 100*l.* are recoverable by summary proceedings before two or more justices.

Clarkson for the appellants.—The question is whether this amount of 27*l.* 6*s.* is recoverable as a pilotage due. What is a pilotage due? Surely payment for pilotage. This is not a claim in respect of any services rendered. [He was stopped by the Court.

Milward, Q.C. for the respondent.—The Merchant Shipping Act, 1854, is divided into various heads. Part V. is wholly confined to "pilotage." "Rights, privileges, and remuneration of pilots" is the heading of the group of sections in question. Taking into consideration that his services are compulsory, they provide for the adequate payment of them. No doubt, the payment for outdoor pilotage may vary very considerably, according to the distance that the captain chooses to take the pilot. But the broker in Cardiff must know that he is liable for a very uncertain sum; he knows thoroughly well the risk that he is running, whereas the pilot has no choice. The term "pilotage dues" means something more than mere tolls for pilotage. This sum is part of what is due under the contract of pilotage and for the performance of the duty cast on the pilot by statute. If the pilot has not this remedy, he is without remedy in this country. The object of sect. 363 was to provide for the probability of outgoing ships breaking the law. Enacting, as it does, that the broker who is at home shall be liable to pay the pilot pilotage dues, why should not pilotage dues include all that the pilot is entitled to receive from the master of the ship on which he was engaged.

DENMAN, J.—I think that the magistrates in this case have put too large a construction on the words "pilotage dues." I thought at first that the case found that pilotage services had been performed in respect of the sum claimed; but that is not so. I do not think we are entitled to stretch these words "pilotage dues," so as to include the allowance for detention. We think that the words "pilotage dues" do not include the charge of 10*s.* 6*d.* a day for carrying the pilot beyond the pilotage district. The case lies within a very small compass. Take the clauses one by one. First, there is a certain rate to be paid, according to the scale of the particular port, to the pilot for pilotage in certain parts of the sea. Then, if he is carried on, sect. 357 comes into play. That is as follows: [reads it, *vide sup.*] It does not say there that the pilot shall be entitled to this payment as "pilotage dues;" it does not speak of it as a pilotage due, but says "over and above his pilotage," which is equivalent to over and above his "pilotage dues." Then sect. 358 provides that "Any qualified pilot demanding or receiving, and also any master, offering or paying to any pilot, any other rate in respect of pilotage services, whether greater or less, than the rate for the time

being demandable by law, shall for each offence," &c. Mr. Milward admits that the amount sought to be recovered here is not in respect of pilotage services. Then there is sect. 363, which says: [reads it. *vide sup.*] Looking at the intention of that section, it does not appear to me probable that the legislature intended the broker to be liable to make this payment; it must be quite indefinite, it may be very large, and the broker might be very much out of pocket if he paid it. Then by sect. 380, and the following sections, the words "pilotage dues," are frequently used as equivalent to rates of pilotage. No doubt, those sections only apply to Trinity House pilots, but they show the sense in which the words are used. I am unable to agree with the magistrates that this claim is payable by the broker, not being able to bring it within the words "pilotage dues."

LINDLEY, J.—I am of the same opinion. This Act of Parliament throws upon those who call upon the broker to pay, the necessity of making out his liability: the onus is on them. Now, when we look at sect. 363, it says: [reads it *vide sup.*] Now, *primâ facie*, "pilotage dues" would mean payment for pilotage services; and in the Act the words "pilotage dues" are used as synonymous with pilotage rates and pilotage: [see sect. 333, sub-sect. 5; sect. 350; and the group of sections, beginning with sect. 380, and headed "Rates of Pilotage." It is perfectly true that by sect. 357 the pilot is entitled, if carried out to sea, to a certain sum for detention. But it is not said that that is to be pilotage due. And, although I feel the force of Mr. Milward's argument that it is very desirable that a pilot should be able to recover these expenses in this country, I cannot see my way to holding that the Legislature intended to make them recoverable from the broker.

Appeal allowed with costs. Leave to appeal granted.

Solicitors for the appellants, *Ingledew, Ince*, and *Greening*, agents for *Ingledew, Ince*, and *Vachell*, Cardiff.

Solicitors for the respondent, *Williamson, Hill*, and *Co.*, agents for *E. Bernard Reece*, Cardiff.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

July 15, 18, *and* 31, 1879.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, O'HAGAN, BLACKBURN and GORDON.)

AITCHISON AND ANOTHER *v.* LORNE.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Partial loss—Cost of repairs—Allowance of one-third new for old—Suing and labouring clause—Salvage expenses.

A policy of marine insurance is not a perfect contract of indemnity, but must be taken with certain well-established qualifications, which must be applied, even if the assured thereby receives more than a perfect indemnity.

An assured, whose ship is damaged, is not bound to claim for a total loss where repair is practicable, but may repair her, and even where her value when repaired is less than the cost of repair, may recover from the assurers their proportion of the reasonable cost of repair less one-third new for old, although such proportion exceed the amount the assurers would be liable for if they paid for a total loss.

Under the sue and labour clause in a policy of insurance, the assured may recover expenses incurred by themselves or their agents for the hire of persons expressly engaged by them to avert loss to the insurers, but cannot recover money paid to salvors giving assistance to the ship to save her from perils of the seas, such salvors not being agents of the assured, and having no contract with the assured, but acquiring a lien on the ship by the law maritime.

A claim for salvage is recoverable directly as a loss by the peril insured against, and the underwriters are not liable in respect thereof beyond the amount insured.

The appellants insured the respondent for 1200*l. upon a ship valued at* 2600*l. The policy contained the usual suing and labouring clause. The ship suffered damage from perils of the sea, and was brought into port by salvors not hired by the assured but having and enforcing a claim against the ship by the law maritime. The owner elected to repair, and the result of the repairs was to make the ship, which was an old one, more valuable than she had been at the time of the insurance.*

Held (affirming the judgment of the court below), that the measure of the loss was the cost of the repairs, with the usual allowance of one-third new for old; and that consequently the assured was entitled to recover up to the full amount insured for, though it might be more than the amount payable on a total loss with benefit of salvage.

Held, further (reversing the judgment of the court below), that the assured could not recover, under the suing and labouring clause, a proportion of the salvage expenses in addition to the amount for which the policy was underwritten.

THIS was an action brought by the respondent against the appellants, on a policy of insurance, to recover the cost of the injuries sustained by his ship the *Crimea* from perils of the sea.

In Sept. 1872 the plaintiff effected a policy on his ship, which was valued at 2600*l.*, for 1200*l.*, for a voyage out and home from the Clyde to Quebec or St. John's, and thence to any port in the United Kingdom. The policy contained the usual suing and labouring clause. On the homeward voyage, in Jan. 1873, the ship met with heavy weather, and was towed into Queenstown by the steamship *Texas* in a water logged condition. The Admiralty Court of Ireland awarded the *Texas* 800*l.* for this service.

The value of the *Crimea* in her then condition was stated to be 998*l.*, and the cargo was worth between 3000*l.* and 4000*l.* The ship, which was fifteen or sixteen years old, was repaired under contract for 2982*l.*, and was thus made of greater value than she had been at the commencement of the voyage.

The plaintiff claimed 1707*l.* as the amount due from the defendants, but they contended that they were not liable for more than a total loss with benefit of salvage, deducting from that the ship's proportion of salvage and general average, and they paid 1080*l.* into court. A special case was stated, which was argued in the Queen's Bench Division before Mellor and Lush, JJ., who gave judgment for the plaintiff for the sum of 120*l.*

beyond the amount paid into court, as reported in 3 Asp. Mar. Law Cas. 445, L. Rep. 2 Q. B. Div. 501, and 36 L. T. Rep. N.S. 794, where the special case is set out in full.

Both parties appealed, and the Court of Appeal (Bramwell, Brett, and Cotton, L.JJ.) affirmed the judgment of the Queen's Bench Division on the main question; but held also, reversing the Queen's Bench Division upon this point, that the plaintiff was entitled to recover a proportion of the salvage expenses under the suing and labouring clause in addition to the amount for which the policy was underwritten, as reported *ante* p. 11, and in L. Rep. 3 Q. B. Div. 553, and 38 L. T. Rep. N.S. 802.

This appeal was then brought.

Benjamin, Q.C. and *J. C. Matthew* appeared for the appellants, and contended that there could not be a loss on a single policy beyond the amount insured, else it ceases to be an indemnity, and becomes a source of profit, whereas an insurance can only be an indemnity. If the plaintiff is right, particular average may exceed a total loss. The rule of "one-third new for old" is perfectly sound if not stretched unduly. What was done to the ship in this case, though no doubt rightly done, was in fact not repairing, but rebuilding. The plaintiff cannot recover more than the proportion of 2600*l.*, which he would have lost if not insured. On the question of salvage the judgment of Lush, J. is in accordance with the authorities, but that of the Court of Appeal is not. The expenses of salvage do not come under the "suing and labouring clause," but are an independent part of the loss sustained. A salvor is a person who voluntarily comes in and assists. They cited

Phillips on Insurance, sects. 1551, 1716, 1743;
Kidston v. *The Empire Marine Insurance Company* L. Rep. 15 C. P. 535; 15 L. T. Rep. N. S. 12; affirmed in the Exchequer Chamber, L. Rep. 2 C. P. 357; 16 L. T. Rep. N. S. 119; 3 Mar. Law Cas. O. S. 400, 468;
Arnould on Insurance p. 1004, 5th ed.;
Emerigon, chap. 1, sect. 4.

Cohen, Q.C. and *Hollams*, who appeared for the respondents, were requested by the House to confine themselves to the question of salvage, as to which they argued that the assured could recover under the "suing and labouring clause" or not, at his election. They cited Arnould on Insurance, p. 778, 5th ed.; Phillips on Insurance, sect. 1742; and the American case *Barker* v. *The Phœnix Insurance Company* (8 Johnson 307) there referred to, and also the judgment of Willes, J. in *Kidston* v. *The Empire Marine Insurance Company* (*ubi sup.*).

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 31.—Their Lordships gave judgment as follows:—

Lord BLACKBURN.—My Lords, in this case the respondent insured 1200*l.* on a ship, the *Crimea*, valued in the policy at 2600*l.*, with the appellants' company on a voyage out and home from the Clyde to St. John's. The policy was against all the usual perils, and contained the usual suing and labouring clause. The appellants paid into court 1080*l.*, being at the rate of 90 per cent. on 1200*l.*, and the question was whether, under the circumstances stated in a special case, this sum was sufficient, or, if not, how much more the plaintiff below (the respondent) was entitled to recover. The Queen's Bench Division was of opinion that the amount recoverable was 1200*l.*, or 100 per cent., and gave judgment for 120*l.* Both sides appealed, and the Court of Appeal was of opinion that the sum recoverable was 100 per cent. in respect of the direct damages to the ship, and a further percentage in respect of the salvage and general average charges. The record was so imperfectly drawn up that it does not appear on it what was this further percentage. The counsel at the Bar of this House agreed that if the judgment of the Court of Appeal was affirmed, that percentage should be some rate which they agreed on between themselves. Some anxiety was expressed lest it should be supposed that in sanctioning this agreement this House determined some question of principle which was given up by one side or the other as of no practical importance in this case, though it might be of importance in other cases. The House certainly determined no such point, and indeed was never informed what this point was.

It appears from the statements in the case that the *Crimea* on the voyage home during the month of Jan. 1873 encountered a succession of stormy weather, and in consequence of the perils of the seas great damage was done to her, and she was reduced to a leaky and water-logged condition. It appears, incidentally, that some general average had arisen, for a proportion of which the ship was liable. The case then states that "on the 30th Jan., the ship being then in great danger of being completely lost, and being without fresh water or provisions and in a helpless condition, and not capable of being navigated, those on board of her sighted the steamship *Texas*, which ultimately took her in tow, without any agreement being come to as to remuneration for the service, and took her into Queenstown, and on or before the 11th March she was placed in safety near the wharf of the Victoria Dry Dock Company."

It may be as well here to point out that the liability of the articles saved to contribute proportionately with the rest to general average and salvage in no way depends on the policy of insurance. It is a consequence of the perils of the sea first imposed as regards general average by the Rhodian law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but, at least, long before any policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the common law to those who preserve goods on shore, unless they interfered at the request of the owner: (*Nicholson* v. *Chapman*, 2 H. B. 254) There Eyre, C.J., in delivering the considered judgment of the court, says that in respect of salvage "the laws of all civilised nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and our law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect

them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries, not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. Such are the grounds upon which salvage stands; they are recognised by Holt, C.J. in *Hartfort* v. *Jones* (1 Lord Ray, 393)."

The *Crimea* had been before these disasters worth 3000*l.*; as she then lay in a damaged condition she was of the value of 998*l.* The damaged ship was liable to make good her proportion of the general average and of the salvage incurred for the preservation of the ship, freight, and cargo, and that proportion of the two taken together amounted to 519*l.* 0*s.* 1*d.* I think it convenient to pause here and inquire what would have been the loss to an uninsured owner from the perils of the seas under such circumstances. If such an uninsured owner chose to sell the hull as she lay, his position would be this: He would lose the value of the ship—3000*l.* He would receive 998*l.*, the value of the hull, less 519*l.*, the amount of general average and salvage which was a charge on the hull, or 479*l.*, and his loss would be 2521*l.* And if the hull had been so damaged that to repair her would have cost more than she would, when repaired, have been worth, the prudent shipowner would have taken this course. But, in fact, he not only could, but did repair her, and by an outlay of about 5600*l.* (part of which, about 1200*l.*, was for new work) he made the ship worth about 7000*l.*; and then (still assuming him to be uninsured) his position would have been this: original value of ship, 3000*l.*; salvage and average, 519*l.*; expenditure, 5600*l.*; total, 9119*l.*; value of repaired ship, 7000*l.*; loss, 2119*l.*; to which are to be added some particular charges amounting to apparently 235*l.*, bringing the loss up to 2354*l.*

The contract of insurance is a contract of indemnity, and, if it could be worked out as a perfect indemnity it would follow that 90 per cent., the sum paid into court, which on 3000*l.* amounts to 2700*l.*, was more than sufficient. But, as was said in the opinion of the judges in *Irving* v. *Manning* (1 H. of L. Cas. 287), a policy of insurance is not a perfect contract of indemnity. It must be taken with some qualifications. One of those is commonly expressed as the allowance of one-third new for old, and it is on the application of that to the present case that the first question arises. The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing her will exceed her value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay that total loss being entitled to all that is saved. The assured is not even then bound to do so; but if the ship can be practically repaired within the meaning of the phrase as explained by Maule, J. in *Moss* v. *Smith* (9 C. B. 94), the assured has the option not t treat it as a total loss; and on the figures stated in the special case the respondent here had that option. He may repair the damage done by the peril insured against, and if he does so the damage would in general be what would be the reasonable cost of making her as good as she was before. The actual outlay on the repairs, if *bonâ fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than she was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. It is obvious that, applying this, there would be great room for disputes and litigation on the adjustment in every case where repairs were executed, whether the repairs were extensive or not. In the present case, where the ship was fifteen or sixteen years old and the damage was extensive, it is probable, as is said in the judgment of the Queen's Bench Division, that the extent to which she was benefited by having new materials instead of old was much more than one-third of the expenditure. Probably two-thirds might be nearer the fact. But I think it is clearly established by long course of practice and many decisions that, for the purpose of avoiding the expense of litigation, a custom of trade has arisen which, though not written in the policy, is implied in it.

The parties to a policy of insurance on a ship tacitly agree that, in case of repairs, fairly executed to replace damage occasioned by one of the underwriters' perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of the repairs, neither more nor less. It is self-evident that this can very seldom be the accurate measure of the loss. In most cases the rule operates favourably for the underwriter, as the shipowner in spending money on repairs seldom benefits his ship to the extent of one-third, and in such cases the payment of the sum so fixed by custom falls short of a perfect indemnity. In some cases, and this is one, the benefit to the ship exceeds one-third, and there the assured receives more than a perfect indemnity. But if it were lawful to open the question and depart from the rule in any case, the whole object of it, which is to avoid litigation and expense, would be frustrated. No authority has been cited, and, as far as my knowledge goes, no authority exists, for any qualification of the general rule which would take this case out of it. If the rule applies, two-thirds of the expense of repairing the sea damage are to be charged to the ship. The expenses of making additions to the ship are not, of course, to be charged; they are not in any way a consequence of the perils of the sea. The arbitrator has found that the expense to which the rule is applicable were 4414*l.* 18*s.* 11*d.* This finding is binding. Now, two-thirds of this sum is, in round numbers, 2943*l.*, or very nearly 100 per cent. on 3000*l.* According to the finding in paragraph 16, there are other particular charges on the ship, the nature of which is not stated, which bring the loss up to 3178*l.* 11*s.* 7*d.*, which is more than 100 per cent.; and if the salvage and general expenses are added, the loss will be very considerably more than 10 per cent. In Phillips on Insurance, sect. 1743, that very experienced author finds great fault with the decision of the Court of Common Pleas in *Le Cheminant* v. *Pearson* (4 Taunt. 367) (so long ago as 1812), that more than the subscribed amount may be recovered where there are successive losses, which he seems to think can only be supported on the ground of inveterate practice. No question, however, of that kind arises here, for this is a case of one single loss; and he says, "The liability of insurers in a single loss is, without question,

limited to the amount insured, and the expense of suing," &c. No authority in contradiction to this was cited, and I am not aware of any; and the position thus laid down in Phillips was adopted by both the courts below, who consequently limited the amount recoverable under the policy, as far as it related to the indemnity for the underwriters' perils, to 100 per cent, or in this case 1200*l*., or 120*l*. beyond the amount paid into court. I think it clear that they were right both in going so far, and also (which I think was scarcely contested at the bar) in not going further.

On this, the first question, on which both the courts were agreed, the judgment below should be affirmed. But there is a second point on which the courts below differed.

The policy contains the usual clause as to suing and labouring. The Queen's Bench Division were of opinion that the salvage or general average expenses described in the case did not come within that clause. The Court of Appeal were of a different opinion. In the judgment delivered by Brett, L.J., it is said that the general construction of the clause is "that if by perils insured against the subject-matter of insurance is brought into such danger that without *unusual or extraordinary* labour and expense, a loss will very probably fall on the underwriters, and if the assured or his agents or servants exert *unusual or extraordinary* labour, or if the assured is made liable to *unusual or extraordinary* expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each [underwriter," &c. Now if the part of this which is above emphasised is correct, there can be no question that both salvage and general average are unusual expenses, to which the assured have become liable in consequence of efforts to avert a loss. And such seems to be the opinion of the editor of the last edition of Arnould on Insurance, who (2 Arnould, p. 778, 5th edit.) says that salvage "is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue-and-labour clause;" but for that position he cites no authority, and though the Court of Appeal in this case say that they agree with him, I am unable to do so. With great deference to the judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. The words of the clause are that in case of any misfortune it "shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defence, safeguard, and recovery of "the subject of insurance," without prejudice to this insurance, to the charges whereof we, the insurers, will contribute." The object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense reasonably incurred. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose; but the object is to encourage exertion on the part of the assured, not to provide an additional remedy for the recovery from the insurers of indemnity for a loss which is, by the maritime law, a consequence of the peril.

In some cases the agents of the insured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration, proportionate to the value of what is saved, in the event of success. I do not say that such hire may not come within the suing and labouring clause; but that is not this case.

The owners of the *Texas* did the labour here, not as agents of the assured, and to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Eyre, C.J., in *Nicholson* v. *Chapman* (*ubi sup.*), gives them a claim against the property saved by their exertions, and a lien on it, and that quite irrespective of whether there is an insurance or not, or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by that peril (see *Cary* v. *King*, Cas. temp. Hardwicke, 304); and I have not been able to find any case in which it was recovered under a count for suing and labouring. I do not much rely on this, for it is very likely that such counts often were in the declaration, and that therefore no inquiry was made whether the loss was recoverable under one count or another; but at least there is no authority for the proposition that salvage properly so-called was recoverable under that count.

There have been very few cases in our courts in which it has been necessary to discuss the nature of the suing and labouring clause; *Kidston* v. *The Empire Marine Insurance Company* (*ubi sup.*) is, I think, the only one in which there has been a recovery under it. There, however, all the extra labour was directly and voluntarily employed by the agents of the assured, and the charges were paid by them in consequence of this employment. In the very able and elaborate judgment of Willes, J. not a word can be found to countenance the extension of the construction of the clause beyond what seems to me both its language and its object, and except the passage introduced for the first time into Arnould by the present editor, I can find nothing in any text book tending to support it. (*a*)

I therefore think that the judgment of the Court of Appeal should be reversed, and that

(*a*) It is assumed in this case that the salvors made no agreement with the master of the *Crimea*, and Lord Blackburn almost seems to assume that agreements are not made under similar circumstances. It is a fact, however, that it frequently happens that vessels in distress are towed in under agreements between their masters and the salvors for the payment of specific sums of money. If such an agreement amount to a hiring by the assured or their agents of persons to render services, it would seem that by the above decision the sums paid under the agreements should be recoverable under the sue and labour clause in a policy, notwithstanding the fact that the service rendered gives the salvors a maritime lien upon the ship salved. There are also cases where a master of a vessel in distress employs another vessel to tow his vessel into port, it being agreed that the amount of the remuneration shall be settled ashore. The view the court would take of such a contract—whether they would treat it as a hiring within the sue and labour clause or as pure salvage—can hardly be predicted in the face of the present decision.—ED.

of the Queen's Bench Division restored. As there are cross appeals, and neither party is completely successful, I should say that there should be no costs of either party, either in the Court of Appeal or in this House, and the respondents should have only the costs in the Queen's Bench Division, as given by that judgment.

The Lord Chancellor (Cairns), Lords Hatherley, O'Hagan, and Gordon concurred.

Judgment of the Court of Appeal, in so far as it reversed the judgment of the Court of the Queen's Bench Division, reversed; and in so far as it dismissed the appeal against the judgment of the Queen's Bench Division, affirmed.

Solicitors for the appellants, *Waltons, Bubb,* and *Walton.*

Solicitors for the respondent, *Hollams, Son, and Coward.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. Roche, J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

July 7, 8, 10, 11, *and Aug.* 8, 1879.

(Before James, Brett, and Cotton, L.JJ.)

Nelson *v.* Dahl

Charter-party—Construction—Place of discharge—Liability of charterer for delay in unloading—Damages—Custom of the port of London.

By a charter-party it was provided that a steamer belonging to the plaintiffs should carry a cargo of timber from the Baltic "to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight" at the rate specified, "the cargo to be received at port of discharge as fast as steamers can deliver," Sundays and legal holidays excepted. The Surrey Commercial Docks are private docks. Before the arrival of the steamer the consignees of the cargo and charterers of the vessel endeavoured to secure a place of discharge in the docks, but owing to their crowded state were unable to do so, and the steamer was obliged to lie out for some time in the river at the Deptford buoys, and ultimately discharged her cargo into lighters. From the evidence it appeared that she would not have been admitted into the docks for several months.

An action was brought by the shipowners against the charterers for demurrage for the detention of the vessel, alleging that by the custom of the Baltic trade and by the terms of the charter-party, it was the duty of the defendants to make arrangements with the dock company for the reception of the ship and discharge of the cargo.

Held (affirming the decision of Jessel, M.R.), that the alleged custom of the port of London was not proved, but,

Held (reversing the decision of the M.R.), that on the true construction of the charter-party, the second alternative came into operation, that, as the crowded state of the docks was an obstruction so permanent as to make it commercially impossible for either plaintiff or defendant to wait for its removal, the vessel might deliver "so near thereto as she may safely get," and that the voyage was at an end when the vessel took up her position at the Deptford buoys and was ready to discharge her cargo, and the liability of the charterers commenced from that date.

An inquiry was directed as to the amount of damages.

This was an appeal by the plaintiffs from a decision of the Master of the Rolls.

On the 21st June 1877 a charter-party was entered into between Messrs. Nelson, Donkin, and Co., shipowners, the plaintiffs, and Messrs. R. H. Dahl and Co., merchants, of London, the defendants, by which it was agreed that a steamer, called the *Euxine,* belonging to the plaintiffs, should go to Sodeshamm, in Sweden, and there take on board a cargo of "deals" for the defendants, and "proceed to London Surrey Commercial Docks, or so near thereunto as she may safely get, and lie always afloat, and deliver the same on being paid freight" at a specified rate, "the cargo to be supplied to steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver, as above.' Before the ship arrived in the Thames, the defendants endeavoured to procure a berth for her to discharge in the Surrey Commercial Docks, but owing to the crowded state of the docks they were unable to do so, and when she arrived she was unable to get into the docks, and had to lie out for some time in the river at the Deptford buoys. The defendants had obtained the promise of a berth in the Millwall Dock, but on the refusal of the plaintiffs to compensate them for the difference, as they alleged, in the value of the timber at the two docks, that arrangement came to nothing, and eventually the cargo was discharged by lighters, employed by the plaintiffs, into the Surrey Commercial Docks. The plaintiffs brought their action against the charterers claiming demurrage for the detention of the ship. The question was whether by the terms of the charter-party or otherwise an obligation was imposed on the defendants to have a berth ready for the reception and discharge of the ship when she arrived. The plaintiffs' case was that this obligation existed by reason of the charter-party itself, or, if not, that it was imposed by a custom in the Baltic timber trade in the port of London, for the consignee or receiver of a cargo of timber, and more particularly of "deals," where a particular dock is named in the charter-party, to make necessary arrangements with the dock owner for the reception and discharge of the ship. On failure of the consignee to make such arrangements according to the alleged custom, he would be liable to the shipowner for any delay. Some of the leading shipowners, and brokers, and timber merchants in the city of London were called on both sides to prove and disprove respectively the alleged custom. In the court below,

Jessel, M.R., in giving judgment, said:—

I must read this charter-party as any other mercantile document, and must assume that the shipowner when he entered into it knew perfectly

well the meaning of the words to deliver at the Surrey Commercial Docks. That dock company, just as all other private dock companies, is ready enough to receive vessels for the purpose of discharge if they have room. It may, however, happen that owing to a press of business a ship may not be able to get in for some time, and therefore a shipowner entering into a contract of this sort does so, in my opinion, on the chance of being able to get into the dock. That is the construction put on the contract independent of the usage, and the shipowner must not only take his ship outside, but must take her inside, and even (though it is not necessary for the decision here) to a berth in the dock. That is an obligation quite independent of the question whether the dock happened to be full, or even when, from stress of weather, and too great draught of water, or, it might be, from some accident to the dock gates, the ship is unable to get inside the dock. The shipowner took that risk, but then so did the charterer or consignee, who was for the time deprived of his cargo. Both parties, therefore, took their chance of arriving at the place of discharge, unless the contract is controlled by the custom.

Now, is there such a custom as alleged? In my opinion no such custom has been proved by the plaintiffs. It is a question of fact, and must be strictly proved. The custom must, moreover be notorious, so that every person in the trade must know of it and regard it as a term of any contract entered into. The custom must, moreover, be uniform, certain, and reasonable, and such an absence of these conditions I have rarely seen. The practice of a named dock is only of recent introduction, and steamers have only since 1876 been generally used in the trade. It is therefore very unlikely that such a custom can have been established in such a short time. As to sailing vessels, which were in use prior to 1876, scarcely an instance has been proved in which such a custom has been really established, and where demurrage has been actually paid for the delay. No doubt the plaintiffs had called witnesses who had honestly testified to the existence of such a custom; but, on the other hand, the defendants had called merchants and shipowners, none of whom had ever heard of it, and some of whom were engaged in the largest transactions. In these circumstances I cannot say the usage was so well known, or so well established, as to exist as a recognised mercantile custom, and therefore the plaintiffs have failed to establish their case, and the action must be dismissed with costs. The defendants will, of course, as they have offered to do, pay the freight and all usual landing charges.

From this decision the plaintiffs appealed.

Benjamin, Q.C., *Chitty*, Q.C., *Cohen*, Q.C., and *J. Rigby*, for the appellants, contended that the defendants had actively interfered and prevented the steamer from obtaining admission to the docks; that such obstacle to the delivery of the cargo at the place primarily named was to be considered of a permanent nature, it being one which could not be removed within a reasonable time, and that under the circumstances the vessel having arrived within the terms of the charter-party at the alternative place of discharge, the shipowners were entitled to call upon the defendants to take delivery of the cargo at that place, a place so near to the docks as the vessel could safely get. On this point they referred to

Schilizzi v. *Derry*, 4 E. & B. 873; 25 L. T. Rep. 66.

They further contended that by the custom of the port of London with regard to timber ships from the Baltic, the charterers undertook absolutely to obtain admission of the vessel into the docks, and that, if they did not, they were liable to pay damages in the nature of demurrage. The following cases were also referred to:

Randall v. *Lynch*, 2 Camp. 352;
Brown v. *Johnson*, 10 M. & W. 331;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 347; 34 L. T. Rep. N. S. 526; L. Rep. 1 Q. B. Div. 244;
Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46;
Ashcroft v. *The Crow Orchard Colliery Company*, 2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. N. S. 296; L. Rep. 9 Q. B. 540.

C. Russell, Q.C., *A. L. Smith*, and *R. T. Reid*, for the defendants, submitted that the vessel was not entitled to rely upon being so near to the named place of destination as she could safely get, unless she was prevented by some physical cause existing in the named place, and unless such cause was permanent. Here no physical cause existed in the docks which made them unsafe for the ship, and the obstruction was not of a permanent character, for the vessel might have waited her turn to go in. Danger to the ship was the only event for which the alternative clause provided, and, with regard to the alleged special custom of trade, its existence had not been proved in evidence. They cited

Ford v. *Cotesworth*, 19 L. T. Rep. N. S. 630; L. Rep. 4 Q. B. 127; 3 Mar. Law Cas. O. S. 190, 468;
Kell v. *Anderson*, 10 M. & W. 498;
Brereton and others v. *Chapman*, 7 Bing, 559;
Parker v. *Winlow*, 29 L. T. Rep. 64; 7 E. & B. 942;
Bastifell v. *Lloyd*, 1 H. & Coll. 388.

At the conclusion of the arguments, their Lordships reserved judgment; and on the 8th Aug. James, L.J. shortly stated the decision to which they had come, though their written judgments were not then completed.

Subsequently the following written judgments were delivered out to the parties:

Brett, L.J.—Charter-parties, though all are as to the majority of the stipulations in them identical and in a common form, vary in some particulars. The descriptions of the voyages are necessarily various. But they are always described or ascertained by describing in terms the place where each is to begin and the place where it is to end. And it is this invariable mode of ascertaining what the agreed voyage is, which gives the key to the interpretation of the charter-party as to the time of the accruing of the liabilities as to loading and unloading. It is not invariable that the voyage or voyages which the shipowner undertakes is or are the voyage or voyages on which he is to carry cargo; as, for instance, when he undertakes to sail to a named place and there load and thence proceed and carry a cargo to another named place. In such case there is a voyage to the place of loading which the shipowner undertakes to make, and with regard to which he undertakes liabilities, but on which he carries no cargo. But if the charter is made at a time when the ship is already at the place of lading, the only voyage

described is the voyage on which the ship is to carry cargo. The chartered voyage is therefore not necessarily identical with the carrying voyage. Charter-parties also differ in this, that in some of them lay days and demurrage days are specified, in others no mention is made of such days. Questions arising as to the commencement of the liability in respect of loading and unloading—and such is the question in this case—refer to (1) the rights of the shipowner with regard thereto; (2) his liabilities; (3) the rights of the charterer; and (4) his liabilities. I will consider first the rights and liabilities of both parties as to loading. The first right of the shipowner is the right of placing his ship at the disposition of the charterer so as to initiate the liability of the latter whatever it may be, to take his part as to loading. In every case it seems to me that it is a condition precedent to such right of the shipowner to place his ship at the disposition of the charterer for such purpose that the ship should be at the place named in the charter-party as the place whence the carrying voyage is to begin, and that the ship should be ready to load so far as the ship's part of the operation of loading is concerned. The place so named may give a description of a larger space in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay berth, or a particular part of a port or dock. If, when the charter is made, the ship is already in the place named, the shipowner may place the ship at the disposition of the charterer as soon as the ship is ready so far as she is concerned, to load, by giving notice thereof to the charterer. If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated. If the ship is not, when the charter-party is made, at the port or place where she is to load, the form of the charter-party is, "That the said ship being at (the place where she then is), shall proceed, &c., to (the place named as the beginning of the carrying voyage), or so near thereto as she can safely get, and shall there load, &c., and proceed thence, &c." In this case also the named place whence the carrying voyage is to begin, though the carrying voyage is not the whole chartered voyage, may, as before, describe a larger or a more limited space. If it describes a larger place as a port or quay, the shipowner may place his ship at the disposition of the charterer when the ship arrives at that named place, and so far as she is concerned is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but, in the absence of his right to place his ship only as near to the named place as she can safely get, which is a stipulation to be discussed hereafter, he cannot place his ship at the disposition of the charterer, so as to initiate the liability of the latter as to the loading, until the ship is at the named place, or the place which by custom is considered to be intended by the name; as, if a larger port be named, the usual place in it at which loading ships lie. If it describes a more limited place, as a quay or quay berth, or a particular part of a port or dock, the shipowner may place his ship at the disposition of the charterer when the ship is arrived at that place ready, so far as she is concerned, to load, but not until the ship is at that place. The further right of the shipowner as to the loading is, of course, his right to insist on the liability of the charterer, whatever that may be, which attaches when and after the ship is duly placed at his disposition. The liability of the shipowner as to the commencement of the loading depends on the particular form by which he has bound himself to place his ship at the disposition of the charterer for that purpose. He must do so "with all convenient speed," or "with all possible despatch," or "immediately unless prevented by enumerated accidents," or "within a reasonable time," according to his agreement in each case. If he fails to satisfy this liability an action may be maintained against him, as for instance, an action for a deviation in the preliminary voyage.

The primary right of the charterer as to the loading under a charter-party in ordinary terms seems to me to be that he cannot be under any liability as to loading until the ship is at the place named in the charter-party as the place whence the carrying voyage is to begin, and the ship is ready to load, and he, the charterer, has notice of both these facts; when these conditions are fulfilled, the liability of the charterer begins. The extent of that liability depends on the form, as to it, of the charter-party. If there be no undertaking that he will load the ship, at all events within a specified time, he will be bound to use reasonable diligence to do his part towards the loading according to the terms or meaning of the charter-party; that is to say, "with all possible despatch," or "with usual despatch," or "with the customary despatch of the port," or "within a reasonable time." But whenever in the charter-party it is agreed that a specified number of days shall be allowed for loading, and that it shall be lawful for the freighter to detain the vessel for that purpose a further specified time on payment of a daily sum this constitutes a stipulation on the part of the freighter that he will not detain the ship for the purpose of loading beyond those two specified periods. This is the principle laid down in *Ford* v. *Cotesworth* (3 Mar. Law Cas. O.S. 190, 468). If the ship in such case is detained beyond the specified lay days, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in loading has occurred from causes wholly beyond the charterer's control.

The rights and liabilities of the shipowner and charterer as to unloading under a charter-party, in ordinary terms, are very much the same as, though they are not identical with, these respective rights and liabilities as to loading. The right of the shipowner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is to end, and the ship is ready, so far as she is concerned, to unload. The shipowner, however, is not bound to give notice that his ship is so arrived and is so ready. If the named place describes, as before, a large space in several parts of which a ship can unload, as a port or dock, the shipowner's right to have the charterer's liability

initiate commences as soon as the ship is arrived at the named place, or the place which by custom is considered to be intended by the name, and is ready, so far as the ship is concerned, to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged. But, in the absence of his right to place the ship only as near to the named place as she can safely get, the shipowner's right to have the charterer's liability to unload initiate does not commence until the ship is in the named place. The liability of the shipowner as to the commencement of the unloading is to use all reasonable despatch to bring the ship to the named place where the carrying voyage is to end unless prevented by excepted perils, and when the ship is there arrived to have her ready with all reasonable despatch to discharge in the usual or stipulated manner. If the named place describes a more limited space, as a quay, &c., then the right of the shipowner to have the liability of the charterer initiate does not commence until the ship is at the named place, although the ship is in the port or dock or larger space in which the named place is situated. The primary right of the charterer as to unloading is similar to his primary right as to loading, namely, that he cannot be under any liability as to unloading until the ship is at the place named in the charter-party as the place where the carrying voyage is to end, and the ship is ready, so far as she is concerned, to discharge; or, if the necessary conditions are fulfilled, he may, as a substituted liability, be liable when the ship is as near to the named place as she can safely get. But when the ship is at the named place, or the substituted place, and is ready to discharge, the liability of the charterer as to the unloading commences. And here again the extent of his liability depends on the form as to it of the charter-party. If there be no undertaking that he will discharge the ship at all events within a specified, that is to say, a described time, he will be bound to use reasonable diligence to do his part towards the unloading, according to the terms or meaning of the charter-party. That may be "with all possible despatch," or "with usual despatch," or "with the customary despatch of the port," or "within a reasonable time." But if there be a stipulation express or implied on the part of the charterer that he will not detain the ship for the purpose of unloading beyond a specified time (and there is such a stipulation when lay days are allowed for unloading and demurrage days on payment of a daily sum), and if the ship be in fact detained beyond the lay days after she has arrived at the place named for the end of the carrying voyage, and is there ready, so far as she is concerned, to unload, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in unloading has occurred from causes wholly beyond the charterer's control. In either form of naming the place at which the voyage is to begin and end, it follows from the very form of the agreement, which fixes what the voyage is by naming the places at which it is to begin and end, that the carrying voyage does not begin until the ship is at the place named as the place where it is to begin, and the carrying voyage does not end until the ship is at the place named as that where the voyage is to end. It would be a contradiction of the whole substance of the contract to carry on a voyage to say that the charterer is bound to load before the ship is at the place whence the goods are to be carried, or that the charterer is bound to receive the cargo before the shipowner has carried it to the end of the voyage for which he is paid to carry it.

These statements of the law seem to me to be also consistent with and to be the result of all the cases. In *Randall* v. *Lynch* (2 Camp. 352) the description of the carrying voyage was, as to the ending of it, to proceed direct to the said port of London, and when there, that is to say, at "the London Docks," to make discharge and faithful delivery of the said homeward cargo, &c,, and there end and complete both out and homeward voyages." The ship arrived in "the London Docks," but on account of the crowded state of the docks was delayed in discharging. The first part of the judgment of Lord Ellenborough is: "I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to her owner. He is responsible for all the varied vicissitudes which may prevent him from doing so." This part of the judgment obviously gives no intimation as to when the end of the stipulated time arrives. It only states what is the liability when the end arrives. But when lay days are allowed the end of the stipulated time depends on the time when the liability to unload commences. That time is expressed later in the judgment. "When she was brought into the docks," says Lord Ellenborough, "all had been done which depended on the plaintiff, the shipowner," That is to say, the lay days began when she was brought into the docks. So the case has always been construed. *Brereton* v. *Chapman* (7 Bing. 559) only decides that where a large port, as Wells, is named, the vessel must have arrived not merely at the entrance or in the port, but at the usual place for discharging vessels which arrive in the port to be discharged. *Kell* v. *Anderson* (10 M. & W. 498) is to the same point, the named port being London. In *Brown* v. *Johnson* (10 M. & W. 331) the charter is to proceed to a port in the United Kingdom, fifteen days for discharging and thirty days, &c., demurrage. The ship was afterwards ordered to Hull. The ship arrived in port on the 1st Feb., in dock on the 2nd, but did not get into a place of unloading in the dock until the 4th, in consequence of the full state of the docks. Alderson, B. ruled that the period from which the lay days was to commence was the day of her coming into dock, and not the coming to her berth in the dock. And that ruling was upheld by Lord Abinger on the authority, he said of *Randall* v. *Lynch* (*sup.*) and *Brereton* v. *Chapman* (*sup.*). It must have been assumed or proved that the usual place of unloading all ships in the port of Hull was in a dock.

In *Ford* v. *Cotesworth* (3 Mar. Law Cas. O. S. 190, 468) the charter was that the ship "shall proceed to Lima, and there, or so near thereto as she may safely get, deliver the cargo in the usual and customary manner, and so end the voyage." No lay days or days on demurrage were named. The ship arrived at Callao, the port of Lima, and was ready to discharge. The authorities refused to allow the cargo to be unloaded for seven days: judgment for defendants. Blackburn, J. said: "When-

ever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may devise his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause over which he has no control prevents him from performing what he has undertaken within that time, he is responsible for the damage. But where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect either expressed by the parties or to be collected from what they have expressed, the damage arising from an unforeseen impediment is to be cast by the law on the one party more than on the other; and consequently we think that what is implied by law in such a case is not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part." But he adds: "Wherever in the charter it is agreed that a specified number of days should be allowed for unloading, and that it should be lawful for the freighter to detain the vessel for that purpose a further specified time, on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain her beyond those two specified periods."

The case throws no light upon the question as to when lay days are to commence. Whatever the extent of the charterer's liability was, the question as to its extent arose with regard to delays which happened after the ship was at Lima. The only question decided was that, where no lay days are mentioned, and there is no other stipulation binding the shipowner or charterer to load or discharge the ship, at all events within a given time, their reciprocal liabilities are only to use their best endeavours to load or discharge within a reasonable time. This appears clearly from what was said in *Thiis* v. *Byers* (3 Asp. Mar. Law Cas. 34). The charter was "to a safe port in the United Kingdom, to be discharged in fourteen days, ten days on demurrage." The ship was ordered to and arrived at Middlesborough. In the course of unloading bad weather intervened, and without any fault of the charterer the ship was detained beyond the lay days. It was argued that the charterer was not liable, because he had used his best endeavours, and *Ford* v. *Cotesworth* (3 Mar. Law Cas. 190, 468) was cited. "In that case," said Blackburn, J., "no lay days for unloading were stipulated." In *Tapscott* v. *Balfour* (1 Asp. Mar. Law Cas. 501) the charter was "to proceed direct to any Liverpool or Birkenhead dock, as ordered by charterer, and there load in the usual and customary manner a full and complete cargo of coals. The cargo to be loaded as customary at the average rate of 40 tons per working day, and freighters to pay demurrage at the rate of 4*d.* per ton register *per diem*." The vessel was ordered to the Wellington Dock, Liverpool. The vessel arrived at Liverpool. An order was obtained on the 29th June to admit the vessel into dock. She was not permitted by the authorities to go into the Wellington Dock until the 11th July, but on that day she went into the dock. She was not permitted to go under the spout until the 29th July. Bovill, C.J. and Denman, J. held that the lay days commenced on the day the ship entered the dock, and that the charterer was liable for subsequent delay beyond the lay days. The rule, it was said, is that where a port is named in the charter-party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port; not the actual berth at which she unloads, but the dock or roadstead where loading usually takes place. And Bovill, C.J. took notice that the stipulation relied on in argument to vary this general rule was in that case not a stipulation to load "with the customary or usual despatch," but to load "in the usual or customary manner," and that, he said, referred to the mode of delivery and not to the time of delivery. And surely he was right. In *Ashcroft* v. *The Crow Orchard Colliery Company* (2 Asp. Mar. Law Cas. 397) the charter seems to have been made whilst the ship was in the port of Liverpool, though not in dock. The whole charter is not given. As described in the judgment no mention is made of Liverpool at all. There it is said that "by the charter-party dated Liverpool the master engaged to receive and load a full and complete cargo of coal, and proceed to Belfast, &c. To be loaded with the usual despatch of the port." By the memorandum at the foot the vessel was to load in Bramley Moore or Wellington Docks. But in the headnote it is said that "by charter-party the master engaged to receive on board and load a cargo of coals, at the port of Liverpool." If those words were in the charter-party they described the place from which the carrying voyage was to begin, and the stipulations as to the dock were only as to the particular part of the named place, *i.e.*, the port of Liverpool, in which the loading was to take place. If this view of the terms of that charter be correct, the decision is strictly in accordance with all former cases. I cannot but think it is correct, or was so assumed, for the judgment states that the contention of the defendant's counsel was, that the words "to be loaded with the usual despatch of the port" applied only to a delay in the process of loading when the vessel had arrived at the berth. "But we are of opinion," says the judge, "that the obligation goes further, and covers the whole period; from the time when the vessel at the port is placed at the disposal of the charterer there is a condition to receive her cargo." If the place named was the port, that is consistent with all the previous cases. It should be observed also that the court held that there was an absolute contract by the charterers that the vessel should be loaded with the usual despatch of the port. But in the charter-party, as reported, there are no lay days or days on demurrage given for loading, so that, if the charter-party is correctly set out, and if the decision be supposed to be other than one as to the extent of the liability, and not as to the time when it was to begin, or as a decision on the particular covenants in that charter-party, and on the particular facts of that case, it is in direct conflict with *Ford* v. *Cotesworth*. It is sufficient surely to say, without in the least questioning the correctness of the decision, that it is not a decision as to the time when the liability of a charterer

as to loading or unloading is to begin to attach. In *Tapscott* v. *Balfour* the stipulation was to load "in the usual and customary manner." In *Ashcroft* v. *The Crow Orchard Colliery Company* the stipulation was that the vessel was to be loaded "with the usual despatch of the port." Both decisions were independent of the question as to what was the time at which the liability was to accrue. I cannot see that the two cases are in conflict. I cannot believe that *Ashcroft* v. *The Crow Orchard Colliery Company* was intended to overrule any previous case as to the period from which lay days are to commence to run at a place of discharge. Neither of the cases tried before me, which were cited, differ from the rule I have enunciated as to this point. In *Strahan* v. *Gabriel* (26th June 1879, not reported), tried at Newcastle, the named place was a quay. The ship arrived, and found the only quay berth occupied by another ship. The shipowner offered to discharge across the ship which occupied the quay berth, if the charterer would pay for the stage and labour. The charterer refused. The shipowner claimed demurrage. I held that the lay days did not commence to run until the plaintiff's ship was alongside the quay, the quay being the place named whereat the voyage was to end. In *Davis* v. *M'Veagh* (4 Asp. Mar. Law Cas. 149), tried at Liverpool, the place named was the Wellington Dock. The ship was on a certain day admitted into the Wellington half-tide basin, but was refused admission for a considerable time into the Wellington Dock, because the loading berths therein were full. The evidence given—and I have referred to my notes for the purpose—was in terms that there were gates to the half-tide basin from the river, and that at Liverpool the half-tide basin was always treated as part of the Wellington and Bramley Moore Docks. It was not argued that it was not, but only that the liability of the charterer did not initiate until the ship was at the high level in Wellington Dock, which was the place of loading. I held that the lay days began to run when the ship was admitted into the dock, *i.e.*, the half-tide basin. I held that it was the dock in consequence of the evidence. The dispute was only whether the liability commenced when the ship was in the dock, or when she was at a loading berth. I ruled upon that dispute. Nobody suggested the ship was not in dock.

Upon this review then of the cases, it seems to me that since *Randall* v. *Lynch* (2 Camp. 352) all the cases recognise the doctrine that when lay days are allowed they begin to run when the ship is in the place named in the charter-party as that whence the carrying voyage is to begin, or where that voyage is to end, and they do not begin until then. And that proposition, put into more general words, is, that upon a charter-party in ordinary form the shipowner's right to place his ship at the disposition of the charterer, so as to initiate the liability of the charterer either as to loading or discharging the ship, and the reciprocal commencement of the liability of the charterer either as to loading or discharging the ship, do not commence until the ship is in the place named as that whence the carrying voyage is to begin, or where the carrying voyage is to end.

Unless therefore the shipowner in the present case can maintain that he had a right to call upon the charterer to take delivery not in the Surrey Commercial Docks, but at a place so near thereunto as the ship could safely get, I am of opinion that he cannot maintain the action for any part of the demurrage, or any part of the damages which he has claimed. At the hearing before the Master of the Rolls it was contended that the shipowner was in this case prevented from obtaining admittance into the Surrey Commercial Docks by the act of the charterer. If that had been proved I should have thought the charterer was liable to damages on that ground, as for a wrongful act preventing the shipowner from carrying out his contract with the charterer. But the assertion was not supported by the evidence. A long and persistent endeavour was made to prove that, by a binding custom of the port of London with regard to timber ships importing timber from the Baltic, the charterer, who was an importer, undertook absolutely to obtain the admission of the ship into the dock. The meaning being that by the custom if he did not, he was, according to the understanding of all shipowners and importing charterers in that trade, liable to pay damages in the nature of demurrage. I entirely agree with the Master of the Rolls that no such custom was proved.

Another ground of liability was urged before us upon a suggestion of James, L.J., which was, that under the circumstances of this case the shipowner was entitled to call upon the charterer to take delivery at a place as near to the docks as the ship could safely get. That ground for liability does not seem to me to have been urged by anyone before the Master of the Rolls. It was there suggested that, if the place named in the charter-party was a private dock or quay, there arose an implied obligation from that fact alone binding the charterer to obtain admittance for the ship into that dock or to that quay. With the greatest deference I cannot accede to that view. In the first place, it contravenes what I apprehend to be the received interpretation of a well-known mercantile document, namely, a charter-party, which is, as I have stated, that the reciprocal rights and liability do not accrue until the ship is at the named place. In the second place, the hypothesis seems to me to violate the principle laid down in *Ford* v. *Cotesworth*, that where the act to be accomplished is to be brought about by the joint efforts of both parties, the only implication, in the absence of an express contract to the contrary, is that each will use his best endeavours to forward the accomplishment of the common object. It may be in such case that both shipowner and charterer would be bound to use their best endeavours to obtain access to the dock or quay, but no more; and, if so, the defendant in this case did use his best endeavours. But liability on that ground seems to be sufficiently asserted in the 15th paragraph of the statement of claim, and to be raised by the evidence. It seems to me to be proved by the evidence that the ship was prevented from entering the Surrey Commercial Docks solely by the action of the proprietors of those docks, and without any default of the defendant the charterer, and notwithstanding every effort of the plaintiff, the shipowner, to obtain admission. And it appears to me to be proved that the causes of the refusal would have inevitably lasted for many months, for more than six months. Upon the one side it is

said that this refusal, which would have inevitably existed for so long a time, made it impossible within the meaning of the charter-party that the ship could enter the dock, and therefore she was only bound to go "as near thereto as she could safely get," and being so near was entitled to say that the ship had arrived within the terms of the charter-party, at the end of the carrying voyage, and was therefore entitled to call upon the charterer to take delivery at that place; and on the other side it was said that a ship is not entitled to rely upon being as near to the named place of destination as she can safely get, unless she is prevented by some physical cause existing in the named place, and unless such cause be permanent; and that in the present case there was no physical cause existing in the docks which made them unsafe for the ship, and if a disability to enter the docks arising from other than a physical cause might suffice if it were permanent, the cause in this case was not sufficiently permanent. I am not aware of any case having been decided under this head except where the cause was physical. But where the cause has been physical it has been often decided that if the obstacle was only temporary it was not, however complete for the time, sufficient to enable the shipowner to insist on the substituted or alternative place of delivery. This has been decided in *Schilizzi* v. *Derry* (4 E. & B. 873), and in *Bastifell* v. *Lloyd* (1 H. & Coll. 388). The term used has been that the obstacle must be "permanent." I think it is dangerous to depart from a recognised judicial phraseology. But the phrase must have a practical interpretation, just as the term "impossible" was interpreted by Maule, J. By analogy I should say that "permanent" as used in the cases on this subject, means that it is an obstacle which cannot be overcome by the shipowner by any reasonable means within such a time as, having regard to the objects of the adventure of both charterer and shipowner, is, as a matter of business, wholly unreasonable. I think notice must be taken of what the particular adventure in each case is; as, for instance, whether the voyage be to seas periodically frozen, or to such ports as London or New York. In the one case a much longer possible delay must be anticipated by both parties to the adventure than in the other. As to the question whether the obstacle must be physical, it depends upon what is the expressed or unexpressed condition to be implied from the stipulation "or so near thereto as she can safely get." Is it if the ship cannot get with safety to the place primarily named? or is it if the ship cannot get to the place primarily named? It seems to me on consideration that the sensible implication is, if the ship cannot get to the place primarily named. There is as much reason why the delivery and acceptance of the cargo should take place at the substituted place if the ship cannot arrive at the place primarily named for any other reason, as if she cannot arrive there with safety to herself.

The proposition then in such a case is, that lay days do not begin to run either for the purpose of loading or unloading until the shipowner has brought his ship to the primary destination named in the charter-party, so as to be ready, so far as the ship is concerned, to receive or deliver there unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means within such a time as, having regard to the object of the adventure of both the shipowner and charterer, is, as a matter of business, wholly unreasonable. If there be such an obstruction or disability the lay days begin when the shipowner has brought his ship to a place so near to the primary place of destination as the ship can be brought with safety to the ship and cargo, and so as to be ready, so far as the ship is concerned, to deliver there. In the present case there was such a disability as is described in the above proposition, and it was permanent in the sense expressed. Consequently, in this case the charterer was bound to assist in the discharge of the cargo at the place where the ship lay near the Surrey Commercial Docks, and, upon his neglect and refusal so to do, was liable for the damages thereby caused to the plaintiffs.

Cotton, L.J.—This is an appeal from an order of the Master of the Rolls dismissing the action. The action was by the owners of the steamship *Euxine*, to recover from the defendants as charterers of that vessel, freight and demurrage. There is no dispute about freight, for, although the Master of the Rolls dismissed the action, he did so on the undertaking of the defendants to pay the freight.

Although in terms the statement of claim asks for demurrage, in substance the claim is for damages for the neglect or refusal of the defendant to accept delivery of the cargo, and thereby detaining the plaintiffs' vessel, and subjecting the plaintiffs to divers charges and expenses in respect of the ship and cargo.

Under the charter-party, which was dated the 21st June 1877, the ship was to go to Sodeshamm, and there load a cargo of deals. [After referring to the terms of the charter-party, his Lordship continued:]

The ship arrived at Sodeshamm, and between the 21st and 28th July shipped the cargo of deals, and arrived in the river on the 4th of the following August. It appears that the Surrey Commercial Docks are in the habit of sending to merchants and others printed forms. These purported to be addressed to the captain of a ship to be named and contained a direction to him to take the ship into the docks, which is to be signed by the consignees. Then there follows a statement of the place where the consignee wishes the cargo to be stowed, and there is subjoined a notice relating to the different entrances to the docks, and a note that the vessel will not be docked at any other lock than that stamped thereon. The lock was the entrance from the river into the docks. It appeared that, when a consignee or charterer desired that the cargo of a steamer should be unloaded in the Surrey Commercial Docks, he made arrangements with the dock company for an unloading berth for the ship, sent to them one of the papers filled up so as to suit the particular case, and further, that if the dock company were able to provide accommodation for the vessel they were accustomed to stamp the document so filled up with the name of the lock by which it was to be admitted into the docks, and sent it to Gravesend, to be delivered by their agent there to the captain on his arrival. The document thus filled up and stamped became a direction to the captain, if no dock had been mentioned in the charter-party, to go to the Surrey Commercial Docks, and, whether the dock had been named in

the charter-party or not, a direction to enter the docks by a particular lock, and it was a direction to the dock master to admit the vessel. The defendants on the 16th July endeavoured to obtain for the *Euxine* an unloading berth in the Surrey Commercial Docks, and with that view sent to the dock company one of the documents above mentioned. But the dock company had made arrangements for unloading so many steamers laden with deals that they were unable to provide an unloading berth for the *Euxine*, and declined to stamp the document, or to send it to the ship at Gravesend. On the 4th Aug. the ship went to one of the entrances of the Surrey Commercial Docks in order to enter the dock, but when at the point of entering the dock gates it was turned back by the dock master, and was moored near the entrance to the docks. A subsequent attempt was made by the captain and agents of the vessel to obtain admission into the docks, but the officers of the dock company refused admittance, and did so because they were unable to provide an unloading berth for the steamer. On each occasion there was room for the vessel to enter and be moored in the dock if the officers of the company would have allowed it to enter the dock gates. The plaintiffs contended that the defendants had actively interfered, and prevented the dock company from admitting the *Euxine* into their dock, but in my opinion this was not established. The first refusal of the dock company to admit the *Euxine* into the docks was at the time when the defendants were doing their best to induce the dock company to provide an unloading berth for the ship; and although the secretary of the dock company did, at the instance of one of the defendants, telegraph to the dock master not to admit the ship into the docks, this telegram was a mere repetition of orders previously given. Subsequently the captain and agent of the ship requested the defendants to make arrangements for unloading the ship in some other dock, which the defendants then had an opportunity of doing. They, however, refused to do so, and required the captain to discharge his cargo in the Surrey Commercial Docks, and as he was unable to obtain admission into that dock, he, after some delay, unloaded the cargo into lighters, which ultimately landed the cargo in the Surrey Commercial Docks.

Under the circumstances the ship was detained for a considerable time longer than would have been occupied in discharging its cargo if it had been received into the Commercial Docks and there unloaded with the usual steam despatch of that dock, or than would have been occupied in discharging the cargo if the defendants had been ready and willing to accept delivery of the cargo as soon as the vessel, after having failed to obtain admission into the docks, was moored in the river, and ready to deliver its cargo there.

It has been arranged between the parties that, if we shall be of opinion that the defendants are liable to the plaintiffs for detention of their vessel, the amount of damages shall be ascertained out of court.

As a general rule, the time within which the charterer or consignee is bound to accept delivery of a cargo does not begin to run until the ship has arrived at the stipulated place of discharge, and is ready there to begin to discharge her cargo; and the first point to be considered in the present case is whether the *Euxine* ever did arrive at a place of discharge stipulated for by the charter-party. The words are "shall therewith proceed to London Surrey Commercial Docks, or so near thereto as she may safely get and lie always afloat, and deliver the same, &c." I am of opinion that the ship never did arrive at the Surrey Commercial Docks within the meaning of this stipulation. For, although she arrived at one of the entrances to that dock, she never entered the dock, and in my opinion the contention of the defendants was correct that the meaning of the charter is that the ship should go into and not merely to the entrance of the docks. The question remains, did she go to the alternative place of discharge? It was argued on behalf of the defendants that the alternative was intended to provide for the accident of the vessel being unable to get to the primary place of discharge, in consequence of some permanent obstruction endangering the safety of the ship. Undoubtedly the alternative applies to and includes such a case, but the reference to the safety of the ship in the alternative clause is, in my opinion, introduced to show what the alternative place of discharge is to be, not to show when the alternative is to arise. In my opinion there is neither authority nor principle for holding that danger to the ship is the only event for which the alternative provides, and although expressions of judges may be found to the effect that the alternative was intended to provide for such a case, they must, in my opinion, be taken with reference to the cases in which they were used, and not as restricting the operation of the clause to that one case. In the present case we must construe the charter-party according to the facts known to both parties. On the evidence, and for the purpose, it is sufficient to refer to that of the defendants' witness, Sir Thomas Gabriel, it appears that it is the practice for the charterer or consignee to go to the docks to make arrangements first for admission of the vessel into the dock. It also appears that the dock was a private one; that is to say, that the dock company claimed the right to exclude any vessel which it was not for their interest to admit into their dock. The ship failed to obtain admission into the dock in consequence of the defendants having been unable to obtain a discharging berth for her. I think this charter-party may be construed as if the alternative place of discharge were allowed in case the dock company, from inability of the charterer to obtain a discharging berth, declines to admit the ship into the dock, and that consequently, subject to an objection which I shall mention, the ship, when she, after having been refused admission to the dock, anchored in the river, and was ready there to discharge her cargo, had arrived at the alternative place of discharge allowed by the charter-party, and that at least from that time the defendants are liable for any delay in accepting delivery of the cargo. But it is said that the ship might have waited for its turn to go into the dock, and therefore that, even if the provision for an alternative place of discharge would under any circumstances apply to the case of such an obstruction as existed in the present case, it cannot under the circumstances of this case do so, because the obstruction was temporary only, and not of a permanent character. In support of this argument cases were referred

to where the owner of the ship was held not to be excused for not going to the primary place of discharge in consequence of its having been impossible so to do for a considerable time, as in *Parker* v. *Winlow* (7 E. & B. 942) and *Bastifell* v. *Lloyd* (1 H. & C. 388), in each of which cases the delay was for about a fortnight. But in each of these cases the access to the place of discharge was prevented by the state of the tide in the port, which must be considered as one of the usual accidents of navigation, which is a risk to be undertaken by the ship. In the present case the vessel had practically arrived at the end of the highway which formed the access to the place of discharge and her liability to enter the dock was not owing to any difficulty of navigation. It was attributable solely to the refusal of the officers of the dock company to admit her, and, in my opinion, on this contract the only question is whether the obstruction to her entering the dock is to be considered of a temporary or of a permanent nature. I think that an obstruction must be considered a permanent one which cannot be removed in a time which is reasonable, having regard to the interests of the shipowner and of the consignee; and such, in my opinion, was the obstruction in the present case, for the evidence was that the dock company would not admit the steamship unless an unloading berth could be provided for her, and that they would have been unable to provide an unloading berth for the *Euxine* for at least a month, probably for some months. This, in my opinion, must be considered a permanent and not a merely temporary obstruction to the admission of the ship into the docks.

In my opinion, therefore, the ship, when moored in the river ready to discharge her cargo, was entitled to say that she had arrived at the alternative place of discharge, and could require the defendants to accept delivery of the cargo. But independently of the question whether the ship had arrived at a place of discharge mentioned in the charter-party, I am of opinion that under the circumstances of this case the plaintiffs are entitled to recover. For it is proved that it is in fact the practice of the charterer or consignee to make arrangements for an unloading berth. The contract was made with reference to this state of things, and in it there is the stipulation that the cargo was to be received at port of discharge "as fast as steamer can deliver." It was urged that this provision only applied when and if the ship was in the Surrey Commercial Docks. I think it may fairly be construed as a stipulation by the charterer that the vessel shall, as far as he is concerned, be unloaded with the despatch of a steamer having the usual means of unloading in use in the Surrey Commercial Docks. It was solely in consequence of the inability of the consignee to obtain an unloading berth in the Surrey Commercial Docks that the ship was refused admittance into the dock. The ship was at the very entrance of the dock, ready to enter and to be put under the orders of the consignee for discharge. That it did not enter the dock was not attributable to any difficulty of navigation, or to any default on the part of the ship. In this case, as from the time when the ship was ready to enter the dock, the case as between the shipowner and consignee must be dealt with as if the ship had been in the dock, and the delay, if any, must in my opinion be considered as that of the charterer, for which the owner is entitled to claim compensation in damages.

This view is strongly supported by the judgment of Bramwell, L.J. in *Davis* v. *M'Veagh* (4 Asp. Mar. Law Cas. 149). It was pressed upon us that a decision in favour of the plaintiffs in this case would be at variance with the decision in *Tapscott* v. *Balfour* (*sup.*). That case may be distinguished from the present by the stipulation in the present charter-party that the cargo was to be received at port of discharge as fast as steamer could deliver. Apparently there was not any similar provision in that case, and in the subsequent case of *Ashcroft* v. *The Crow Orchard Colliery Company* (*sup.*), a case the circumstances of which were very similar to that of *Tapscott* v. *Balfour*, the court, in deciding in favour of the shipowner, relied on a stipulation in the charter-party that the vessel was to be loaded with the usual dispatch of the port, which is very similar to the stipulation in the present case to which I have referred. Certainly the present case is more like that in the Queen's Bench than the previous decision in the Court of Common Pleas. In my opinion the court in *Tapscott* v. *Balfour* did not intend to lay down a general rule that, where the place of discharge is a private wharf or dock, and the inability of the ship to get to such a place of discharge is attributable to an omission or inability of the charterer to provide the means of discharge for the ship there, which it is usual for him to provide, in such a case the ship and not the charterer is to bear the loss.

James, L.J.—I concur generally in the judgment of Lord Justice Cotton.

It appears to me that, for the determination of the present question between the parties, the contract between them may be read as if expressed in ordinary Queen's English, and not in the peculiar dialect of charter-parties, and may be construed according to general legal principles, and not according to any peculiar usage, either maritime or commercial.

Now, in this case the charterers (the defendants) hired the plaintiffs' ship to proceed to a Baltic port, and there load from the factory of the merchant a full and complete cargo of deals, &c., and being so loaded, to proceed "to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same," at a certain freight, with 5*l.* gratuity in full of all port dues and pilotages. There was the usual exception of the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation.

It was proved by the defendants' witnesses that the Surrey Commercial Docks was a private speculation and undertaking, the proprietors of which had and exercised the right to grant or refuse admission to any vessel, at their sole will and pleasure. As a matter of fact, therefore, the Surrey Commercial Docks was a private close to which there was access through their private gates from the port of London, but was outside of and no part of such port; that is to say, the water surface of the dock was no part of the water highway of the port. I hold it to be a matter of general law that where one man hires another to do something in a private close, his own or another's, there is, in the absence of express or implied stipulation or exception, a grant or a warranty of

the requisite right of ingress, egress, and regress, to and from such close to enable the hired man to do the work. But where the close is not strictly a private close, but one which both parties know to be the close of another, whose ordinary business it is to allow access for his own profit, and whom it ordinarily suits to give such access to anyone willing to pay for it, what is the reasonable implication as to such access? Is it reasonable to imply that the hired man binds himself that the owner of the close will permit such access, and to hold that through the act of such owner in refusing such access, the contract is broken by the hired man? Is it, on the other hand, reasonable to imply that the hirer binds himself absolutely to procure such access, and breaks his contract if without any fault of his own, he fails? Supposing that the close being a dock, as in the present case, the dock walls had given away, and the dock company had been insolvent and wound-up, and unable to repair them, would that be a failure of the ship to complete its voyage? Would that be a default of the merchant preventing such completion? I cannot myself think that either alternative would be the true answer, and I think that there would be, *in gremio contractûs*, implied some such alternative as that which is actually expressed in the ordinary printed forms of charter-parties, and I approach the construction of that clause in the charter-party with this conviction, that no sensible shipowner, and no sensible merchant, would be contracting for the continued existence or physical fitness of the dock, or for the continual existence of the joint stock company, its owners, or for the readiness and willingness of the latter to open its gates.

I read the clause thus: "Shall proceed to the port of London, and discharge in the Surrey Commercial Docks, or if she cannot, from any physical or legal obstruction or other cause, not being an accident of sea or river (which the ship takes to herself), get into such dock, then she is to go so near thereunto as she can get, and as she can so get and lie, with safety and always afloat."

That this is the true construction (so far, at least, as it is favourable to the shipowner) appears to me to be strengthened by this, that the printed common forms, one of which was used on the present occasion, are adapted for the case of a port not named but to be named, and contain the following clause applicable thereto, and which still remains in the print: "If ordered to London the steamer to discharge in one of the docks in the river Thames." That means a dock to be named by the charterer. Now, could it be reasonably held that, under such a charter-party as that, the charterer could select and name a dock which he knew would not admit the ship for months, and so compel the ship to remain as a floating warehouse for him during three months? But what is the difference, in point of legal construction and effect, between such a charter-party completed by subsequently naming the port and dock, and a charter-party originally containing the names of both?

Adopting the construction which I think the grammatical and reasonable one of the alternative clause, I next inquire what is the practical effect of it? A ship is not, in my view of it, prevented from getting in if there be only a temporary delay or casual obstruction, such an accident as may be expected in the ordinary course of affairs. Supposing, for example, she had to wait her turn while some other ships were going through the dock, or to wait for a few hours, or a few tides, while some ships were being removed from their berths. Supposing, for another example, that a ship had foundered in the dock, or at the entrance, and that obstruction was being removed, and would be removed in a few hours, or a day or two—I should think that a mercantile jury would not hold that she was prevented from getting in. But supposing that the dock had fallen in, and that it would take at least several weeks or months to repair it—I think such a jury would say she was so prevented.

The present case, except that it is a case of a legal and not a physical obstruction, appears to me to fall exactly within the same category as the last example. The dock company, having plenty of room in the dock, refused to allow the ship to enter, not for a tide, nor for a day, or a week, but until they and the charterer could arrange as to giving a discharging berth to the latter, and when they would be able and willing to do so they could not and would not say. They would bind themselves to nothing, and all they would say was, that it would be a month, or might be months, before they would, in their good pleasure, think fit to permit the ship to enter. It is not easy to see why they should not allow the ship to enter and lie afloat in their water space, waiting safely there to get up to a berth. Peradventure it was that the dock managers had a notion that the law was as is contended for by the defendants, viz., that so long as the ship remained outside there could be no demurrage, and that they were minded to favour the charterer at the expense of the shipowner, by keeping the ship out. It was contended, in the course of the argument, that, if the ship had been allowed or contrived to enter into any part of the dock, the voyage would have been at an end, although the ship had not got, and could not for a long time get, to the discharging berth, or had been actually turned out. I find a difficulty in apprehending the distinction between failing to get into the dock and failing to get up to the berth; between the ship being turned back at the dock gates and being turned out after she had gone in without permission. It does not seem to me reasonable that the rights and liabilities of the parties should depend on the caprice of a third party, and who, if that be so, might, apparently, without violating any law, put a price on his exercise of such caprice. In my opinion, it is more reasonable to hold that the voyage, *quâ* voyage, ends where the public highways ends, and that everything afterwards is part of the mutual and correlative obligations of the shipowner and merchant to do everything that is respectively incumbent on them in order to effectuate the discharge of the cargo according to the true intent and meaning of the contract. The shipowner must of course be willing and ready to go into the dock specified, just as he must be willing and ready to proceed, when in the dock, to a proper berth assigned to him for unloading. There is, in my mind, a marked and broad distinction between the port of discharge, the usual public place of discharge in that port, which it is the shipowner's business at all events, at his own risk, to reach, and the private quay, wharf, or warehouse, or private dock adjoining or near the port, on which or in which he is to co-

operate with the merchant in the delivery of the cargo.

We expressed our opinion that the evidence did not establish that there was any special or peculiar custom of trade applicable to the case. But I cannot help thinking that that evidence shows that everybody really acted according to the law as I understand it. The printed forms prepared by the dock company are all based on the assumption that it is the merchant who will apply for the necessary pass for the ship, and it was the merchant who always did apply for and obtain such pass to be forwarded to the ship at Gravesend, the ship learning, from such pass, and such pass only, by what lock it was to enter.

Solicitors: *Druce, Sons*, and *Jackson*; *Plews, Irvine*, and *Hodges*.

Saturday, Nov. 8, 1879.

(Before James, Baggallay, and Thesiger, L.JJ.)

The Khedive.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Admiralty appeal to House of Lords—Stay of execution.

Where an appeal is carried to the House of Lords for the decision of the Court of Appeal in an admiralty action, an application for a stay of proceedings pending such appeal must be made to the Court of Appeal, and not to the court below.

This was an application for a stay of execution pending an appeal to the House of Lords. This being the first Admiralty action carried from the Court of Appeal to the House of Lords, the practice was not settled.

The action was brought in the Admiralty Division by the Stomvart Maatschappy Nederland, owners of screw steamer *Voorwarts*, against the Peninsular and Oriental Steam Navigation Company, owners of the screw steamer *Khedive*, for damages sustained by the *Voorwarts* in a collision between those vessels which occurred on the 23rd May 1878, in the straits of Malacca. The owners of the *Khedive* counter-claimed for their damages in the said collision. The case was heard on the 5th, 6th, and 7th Feb., when judgment was reserved, and on the 20th Feb. Sir R. Phillimore delivered judgment by which he found both vessels to blame for the collision, and decreed that, in accordance with the practice each vessel should pay the other the half of the damage she had sustained.

From this decree the defendants appealed, and the appeal was heard by the Court of Appeal at Lincoln's-inn on the 21st and 22nd July 1879, when the Court (James, Brett, and Cotton, L.JJ.) reserved judgment, and on the 28th delivered a judgment, varying the decree of the court below by finding that the *Voorwarts* was alone to blame. No application was made at the time for a stay of execution, but on the 4th Nov.,

W. G. F. Phillimore, for the owners of the *Voorwarts*, applied to the judge of the Admiralty Division for a stay of execution. This being the first appeal from the Admiralty Court to the House of Lords there is no settled practice, but it appears that the application ought to be made here, and not in the Court of Appeal:

Justice v. *Mersey Steel and Iron Company*, L. Rep. 1 C. P. Div. 575.

Clarkson for the owners of *Khedive*. — The application should be made in the Court of Appeal; that court has full possession of the case, and any application should have been made at the hearing. I am entitled to my costs of appearance.

Sir R. Phillimore made an order as follows: "The judge having heard counsel on both sides directed plaintiffs' motion to stay execution of the decree of the Court of Appeal on the 28th July last to stand over to give opportunity to the plaintiff to make the said motion to the aforesaid Court of Appeal."

Nov. 8.—*W. G. F. Phillimore* moved the Court of Appeal.—The parties being agreed as to the terms on which execution should be stayed, there is still a doubt as to whether the order should be made in this court or in the court below; *Justice* v. *Mersey Steel and Iron Company* (1 C. P. Div. 575) being apparently in conflict with *Morgan* v. *Elford* (4 Ch. Div. 388) and *Grant* v. *Banque Franco-Egyptinne* (3 C. P. 202; 38 L. T. Rep. N. S. 622). In the former practice in Admiralty appeals to the Judicial Committee of the Privy Council it was not necessary to make any order, as, on the appeal being lodged, an inhibition issued as a matter of course:

Rules of Privy Council, Dec. 1865, r. 4.

The powers given to the court by Judicature Act 1875, Sch. 1, Order LVIII., r. 5, appear to be large enough to enable it to make such an order.

Clarkson was not called on.

James, L.J.—*Justice* v. *Mersey Steel and Iron Company* (1 C. P. Div. 575), refers to the practice in the courts of common law of giving bail in error, and does not apply to other appeals. This is the proper court to apply to for a stay of execution under the circumstances, and an order will be drawn up in accordance with the terms agreed to by counsel.

Baggallay and Thesiger, L.JJ. concurred, and the decree was drawn up as follows:—The Court of Appeal, having heard counsel on both sides, on plaintiffs (appellants) undertaking to prosecute their appeal to the House of Lords within a month, stayed the execution of the decree of the court of the 28th July last, so far as regards the assessment of damages, and in the event of defendants (respondents) proceeding to tax and enforce payment of their bill of costs, directed that an undertaking be given by their solicitors to refund the amount of such costs should the decree be reversed. The court also condemned the plaintiffs in the costs incurred by this motion.

Solicitors for the plaintiffs, *Clarkson, Son*, and *Greenwell*; Solicitors for the defendants, *Freshfield* and *Williams*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

June 11, 12, *July* 8 *and* 15, 1879.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE MARY.

Damage—Liability—Tug and tow—Compulsory pilotage—17 & 18 *Vict. c.* 104, *s.* 388.

Where a tug is employed to tow a ship which is in charge of a pilot by compulsion of law, the exemption from liability given to the owners of the ship for damage arising in consequence of obedience to the pilot's orders by sect. 388 *of the Merchant Shipping Act* 1854 (*a*) *does not extend to the owners of the tug for damage done by the tug, whether from acting in obedience to the pilot's orders, or in the absence of any orders.*

The Ticonderoga (*Sw.* 215) *followed.*

THIS was a case in which separate actions had been brought against the *Mary* by the *Sussex* and the *Desdemona* for damages sustained by the two latter vessels in a collision which took place between them and the *Mary*, whilst the *Desdemona* was in tow of the *Sussex*. The collision took place in Sea Reach in the river Thames about 8.30 a.m. on the 30th April 1879, the wind was about N.E., with fine weather, and the tide ebb running about 2½ knots. The *Sussex* was a paddle tug, and in company with another tug, the *Rambler*, was towing the *Desdemona*, a ship of 1490 tons burthen, up the river, the *Sussex* being made fast on the starboard and the *Rambler* on the port bow of the *Desdemona*. The *Desdemona* had on board a pilot whose employment was compulsory by law. The *Mary*, a Norwegian barque of 518 tons register, was proceeding down the river under all plain sail.

The *Mary* was close hauled on the starboard tack, standing across the river to the northward. and the *Desdemona* and her tugs were steering about W.N.W. up the reach, and, for the *Desdemona*, it was alleged that she and her tugs would have gone clear under the stern of the *Mary* had the latter not gone in stays. For the *Mary* it was alleged that she did not go in stays till the approach of the *Desdemona* and tugs had rendered a collision imminent, and that the *Desdemona* and her tugs only starboarded when it was too late. The stern of the *Sussex* struck the starboard bow of the *Mary*, and afterwards the *Desdemona's* starboard bow struck the stern of the *Sussex*, driving the latter vessel again against the *Mary*. All three vessels sustained damage, the *Mary* counter-claiming against the owners of the *Sussex*.

The *Sussex*, in reply to the counter-claim, alleged that, if the collision was occasioned by the neglect or default on the part of the *Desdemona* or tugs, it was occasioned solely by the fault or incapacity of a pilot in charge of the *Desdemona* and the tugs, and whose employment was compulsory by law, and also that the tugs were under the orders of those on board the *Desdemona*.

The cases were heard together, the evidence in one being accepted as evidence in the other, on the 11th and 12th June 1879, before Sir R. Phillimore and Trinity Masters.

Myburgh and *Nelson* for the *Sussex*, *E. C. Clarkson* for the *Desdemona*, *Butt*, Q.C. and Dr. *W. G. F. Phillimore* for the *Mary*.

After hearing evidence on the merits, his Lordship decided that the *Sussex* was to blame for the collision for not starboarding sooner, and that the *Mary* was not to blame, and that therefore both suits against her should be dismissed, reserving the point of law as to the liability of the *Sussex* on the counter-claim of the *Mary*.

On the 8th July the point was argued.

Butt, Q.C. and Dr. *W. G. F. Phillimore* for the *Mary*.—Even if the tugs acted solely in obedience to the orders of the pilot on board the *Desdemona* that would not free her from liability. The sole ground of exemption is the compulsion of law, which does not create the relation of master and servant, between shipowner and pilot so employed, but there is no such compulsion on the tug. It is a purely voluntary agreement on her part to tow on what conditions may be mutually agreed upon, as she is not bound by law to obey the orders of the pilot, and therefore cannot claim the exemption from liability given by sect. 388 of the Merchant Shipping Act 1854:

The Ticonderoga, Swabey Ad. Rep. 215.

Here the speed, which was one cause of the collision, was left in the hands of the tug. The tugs and tow are only considered as one vessel, in so far as their duties in obeying the rules of navigation are identical. If a vessel in tow, by mistake of her helmsman, executes a wrong manœuvre, it could not be said that the tug which had done nothing wrong was to blame for a collision ensuing. The case of *The Duke of Sussex* (1 W. Rob. 270, 1 Notes of Cases 61) is no authority now; it was decided under the law in force before the Merchant Shipping Act, which exempted all vessels acting under the orders of a duly licensed pilot, whether his employment were compulsory or not, from liability for damage done in consequence of his orders.

Clarkson and *Nelson* for the *Sussex*.—The fault was the fault of the pilot. The fact that he gave no order does not alter the case; he tacitly permitted the tug to go at a speed and in a direction which led to the collision, and he being in charge of the ship and tug, that is equivalent to an order to go at that speed and in that direction:

The Energy, L. Rep. 3 Ad. & Ecc. 48; 23 L. T. Rep. N. S. 601; 3 Mar. Law Cas. 503.

The 388th section of the Merchant Shipping Act does not require that the employment of the pilot by the tug should be compulsory, but that the place should be within the district where his employment was compulsory—that is, by the tow, and the tug is only the motive power of the ship, and so long as it does not disobey the orders of

(*a*) MERCHANT SHIPPING ACT 1854 (17 & 18 VICT. c. 104).
Saving of Owners and Masters Rights.
Limitation of Liability of Owner where Pilotage is Compulsory.

Sect. 388. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

the pilot must be taken to be acting in obedience to them, and when damage ensues in consequence of obedience to the orders of a pilot in a district where his employment is compulsory, as in this case, the owners are exempt from liability for it.

Butt, Q.C. in reply.

Cur. adv. vult.

July 15.—Sir R. PHILLIMORE.—In this case the steam tug *Sussex* has been found alone to blame for the collision with the barque *Mary*. It is now contended that the *Sussex*, the wrongdoer, is exempt from responsibility to the injured ship upon the ground that the *Desdemona*, the ship which, in conjunction with another tug, she was towing, had a pilot on board by compulsion of law. To this defence two answers have been made: First, that the immunity of the ship towed does not extend to the tug; secondly, that it is not proved by trustworthy evidence that this collision was solely occasioned by "the fault or incapacity" of the pilot "acting in charge" of the ship, and therefore that sect. 388 of the Merchant Shipping 1854 Act (17 & 18 Vict. c. 104) does not apply to this case.

First, as to the question of law, to use the language of Dr. Lushington in *The Protector* (1 William Rob. p. 57): "The great principle that a wrongdoer is responsible to the injured party, saving in the excepted cases, continues unaltered." The burden of proof, lies upon the party claiming the exemption. It is necessary to bear in mind the distinct relations subsisting between the ship and her tug and the ship and her pilot; perhaps a close attention to this distinction will remove the difficulty which the language of some of the earlier reported cases on this subject is supposed to have created. The root of the exemption in the case of compulsory pilotage is that the pilot is not the servant of the owner, but a servant forced upon him by the statute, whom he must employ, whether he likes it or not, but his relation to the tug is very different; the tug is his servant, voluntarily taken and employed by him for the occasion. The law, indeed, implies, when a tug is employed, a contract between the owner of the tug and the owner of the ship to the effect that the tug will obey directions from the ship and act as the servant of the shipowner; but this contract does not affect third parties, and the principle which exonerates the ship in the case of the pilot does not apply to the tug. It has been said, indeed, in various cases, that the tug and her tow constitute one vessel, but this has been said, and even then without exceptions, in the sense that the tug is bound by the rules of navigation applicable to steamers; in that sense it may be metaphysically, but not physically, that they are one vessel; the tug has a separate contract and a separate responsibility from the pilot. In short, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot. It has been contended, however, that my predecessor, Dr. Lushington, ruled in the case of *The Duke of Sussex* (1 W. Rob. 270; 1 Notes of Cases, 161) that the exemption of compulsory pilotage extended to the tug. I think that a careful examination of this case does not lead to that conclusion. The case was decided in 1841, when 1 Geo. 4, c. 125, sect. 55, was in force, in which the words "compulsory by law" were not inserted; and it appears from the more full and accurate report in the Notes of Cases that Dr. Lushington, following a decision of the Court of Exchequer, decided that if the pilot was taken on board, whether by compulsion or not, the owner of the ship was exonerated from responsibility. Dr. Lushington seems to have been much impressed by the mischievous consequences which would follow from holding that the tug was not as much under the control of the pilot as the tow, and the chief object of his judgment seems to have been to refute the contrary opinion. He appears to have had the same object in the subsequent decision in *The Christina* (3 W. Rob. 27, 6 Notes of Cases 4) delivered in 1848. Looking at all the circumstances of these decisions, I am of opinion that they do not furnish a precedent for the case now before me, and I am fortified in this opinion by a subsequent decision of the same learned judge in *The Ticonderoga*, A.D. 1857 (Swabey Ad. Rep. 215), the marginal note in the report of which case appears to me to be accurate: "The *Ticonderoga*, under a charter-party to the French Government, was towed by a steamer athwart the hawse of the *Melampus*. The *Ticonderoga* alleged that she was not liable for the damage done, as her charter-party obliged her to obey orders, and put herself in tow of the steamer. Held, that such obligation was no compulsion, so as to lay the ground for exemption from liability for the damage done; as it arose from a voluntary stipulation entered into by the owners themselves." Dr. Lushington said (p. 216): "I take the true meaning of the plea to be, that the *Ticonderoga* was in the service of the French Government; that the steamer was attached to her, and she was compelled, by the order of the Government, to employ her in all the proper duties which could attach to a steamer." He goes on to say, "The blame having been imputed to the steamer, let us consider whether the *Ticonderoga* can or cannot be made responsible for the damage which has been done. Now, that the steamer was engaged in the service of the *Ticonderoga*, and that the steamer took the *Ticonderoga* into mischief, there can be no doubt whatsoever. We must recollect that this is a proceeding *in rem*. Let us see what cases there are in which the court does not hold a vessel responsible for the damage done. There is one case, and one only, that I am aware of, and that is where a pilot is taken on board by compulsion. On what principle is the owner, in that case, relieved from paying the damage done? On the principle of compulsion — the principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament. Was this steamer taken by compulsion, or was it not? What species of compulsion is it which is averred on behalf of this American vessel that is to relieve her from the responsibility which the maritime law of the world attaches to the wrongdoer?—entering into a stipulation with the French Government. It is impossible to contend that, because a person has entered into a voluntary contract by which he is finally led into mischief, that that can relieve him from making good the damage which he has done." Upon the whole I am of opinion that the *Sussex* cannot be exonerated from the consequences of her wrongful act by reason of the *Desdemona* having on board a pilot by compulsion of law.

Having expressed my opinion on the question of

law, it is perhaps unnecessary to deal with the question of fact, but I think it right to state that my recollection of the opinion of the Trinity Masters, as well as a re-perusal of the evidence, lead me to the conclusion that the damage was as a matter of fact occasioned, not solely by the fault or incapacity of the pilot, but that the master and the tugs were, as Sir John Nicholl said in *The Girolamo* (3 Hagg. Ad. 176) *in pari delicto*, and that I do not think there is any trustworthy evidence that the pilot's orders were obeyed; therefore, upon both the grounds of law and fact, I pronounce judgment in favour of the *Mary*.

Solicitors for the owner of the tug *Sussex*, *Lowless* and *Co.*

Solicitors for the owners of the *Desdemona*, *Mercer* and *Mercer*.

Solicitors for the owners of the *Mary*, *Thomas Cooper* and *Co.*

May 21, *and July* 1, 1879.

(Before Sir R. J. PHILLIMORE.)

THE EMPUSA.

Limitation of liability—Collision—Freight pledged for a loan—Right of assignee of freight to claim against fund in court—Costs.

Where freight is pledged by an instrument in the nature of a bottomry bond and the ship is totally lost, whilst the freight is at risk, by a collision with another ship which admits and limits her liability under the Merchant Shipping Acts, paying the amount of her liability into court, the holders of the instrument are entitled to rank against the fund paid into court for the freight pledged to them.

Semble, that the bondholders are entitled to recover out of the fund in court applicable to the payment of damages for loss of freight the same proportion of the sum secured by the bond as the total sum apportioned in respect of loss of freight bears to the whole freight of the ship lost.

In a limitation suit the costs of deciding a point of law arising on the claims of two rival claimants to the same fund not allowed as against the plaintiff; each claimant ordered to pay his own costs. (*a*)

THE owners of the ship *Empusa*, by action in the Admiralty Division, limited their liability in respect of damages occasioned by a collision between that vessel and the *Commerce*, resulting in the total loss of the latter, and paid into court a sum to cover the loss of ship, cargo, and freight. A dispute having arisen as to the right to the damages for the loss of freight between the Cassa Marittima, as holders of an instrument pledging the *Commerce* and her freight for an advance made, and the owner of the *Commerce*, the said disputants stated the following

SPECIAL CASE.

On the 24th Aug. 1878 Elijah Nickerson, master of the British ship *Commerce*, owned by the defendant, Lindley, M. M. Willet, and then lying in the port of Philadelphia, requested from the agent of the Cassa Marittima of Genoa a loan of 598*l.* 1*s.* 4*d.* upon the security of the freight of the said ship to be earned on a voyage from Philadelphia to Antwerp.

The said loan was granted, and the said Elijah Nickerson signed the following instrument:

Fifteen days after arrival at the port of Antwerp, Belgium, or other intermediate port at which shall end the voyage of my vessel, denominated the ship *Commerce*, I promise to pay to the order of the Cassa Marittima of Genoa the sum of 598*l.* 1*s.* 4*d.*, sterling value, received as loan on freight for the last expenses necessary to the undertaking of the voyage from Philadelphia to Antwerp, Belgium, on the conditions of the regulations of the Cassa Marittima, of which I have received a copy, ship and freight being in accordance with such regulations liable for repayment, with priority over every other credit.

On the back of this instrument were printed the regulations of the said Cassa Marittima. A copy of the same is annexed hereto, and is to form part of this case.

The sum of 598*l.* 1*s.* 4*d.* secured by the said bill was not actually advanced in full by the Cassa Marittima to the said master, but such sum was and is the aggregate amount of the actual advance made by the Cassa Marittima to the said master, and the premium and interest on such actual advance, which premium was retained by the Cassa Marittima, pursuant to regulation 13 of the said regulations.

The said loan was duly made, and the *Commerce* sailed in due course on her destined voyage from Philadelphia to Antwerp, but on the 26th Sept., while off Hastings, in the English Channel, the *Commerce* was run into and sunk by the steamship *Empusa*, and with her cargo and freight was totally lost.

The plaintiffs, who are owners of the steamship *Empusa*, admitted their liability for the damages occasioned by the said collision, and brought this suit to limit such liability in the manner provided by the statute in that behalf, and obtained a decree therein on payment into court of the amount of their statutory liability and all claims in respect of the loss or damage occasioned by the said collision were referred to the registrar and merchants to report thereon.

Amongst other claims the defendants, the owners of the *Commerce*, claimed the sum of 2148*l.* 13*s.* 6*d.* as damages for the loss of the freight, to be earned by the said ship on the said voyage from Philadelphia to Antwerp, and were allowed the sum of 2088*l.* in respect of such freight, being the amount of such freight less the expenses of completing the voyage.

(*a*) Since the decision on this point, the case of the s.s. *Ponce*, decided by the judge at chambers, has laid down the practice even more clearly. The owners of the *Ponce*, having been condemned in the damages caused by a collision with another steamer, limited their liability to 8*l.* per ton, and took the usual proceedings for the settlement of claims in the Admiralty District Registry at Liverpool. The claims on part of the owners of the plaintiffs' ship and her cargo greatly exceeded the amount for which the defendants were liable, and the latter took no steps to dispute the items claimed, leaving the registrar and merchants to deal with them. The owners of cargo, however, appeared by solicitor before the registrar and merchants and disputed several items in the claim of the shipowners, who also appeared by solicitor in support of their claim; in the result the claim of the shipowner was considerably reduced. The costs of this attendance were considerable, including costs of copies of documents, attendances, &c.; and the respective solicitors for the plaintiffs the shipowners and for the plaintiffs the owners of cargo contended that they were entitled to recover these costs from the owners of the s.s. *Ponce* as part of the necessary costs of establishing their respective claims, relying upon *The Expert* (3 Asp. Mar. Law Cas. 381). The district registrar taxed the costs *de bene esse*, but referred the question of the liability of the defendants for the costs of settling the disputed items of the claims to the judge. On Dec. 2, 1879, the judge in chambers decided that the defendants were not liable for such costs.—ED.

The Cassa Marittima of Genoa also claimed the sum of 598*l.* 1*s.* 4*d.* as the damages they had sustained by reason of the loss of the freight, which was pledged to them as security for the said advance, and their claim was disallowed by the registrar on the ground, among others, that the owner of the ship was the only person who could recover in respect of the freight, and that the Cassa Marittima were not entitled to claim in competition with the owners of the *Commerce*, that vessel having been lost.

The Cassa Marittima of Genoa contend that they are entitled to prove for the loss of the freight so far as it was pledged to them, and that the defendants are not entitled to recover as part of their damages the freight, which would have to be paid to the Cassa Marittima if the *Commerce* had arrived at Antwerp, and that the said freight, having been allowed by the registrar as part of the claim of defendants, the owners of the *Commerce*, such owners ought to hold and receive the same as trustees for the Cassa Marittima, and are under an obligation to pay a proportion thereof to the said Cassa Marittima, or to allow the Cassa Marittima to receive the same out of court.

The questions for the opinion of the court are:

1. Whether the Cassa Marittima as against the owners of the *Commerce* is entitled to prove against the fund paid into court by the plaintiff for the said sum of 598*l.* 1*s.* 4*d.*, as damages occasioned in respect of the said collision.

2. Whether if the Cassa Marittima are not entitled to prove for the said sum as damages against the fund paid into court by the plaintiffs, they are entitled as against the defendants, the owners of the *Commerce*, to receive payment of the said sum out of court, or to an order that the said defendants, out of the moneys recovered by them as damages in respect of the loss of the said freight, should pay to the said Cassa Marittima the said sum for which the freight was pledged.

3. Or, in the alternative, that the Cassa Marittima are entitled to receive out of the fund in court applicable to the payment of damages for loss of freight, or from the defendants, the owners of the *Commerce*, the same proportions of the sum of 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the said ship.

The rules above referred to as being indorsed on the back of the instrument were as follows:

CASSA MARITTIMA.

GENOA.

Rules for Loans on Freight.

The loans which the Cassa Marittima agree to make on freight must be subject to the following rules:

1. Any owner desirous to obtain a loan on freight from the Cassa Marittima must make his request in accordance with the printed form which will be given him for the purpose

The form will indicate

a. The build, name, and tonnage of the vessel.
b. The port in which she is lying, and where and how insured.
c. The voyage she is about to make.
d. The amount of the freight upon which the loan is asked.
e. The amount of loan asked for.
f. The signature of owner or captain.

2. The board of direction authorised by two delegated administrators, according to Article 28 in the statute, accept or decline the demand.

3. The loan can never exceed a third of the whole freight the vessel may make.

4. The owner or the captain, before he can obtain a loan, must produce the bills of lading, signed by the shipper, in proof of not having received any previous advances on the freight.

5. The loan must be repaid within fifteen days after the arrival of the ship in the port to which she is bound, or wherever the voyage may terminate, and the freight and vessel will be liable to the repayment of the loan, with priority over every other credit.

6. In the event of the vessel on arrival at the port of destination being ordered by the shipper of the cargo to any other port, the amount of the loan must be repaid to the agents of the Cassa Marittima, and a further loan may be asked, which the agents have power to grant or decline.

7. Any captain leaving a port in which he has to repay a loan without having done so will be subject to a fine of 30 per cent. upon the sum due, besides being liable for all trouble and expenses caused to the Cassa thereby.

8. If the loan be not repaid when it falls due, as fixed according to Article 7, the Cassa will proceed to enforce payment, and will have the right to exact interest at the rate of 8 per cent. per annum until the payment is made.

9. A receipt will be given by the captain or owner when the loan is made, signed in accordance with the above rules, or with any others that may be established.

10. In the case of ships abroad, when the owner has not time to obtain the sanction of the directors of the Cassa Marittima to a loan on freight, agents are authorised to grant the loan at the request of the captain, always subject to these regulations.

11. Loans shall always be made in gold, and shall be repaid in gold at the current rate of Exchange on London at the port where the vessel discharges, or to the Cassa Marittima in Genoa.

12. Loans shall always be exempt from any contribution to either general or particular average.

13. The premium and interest on the sums granted in loan on freight according to the list must be always retained on the loan itself, and in case of a total loss, if there be no payment of freight, either total or partial, the sums received as loan shall not be paid back except that which has been taken beyond the third part of the freight.

14. Ships discharging in Italian and Adriatic ports shall repay the loan at the official rate current for sight bills.

15. The owner or captain shall not take any other advances upon the same freight at the port of loading, or in such case hold themselves bound to return the present loan, though the vessel be lost.

16. The captain shall give immediate notice on arrival at port of discharge to the Cassa Marittima in Genoa, or to their agents at the nearest port, incurring otherwise the penalty of 10 per cent. on the amount of the loan.

May 21.—*Myburgh*, for the Cassa Marittima.—This is in effect a bottomry bond, and the holders thereof are entitled to have paid to them out of the damages for loss of freight a proportion of the amount. A bottomry bond is *primâ facie* not payable in case of the loss of the ship on which it is given if the ship is lost; but if the loss is occasioned by any wrongful act of the shipowner as deviation the bond is payable in spite of loss, and this shows that loss does not in all cases terminate the liability under a bond. Here the bond, if terminated at all, is at an end because of the wrongful act of a third party who has made compensation to the owners for the loss sustained. The bond is terminated through no fault of the bondholder, and a fund representing the freight is in existence; hence he ought to be paid:

The Dante, 2 W. Rob. 427.

The holders of the bond might even have proceeded for the damage done in the name of the owners of the *Commerce* and have recovered the loss sustained by them. The owners of the *Com-*

merce have a legal interest in the freight, but they can only claim as trustees for the bondholders, so far as the freight is pledged by the bond. The liability of the shipowners on the bond may have ceased, but the force of the bond as an assignment of freight remains. The shipowners have recovered their freight, and must hence pay the bond, or such proportion of the amount secured as the total sum recovered for loss of freight bears to the whole freight of ship.

E. C. Clarkson for the owners of the *Commerce*.—The question turns on the nature of bottomry bonds. The bondholders receive a premium (and in this case they have already retained it out of the sum advanced) in the express condition of taking the risk of loss. The ship and freight have been lost, the bond never became payable, and the conditions under which the bondholders are entitled to claim have never been fulfilled. The owners of the *Commerce* have in fact recovered no freight, only damages for the loss thereof. The bondholders cannot be heard as against the owners of the *Commerce* to say that they can recover on this bond, which by the very terms of it is at an end.

Myburgh in reply. The owners of the *Commerce*, having recovered damages for loss of freight, are precluded from saying that no sum has become payable in respect of freight; if it is once admitted that such a sum is due, we are entitled to enforce our lien on it. If the owners of the *Commerce* are right in their contention, underwriters would be precluded from recouping themselves against wrongdoers for payments made in respect of losses sustained: but they are entitled to proceed in the name of the assured; so ought a bondholder to be able to recover.

Sir R. PHILLIMORE.—This is a case for which there is no legal precedent, but it is one which is to be decided on general principles of equity and the circumstances of the case. Taking into consideration the 13th article of the regulations of the Cassa Marittima, providing for the event of a total loss, I decide that the Cassa Marittima is entitled to receive out of the fund in court applicable to the payment of damages for loss of freight, the same proportion of the sum of 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the said ship. This amount will be ascertained by the registrar. I direct the costs to be costs in the cause.

July 1.—*W. G. F. Phillimore* moved, on behalf of the owners of the *Empusa*, the plaintiffs in the limitation action, to rescind or vary the order as to the payment of costs. The effect of the order as it stands will be to make the plaintiffs pay all the costs of this special case, which is a dispute between two claimants outside the purposes of the action. There is in this case adverse litigation, and in such cases the costs have never been borne by the plaintiff in the limitation action:

The City of Buenos Ayres, 25 L. T. Rep. N. S. 672; 1 Asp. Mar. Law Cas. 169, 182;
The African Steamship Company v. *Swanzy*, 25 L. J. Ch. 870.

E. C. Clarkson, for the owners of the *Commerce*.—I cannot contend that where claimants against a fund enter into an improper or excessive contest they are entitled to their costs. But this is a question *primæ impressionis*, and it arises directly out of the act of the wrongdoer, who by his act has occasioned the necessity for having the question decided; and the costs of so deciding should be borne by the plaintiffs. The cases cited only go to the effect that if there were an improper litigation it might make a difference.

Sir R. PHILLIMORE.—I think my former order was wrong as to the costs. It would be very difficult to draw a line of demarcation, and to say in which cases proper and in which improper litigation has arisen between rival claimants. The circumstances of each case would have to be considered. This case, however, is not a case in which the costs ought to be allowed as against the plaintiffs. The costs here incurred were costs arising out of a peculiar point of law decided as between the claimants, and this is not a case in which the plaintiffs ought to be called upon to pay costs. I shall vary the order by directing each of the claimants to pay his own costs. The plaintiff is entitled to his costs of this application against the *Commerce*.

Solicitors for the plaintiffs, *Lawless* and *Co.*
Solicitors for the *Commerce*, *Clarkson* and *Co.*
Solicitors for the Cassa Marittima, *Cooper* and *Co.*

Nov. 11 *and* 25, 1879.

(Before Sir R. PHILLIMORE.)

THE CITY OF MECCA.

Jurisdiction — Practice — Foreign Judgment — Comity of nations—Maritime lien—Suit in rem—Arrest of ship.

The Admiralty Division of the High Court of Justice has jurisdiction to entertain a suit in rem to enforce a judgment of a foreign court exercising Admiralty jurisdiction in a case where the original suit was to enforce a maritime lien.

The jurisdiction of the Admiralty Division of the High Court of Justice is the same as that formerly exercised by the High Court of Admiralty in matters in which it had jurisdiction by the comity of nations as a court administering civil law.

THIS was a motion by the defendants to set aside the writ of summons and subsequent proceedings by the plaintiffs, and the bail-bond executed by the defendants, and to discharge the bail and condemn the plaintiff in the costs.

The action arose out of a collision which occurred between the British Steamer *City of Mecca*, whose owners resided in Scotland, and the Portuguese steamer *Empreza Insulana de Navegacano*, off the coast of Portugal, in which the Portuguese steamer was sunk, and the *City of Mecca* so much damaged that she had to put into Lisbon. Whilst at Lisbon, an action for the damages sustained from the loss of the Portuguese steamer was instituted before the Tribunal of Commerce, in which the *City of Mecca* was found alone to blame for the collision. This judgment was affirmed by the Courts o Appeal in Portugal. Subsequently, on the *City of Mecca* arriving in this country, the plaintiffs served a writ *in rem* on her in the ordinary way (S. C. J. Act 1875. sc. 1, Order IX., r. 10; R. S. C. Dec. 1875, r. 6 and App. A.), bearing the following indorsement of claim:

The plaintiffs' claim is upon a judgment of the Tribunal of Commerce of Lisbon, by which the court determined that the *City of Mecca* was alone to blame for a colli-

sion, and ordered the defendants to pay to the plaintiffs the loss sustained by them by reason of the said collision, and the plaintiffs claim 25,000*l.*

The defendants appeared under protest and gave bail, but before delivery of any petition on protest they served the plaintiffs with notice of motion to set aside all proceedings "on the ground of the writ having been improperly issued."

Nov. 11.—The motion now came on in court.

Butt, Q.C. and *Clarkson* for defendants.—The writ in this case and all subsequent proceedings must be set aside. The ship proceeded against here *in rem* was in collision with a Portuguese vessel, and judgment in a Portuguese court was given against the owners of the *City of Mecca*; that is, it was a suit *in personam* and not *in rem*. That judgment ordered the owners of the *City of Mecca* to pay a certain sum of money, and now the plaintiffs endeavour to recover that sum of money by a suit *in rem* against the ship in this country, the owners not being resident here. The indorsement on the writ states that the "claim" for 25,000*l.* "is upon a judgment of the Tribunal of Commerce of Lisbon, by which the court determined that the *City of Mecca* was alone to blame for a collision, and ordered the defendants to pay to the plaintiffs the loss sustained by them by reason of the said collision." There can be no dispute as to the right which a person successful in a suit in a foreign court acquires. He is entitled to recover the amount of the judgment as a debt; in the technical language of the courts, it was recovered in this country by an action of *assumpsit*. And at present the only question to be decided by this court is as to the means of procedure proper to enforce a foreign judgment. Before the passing of the Judicature Acts this court would have had no jurisdiction at all in such an action—an action of *assumpsit*. But admitting, for the present at all events, that now as a branch of the High Court of Justice it has acquired a right co-ordinate with that of the other divisions to entertain such an action—subject to the power of transfer—yet it has not acquired any right to entertain such an action by the institution of a suit *in rem*. An action of *assumpsit* is a purely personal action, and the basis of a suit *in rem* is maritime lien, extended by recent statutes to certain other matters, not giving a strictly maritime lien; but an action on a foreign judgment is not one of the matters to which it is extended:

Russell v. *Smyth*, 9 M. & W. 810;
Williams v. *Jones*, 13 M. & W. 633;
Goddard v. *Gray*, L. Rep. 6 Q.B. 139; 24 L. T. Rep. N. S. 89;
Schibsby v. *Westenholz*, L. Rep. 6 Q.B. 155; 24 L. T. Rep. N. S. 93.

In the last of those cases, Blackburn, J. sums up the substance of those proceedings as follows: "It is unnecessary to repeat again what we have already said in *Goddard* v. *Gray* (*ubi sup.*). We think that, for the reasons there given the true principle on which the judgments of foreign Tribunals are enforced in England is that stated by Parke, B. in *Russell* v. *Smyth* (*ubi sup.*), and again repeated by him in *Williams* v. *Jones* (*ubi sup.*), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce." This all speaks of a personal duty by the defendant, not of a lien which travels with the ship; and that view is taken also in the following paragraph: "In the event of a foreign judgment being in favour of the plaintiff, and made the foundation of his suit in England, as he cannot issue, as has been seen, execution upon it here, he must enforce it by bringing a fresh action, technically called an action of *assumpsit*, for the recovery of what is due to him under the judgment:" (Phil. Inter. Law, 2nd edit., vol. 4, p. 739, s. 955.) I do not dispute their right to institute a suit *in rem* against the ship, but that suit must be for the original cause of action, which would be then reheard on the merits, for "It is important to observe that the foreign judgment does not operate as a merger of the original ground of action:" (Phil. Inter. Law, 2nd edit., vol. 4, p. 739, s. 955.) There is no more right in principle in instituting a suit *in rem* against this ship on that foreign judgment than there would be against any other property—any other ship—of the defendants which might chance to be in England, and there is no precedent for such a proceeding.

Webster, Q.C. (with him Sir *Edmund Hornby* and *Gainsford Bruce*) for the plaintiffs.—It must, for the present at all events, be inferred that the judgment of the foreign court was a judgment in a suit *in rem*. It is not the defendants who are found to blame for the collision, but their ship, and the judgment condemned the defendants and the *City of Mecca* in the damages. It is therefore a judgment to enforce a maritime lien—the lien for damage by collision—and it cannot be said that a Court of Admiralty cannot enforce such a judgment by a suit *in rem*. Such a judgment is binding on every court in this kingdom. [Sir R. PHILLIMORE.—May it not be that it is binding, as conclusive evidence, on all courts, but that nevertheless the courts are not bound to enforce it as a judgment?] In any division of the High Court of Justice an action might be sustained on such a judgment. But the Court of Admiralty had a wider jurisdiction over certain causes of action arising on the high seas. Before the Judicature Acts were passed, if a collision occurred, and one of the ships, of which no owner resided in England, came to this country, a common law court would not allow a writ to issue; but the plaintiffs coming to this court would get a warrant and citation *in rem* against the ship. Now this division, being a branch of the High Court, has all the jurisdiction of that court, and therefore can entertain a suit on a foreign judgment, and none the less when that foreign judgment is to enforce a maritime lien. The *res* has come within the jurisdiction, and the *res* is subject to a maritime lien, and there is a judgment deciding the fact. If it has not previously been done, it is because before the Judicature Acts the Court of Admiralty did not exercise a jurisdiction over foreign judgments; but now that it has an undoubted jurisdiction in the matter of foreign judgments, what reasons can there be that, finding a foreign judgment binding against the *res*, it should not enforce it against the *res*? In *Castrique* v. *Imrie* (L. Rep. 4 H. L. 414; 23 L. T. Rep. N.S. 48) it is laid down by Lord Chelmsford that a judgment *in rem* of a foreign tribunal cannot be impeached save "on the ground of fraud, or as

being contrary to natural justice;" and the same principle is clearly stated in the notes to *The Duchess of Kingston's case* (Smith's Leading Cases, vol. 2, 7th edit., p. 828): "The sentence of a foreign Court of Admiralty of competent jurisdiction pronounced *in rem*, is conclusive against all the world, as to the existence of the ground on which the court professes to decide." If then this court can entertain proceedings to enforce a maritime lien, it must be by its own process in cases of maritime lien; *i.e.*, by proceedings *in rem*. If we had instituted a cause of damage *in rem*, in the ordinary way, no objection could have been made to our subsequently in our statement of claim pleading the foreign judgment. The fact that we state it in the writ and do not wait for the statement of claim, cannot alter the rights of the parties. The final judgment of a foreign court is conclusive between the parties on the merits, and no matter can be pleaded to it which might have been a defence on the merits in the original action:

Bullen & Leake, 3rd edit. p. 623, notes.

The suit is the same, whether the process is *in rem* or *in personam*, and if the owners of the *City of Mecca* pass through the kingdom, they can be sued there; why then cannot the *res*, which is here, and liable to the process of the court, be sued?

Sir *Edmund Hornby*.—The court will enforce a foreign judgment *in rem* by its ordinary machinery, but here it has direct authority to entertain a suit *in rem*:

The Bold Buccleugh, 3 W. Rob.; 7 Moo. P. C. C. 267; 19 L. T. Rep. N. S. 235;
The Young Mechanic, 2 Curtis (Amr.) 404;
Taylor v. *Carryl*, 20 Howard (Amer.) 583;
2 Parsons on Shipping, edit. of 1859, p. 544, note 3.

In the case of *Ewer* v. *Jones* (2 Raym. 934), Holt, C. J. says: "The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here, and proceeding after the same law, and no prohibition, because the temporal courts proceed by a due law, and we must give credit to the sentence." The *raison d'être* of the jurisdiction *in rem* is that the *res* comes within the jurisdiction of the court, whilst the person does not: (Brown on Adm. Law, p. 120.)

Butt, Q.C. in reply.—No precedent has been cited for this process, and therefore I may say there is no authority for it. *Castrique* v. *Imrie* (*ubi sup.*) is not in point; that was not an action on a foreign judgment at all, but an action in trover, to which a foreign judgment was incidental. It may be that, if the plaintiffs bring an ordinary suit *in rem*, they may give this judgment in evidence; but that is not the question, they have brought the action *in rem* on the judgment, and that they are not entitled to do. The only jurisdiction this court has over an action on a foreign judgment is that which it has acquired as a branch of the High Court of Justice, and that must be exercised in the same way as any other division of the High Court would exercise it—by an action of *assumpsit*—in which the writ must be served on the defendant in the ordinary way; to institute such a suit *in rem* by service of the writ on the ship is without precedent, and contrary to principle.

Cur. adv. vult.

Nov. 25.—Sir R. PHILLIMORE.—This is a case in which the representatives of the steamship *Empreza Insulana de Navegacao* have brought an action *in rem* against the steamship *City of Mecca*. In the writ of summons it is stated that the plaintiffs' claim is upon a judgment of the Tribunal of Commerce of Lisbon, by which the court determined that the *City of Mecca* was alone to blame for a collision, and ordered the defendants to pay to the plaintiffs the loss sustained by them by reason of the said collision, and that the plaintiffs claim 25,000*l*. In the affidavit to institute this suit it is stated by the solicitor for the plaintiffs, that he is informed that after the said collision the *City of Mecca* put into Lisbon, and that proceedings were there instituted against the said steamship, which subsequently left Lisbon without giving security in the said proceedings; also that the owners of the *City of Mecca* appeared and contested the said proceedings, and that the decree of the Tribunal of Commerce was confirmed by the final Court of Appeal in Portugal. A warrant of arrest was taken out in this court by the plaintiffs, and the vessel has been released on bail. A motion has been made by the owners of the *City of Mecca* to set aside the writ of summons issued in this action, and all subsequent proceedings on the part of the plaintiffs; also the bail bond executed on behalf of the defendants in this action, and that the bail may be discharged, and that the plaintiffs be condemned in the costs of the action on the ground of the writ having been improperly issued.

The question to be decided is whether this court can and ought to enforce the sentence of a foreign Admiralty Court by a proceeding *in rem*? It appears to me expedient to make two preliminary observations. First, I express my opinion that, whatever authority upon this subject was incident to this court before the Judicature Act belongs to it now; secondly, that this court has always exercised a jurisdiction founded on international comity with respect to the execution of the sentences of foreign Admiralty Courts.

I proceed to consider the authorities on this subject in their chronological order, as it is important to show that the duty of the Admiralty Court in England to enforce the decree of a foreign Admiralty Court has been steadily recognised for a great number of years. *Weir's case* (King's Bench, 5th James 1st A.D. 1608; Rolle's Abridgment, 530 and Viner's Abridgment, vol. 6, 513): "If a Friesslander sues an Englishman before the governor in Friesland, and recovers a certain sum, and the Englishman, not having enough to pay for it, comes to England, whereupon the governor sent his *lettres missives* to England, asking all magistrates of that kingdom to cause execution of the said judgment: Le judge del Admiraltie poet executer c'es judgment per imprisonment del partie, et il ne serra deliver per le common ley; car ceoest per la ley de nations que le justice d'un nation serra aidant al justice d'auter nation, et l'un d'executer le judgement de l'auter, et la ley d'Engletare prist notice de c'est ley et le judge del Admiraltie est le proper magistrate pur c'est purpose car il solment a l'execution del ley civill deins c'est relme." This case is referred to in Molloy "De Jure Marit." (book., 3 c. 9, s. 9). The next authority is that of Sir Leoline Jenkins, judge of the High Court of Admiralty in the reign of

Charles II. This authority is one to which very great weight has always been ascribed by Lord Stowell and other eminent civilians, as both witnessing to the practice of the courts administering the civil law and setting forth the principle upon which that practice was founded. Sir Leoline Jenkins (Wynne's Life, vol. 2, p. 762), writing in 1666 A.D., says of the practice of civil courts that "they ordinarily intermeddle not with or inspect the merits of those sentences that are given without the limits of their jurisdiction. 'Tis a ruled case," he says, "that one judge must not refuse upon letters of request to execute the sentence of another foreign judge when the persons or goods sentenced against are within his jurisdiction; and if he do his superior must compel him to it; else it is a sufficient ground for reprisals against the territory." The next authority is only four years later. It is the case of *Jurado* v. *Gregory* (1 Vent. 32, King's Bench, 21 Charles II., A.D. 1670). In this case the plaintiff had sued in the English Admiralty for enforcement of a sentence given in a Spanish admiralty court. A prohibition was granted by the King's Bench, but only on the grounds that the sentence of the Spanish court was not complete, but was only an award, and could not therefore be sued upon, and the original contract being one made on land ought not to be sued upon in the Admiralty. The following proposition was advanced in argument by Finch, the Solicitor-General, and agreed to by the court: "Where sentence is obtained in a foreign Admiralty, one may libel for execution thereof here, because all the Courts of Admiralty in Europe are governed by the civil law, and are to be assistant one to another, though the matter were not originally determinable in our Court of Admiralty;" and *Wier's case*, before referred to, was cited. The next authority occurred in the year 1704. It is the case of *Ewer* v. *Jones* (2 Lord Raymond, p. 935). Holt, C.J., in giving judgment, says: "The sentence of a civil law court in a foreign realm shall be executed in a court of the same nature here, and proceeding after the same law, and no prohibition, because the temporal courts proceed by a due law, and we must give credit to the sentence, as it was adjudged in the time of Charles II. in *Hughes* v. *Cornelius*." To these authorities may now be added a decision of the Supreme Court of the United States of America. In *Penhallon* v. *Doane's Administrators*, decided A.D. 1795 (3 Dallas 54) it was said by Iredell, J.: "It was clearly shown at the bar," referring to page 74, I presume, "that a Court of Admiralty in one nation can carry into effect the determination of the Court of Admiralty in another;" and again by Cushing, J. at page 118, "That Courts of Admiralty can carry into execution decrees of foreign admiralties as seems to be settled law and usage. Dr. Browne, in his "Compendious View of Civil and Admiralty Law," a work dedicated to Lord Stowell, says (edition of 1802, vol. 2, p. 120): "The last branch of Admiralty jurisdiction I shall mention is the enforcing the judgments of foreign courts;" and proceeds to cite the opinion of Sir Leoline Jenkins, which I have before referred to. I find in the American work by Mr. Dunlop, entitled "Admiralty Practice," p. 68, A.D. 1850: "A Court of Admiralty of one country can carry into effect the determination of a Court of Admiralty in another, as well as its own judgments." In Parsons' Maritime Law, vol. 2, p. 541, also the work of an American writer of eminence, it is laid down that Admiralty Courts in different countries "sometimes enforce each other's decrees, or complete in one country what is done in another."

A consideration of these authorities, and of the principles upon which they rest, leads me to the conclusion that it is the duty of one Admiralty Court—a duty arising from international comity—to enforce the decree of another upon a subject over which the latter had jurisdiction.

I do not think it necessary to enter into a consideration of all the cases decided by the common law courts as to the effect of foreign judgments in this country. The general principle of recognising and giving effect to such judgments is now admitted by these courts. I do not indeed understand it to be denied by Mr. Butt that the Admiralty Court has power to execute the sentence of a foreign Admiralty Court. His objection is as to the mode by which it is sought to enforce it. He contends that a proceeding *in rem* can only be instituted where there is a maritime lien, and that the foreign judgment does not confer such a lien. I am of opinion that it is the duty of this court to act as auxiliary to the Portuguese Admiralty Court, and to complete the execution of justice which, owing to the departure of the ship, was necessarily left unfinished by that court; in other words, it is my duty to place this English court in the position of the Portuguese court after its sentence had been given against the defendants.

With respect to the motion now before me, I must take the facts from the indorsement on the writ of summons and the affidavit in support of it. From these I gather that there was substantially a judgment *in rem* in the Portuguese court. There is no doubt that a collision, such as there was in this case, creates a maritime lien. In support of this it is unnecessary to cite authorities. With regard to the further proposition that a proceeding for the enforcement of a maritime lien is a proceeding *in rem*, the remarks of Lord Chelmsford in *Castrique* v. *Imrie* (L. Rep. 4 E. & Ir. App. 447; 23 L. T. Rep. N. S. 38) appear applicable: "This order," he says, "for the sale of the ship, whatever may be thought of the original proceeding, appears to be a judgment *in rem*. Without, however, looking to this ultimate order, I think that the original proceeding being for the purpose of enforcing a maritime lien, which by the law of all foreign codes founded on the civil law exists for money advanced for repairs and necessaries on a voyage, was a proceeding *in rem*." This court is now called upon to be *aidant* to the enforcement of a judgment *in rem* given by the Portuguese court.

With respect to the objection that no direct precedents have been cited in support of the course taken by the plaintiffs, it must be observed that, until a recent period, there were no reports of the courts exercising jurisdiction in accordance with the civil law, that is, of the Ecclesiastical and Admiralty Courts; moreover it is to be remembered that, speaking generally, any court which exercises a jurisdiction *in rem* has the *res*, or some substitute for it in the shape of a security, within its reach, and the wrongdoer is seldom able to evade compliance with the order of the court. This court, on failure of the owners to pay for the damage adjudged to be done by their ship, would arrest that ship, and enforce the judgment against the

res by sale. The occasion for the exercise of such a power of arrest seldom arises, though in a recent case, that of *The Troubadour*, in 1878 (not reported), the court directed the issue of a warrant after judgment for the purpose of enforcing payment of the award of salvage, and there have been several instances in which a ship has been arrested or re-arrested in consequence of the bail becoming insolvent. In fact, what the common law courts do indirectly by implying a contract the Admiralty Court does directly and without any such implication on the grounds of international comity. It is clearly for the interests of justice that this court should exercise the jurisdiction as prayed, and having its hand upon the *res* should not take it off until the sentence be executed. Otherwise the wrongdoer might remove his ship out of this jurisdiction, and by keeping out of Portuguese waters defeat the just rights of the party who has suffered the wrong. It is to be borne in mind that this ship, the *City of Mecca*, is liable for the damage done by her to the plaintiff's property in a sense and in a manner that no other ship of the same owner would be liable.

Upon the whole I do not see why if the Admiralty Court might ever have enforced a foreign judgment—and the authorities are ample on this point—it may not enforce that judgment against the ship, and give that remedy *in rem* which is one of the especial advantages incident to the jurisdiction of the Court of Admiralty. I reject this motion without costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Gellatly* and *Co*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by W. Appleton, Esq., Barrister-at-Law.

Tuesday, June 24, 1879.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Wilkinson *v.* Alston.

Sale of ship—Introduction of purchaser—Commission—Introduction to agent of purchaser.

Defendant agreed that if plaintiff should be the means of introducing a person who should become purchaser of a ship of defendant's he should receive a commission on the purchase money.

In Feb. 1876 *plaintiff introduced one Turpin, who had been recommended by one White, to buy, and it was agreed between plaintiff and defendant that, if a sale was effected with Turpin, White should share plaintiff's commission. No sale was effected.*

In March White mentioned the ship to one Wise. Plaintiff informed defendant, and proposed he should see Wise, but no steps were taken, and Wise did not entertain White's proposal. Subsequently, on the 13*th March, defendant wrote to plaintiff that it was no use doing any more until the ship returned home. Plaintiff thereupon took no further steps. In May Wise wrote, as broker, direct to defendant and introduced a principal, who became purchaser. Plaintiff thereupon claimed his commission.*

The jury having found (1) *that plaintiff was authorised to find a purchaser;* (2) *that Wise was induced to enter upon the negotiations by information received from White:*

Held on appeal (reversing the decision of Lush, J.), that Wise, being the agent of the purchaser, and having acted upon information received from White, plaintiff was entitled to receive his commission, and that even if the letter of 13*th March amounted to a revocation of plaintiff's authority it was then too late.*

This was an action for commission on the sale of a ship, tried before Lush, J. and a jury at the Guildhall during the Trinity Sittings 1878.

The facts of the case and the arguments are sufficiently stated in the judgment of the learned judge in the court below, which was delivered, after consideration, on 30th Nov., and was as follows:

Lush, J.—This action is in its circumstances peculiar. It was set down for trial in February last before the Lord Chief Justice, when the jury were unable to agree upon the questions submitted to them. It was again tried before me at Guildhall in June last, when the jury answered the two questions which I put to them, and I then reserved for further consideration the question what judgment ought to be given upon these findings. The case was argued on the 5th day of this month, and I am now to deliver my judgment upon the whole case. Most of the material facts appear upon the correspondence. The action is brought for commission upon the sale of the defendant's interest in a vessel called the *Madras*, that interest being 37-64ths. The defendant was the owner or part owner of several vessels, and amongst them the *Stamford* and the *Madras*. The plaintiff was a shipbroker. He was on terms of intimacy with the defendant, and for a portion of the time, when the transaction in question took place, namely, from March to June 1876, both parties occupied the same office. The plaintiff having become aware in August 1875 of the defendant's intention to retire from business, began to look out for purchasers, with a view of earning a commission, and the defendant, though he did not put the ships in his hands or give him any authority to sell, agreed to pay a stipulated commission if he should be the means of introducing a person who should actually become the purchaser. The *Stamford* was sold by his instrumentality, and the stipulated commission was paid him. The plaintiff named several persons as likely to become purchasers of the *Madras*, but none of them came to terms. The following letters, amongst others, passed between him and the defendant:—"24th Feb. 1876, plaintiff to defendant.—Mr. James Turpin, of North Shields, has gone over to Stockton to see Mr. Blair with reference to the engine of the *Madras*, and as he knows the price you want it rather looks as though he meant business. He is a friend of Mr. White, who has recommended him strongly to buy. In case business should result, please to reserve the nominal 2½ per cent. for me and White." "25th Feb., defendant to plaintiff.—There is no chance of business herein if White is to finger one cent of it. I would keep the boat for

years before I would allow one farthing to go into his pocket out of the sale of her. If you can bring Turpin to business I will arrange for a commission for you out of it, 1 per cent. say." "2nd March, plaintiff to defendant. — I fear Master White won't be licked off so easily. If I get 1 per cent. and he ditto, I don't think either of us will take any harm, You need not care who you do your business through so long as you get your price. Practical money-making people like you should not allow theoretical trifles to stand in your way." "4th March, 1876, defendant to plaintiff.—I agree with you, and think if you can bring this to business I will be able to swallow my annoyance with White, and pay the 2 per cent." The negotiation with Turpin also went off; no other person was afterwards mentioned by the plaintiff. On the 9th March, a Mr. Wise, jun., a member of the firm of Wise and Son, shipowners, of Hartlepool, called upon White in reference to another vessel called the *Northumberland*, belonging to another owner, which Wise, jun., contemplated buying in conjunction with one Learoyd, when White mentioned to Wise that if that purchase went off he had another vessel, the *Madras*, which he could equally recommend. Wise took no notice of this conversation, and on the 10th March, White, in a letter to the firm relating to the *Northumberland*, referred to his mention of the *Madras* to the son, and inclosed particulars of her, advising, "Please keep this matter private. On the 11th, Wise and Son answered the letter as far as it treated of the *Northumberland*, but took no notice of the *Madras*. On the same day the plaintiff wrote to defendant: "Young Wise was up here on business with White; the latter named the *Madras* to him. Wise thought 25,000*l.*, but White told him that there was not a shadow of a chance under 28,000*l.*, and that it was useless approaching you at less. He promised to crack the matter over with his father when he returned. They have 5000*l.* or 6000*l.* cash ready for any investment they may go into. Adams, of Adams and Co., Aberdeen, entertain the *Madras*." "If you are at Aberdeen or West Hartlepool, you know whether it would be advisable to see them. If you do, keep us a commission. In case of need I will get White to let you down easy, as I want to see business result, and would not myself be hard." It does not appear that Wise ever entertained the proposal to purchase the *Madras*, nor did the defendant go to Aberdeen or Hartlepool, or have any communication on the subject with either Wise or Adams. But on the 13th March he wrote to the plaintiff as follows: "*Madras*.—There is no use doing anything herein until the return home. No one will buy a ship at sea unless they know her thoroughly, such as Portens and Senior." Portens and Senior were the persons who had bought the *Stamford*, and whom the plaintiff had named as probable buyers of the *Madras*, but whose treaty for that vessel had gone off. From the date of the last-mentioned letter no correspondence took place between the plaintiff and the defendant respecting the *Madras* until after the sale of the vessel, as hereinafter mentioned, and although the parties then occupied the same office, neither of them mentioned the subject of the *Madras* to the other, nor did the plaintiff after that letter take any further steps to find a purchaser. On the 18th March White wrote to Wise and Son that, as they had missed the *Northumberland*, he should be glad to hear whether they entertained the purchase of the *Madras*, &c., and on the 22nd April he wrote again: "The *Madras*, the management portion of which I proposed to you for sale, left Bombay some days since for the continent, and may be expected home about the middle of next month. I shall be glad to hear whether you are disposed to arrange any purchase subject to confirmation on inspection as already advised you. The management is exceptional, and the terms of payment very easy." No notice was taken of these letters by Wise and Son, nor was either the defendant or the plaintiff aware that White was in correspondence with them, or was taking any steps to sell the *Madras*. On the 25th April Wise, junior, wrote to the defendant: "I can introduce a buyer for 33-64ths *Madras* (s.s.). What will you accept?" 26th April; defendant to Wise: "I am favoured with your memorandum of to-day, and in reply my lowest price for 37-64ths of the *Madras* (my present interest) is at the rate of 28,000*l.* for the vessel, equal to 16,187*l.*½10*s.* for 37-64ths, payment on the basis of half cash and half at six months. The credit portion I would not object to extend over a longer period to an approved buyer. I would require security on the shares sold for any portion of the price on credit. Interest at the rate of 5 per cent. per annum would be charged on any credit beyond six months. Mr. Blair will tell you the condition of the vessel, and what she got in the Tyne in January last. I may mention for your guidance that I will not take one farthing less than the price named, so you need not bother with her if you cannot offer the price, as I refused in December last the same price, less 2½ per cent., and I can show you the offer if you like. *Madras* is at present on the way from Bombay to Marseilles, and I expect her in this country (all being well) in June. She is not yet chartered for Marseilles, and I might arrange to give delivery there, otherwise she would be sold on her arrival in this country, subject to her bottom and engines being found sound and in good order to the approval of Mr. Blair." This was accompanied with another letter marked "private," dated the same day, in which the defendant said: "I hand you offer of my interest in Madras, so that you may have a chance of working it. I have not put one farthing in to take off again, so you must be good enough to understand this. I cannot afford any commission off the figure named, so to give you some encouragement to work it I will, in the event of a sale, pay you the odd money as commission, say, 187*l.* 10*s.* With kind regards to Mr. Wise, sen., and his home circle, I am," &c." "7th May, Wise, jun., to defendant: I have your esteemed favour *re Madras*, and hope to give you a definite answer in a day or two." "30th May; Wise, jun., to defendant: You last wrote me on the 8th asking a bid against 16,000*l.* for 37-64ths of *Madras*, and now with terms I can get 15,000*l.*, or at the rate of 26,000*l.*, having made great exertions to get up this figure. There is 5000*l.* ready; the remainder will be wanted to stay on for two years at five per cent. He is a younger son of a wealthy parent, and it would be right. I have said nothing about half six months or this 200*l.* you would send me as commission. I have instructions from him to go to another boat where similar terms are offered failing your acceptance,

so beg your decision by 'wire.'" "1st of June; defendant to Wise, jun.: I was going from home the day when I sent my telegram to you, and on my return to-day I find yours in reply waiting me. I am very reluctant to concede the matter as to modification of cash payment, but if your client is such a good man I will accept 5000*l.* cash, and remainder spread over two years, bearing interest at 5 per cent. per annum. The instalments would be quarterly, so that there must be eight equal payments of the credit portion. Of course I would require to be secured, and I propose that I be registered owner of the shares and transfer them *pro rata* as the instalments are paid, granting a mutual trust deed, to be left in the hands, say, of E. Turnbull, embodying the conditions of sale, &c. This seems to me a suitable arrangement, and I have found it answer well in the case of the *Stamford*, on which vessel I had 52-64ths and sold them last January on similar condition. *Madras* is now on her way from Sulina to Antwerp. 37-64ths at 2760*l.* will be 15,609*l.* 7*s.* 6*d.* If you carry this through I will allow 159*l.* 7*s.* 6*d.* commission, not more. This will leave me only 15,450*l*, which will mean a heavy loss to me." "10th June; Wise, jun., to defendant: A very slight concession on your part will bring business. It is, first, this—that buyer does not wish to be bound to particular dates for payment, but to pay over the two years as may be convenient. You would be well enough off with the security and interest. If you will let me know that you agree to this, and that my commission is to be 200*l.*, I will disclose the principal, and business will be almost certain." Telegram, 13th June. Wise to defendant. "Learoyd, Huddersfield, give your price. Five down; remainder over two years; interest five. Wise acceptance. Can build, less money." Telegram, same day; defendant to Wise, jun., "I confirm sale of 37-64ths *Madras*, per my offer. Write you fully." And on the same day the defendant wrote, after referring to the telegram: "Your letter of the 10th came duly to hand, but it not being accepted I did not reply to it. But as your client and yourself have come to my terms the case is altered. As I understand the bargain, the price of 37-64ths at 27,000*l.* for the steamer *Madras* is 15,609*l.* 7*s.* 6*d.*, less your commission, 159*l.* 7*s.* 6*d.*, 15,450*l.*, payable as follows: 5000*l.* down, and balance in equal instalments of 3, 6, 9, 12, 15, 18, 21, and 24 months, bearing interest at 5 per cent. per annum, 37-64ths to be registered in my name as at present; transferred as the credit portion is paid off *pro rata*. A Lloyd's policy in my name for amount of purchase price to be taken out, and a protecting ditto. A trust deed to be executed and deposited in the hands of a trustworthy party, to our mutual satisfaction, setting forth the nature and condition of the sale. Mr. Learoyd's references to be satisfactory to me. Delivery in Tyne or Cardiff, or at Antwerp on completion of present voyage." 15th June: Wise to defendant: "The offer was made to you on the terms I wrote you, and I have authority to close them, but on no other, and Mr. Learoyd has gone away. Of course, it is subject to his stability being satisfactory, but if you have inquired you will find it right. He will not bind himself to dates, but will pay over two years as convenient, and I know if he wants 5000*l.* or 6000*l.* he can get it if he should not have it. As it is a fancy price, I cannot get any other terms. You can either transfer the shares paid for, or take a mortgage of the whole. The insurance would be date policies, and would be in your name. I am now in a position to lay before him a boat built in 1872, carries 2300 tons, 150 horse power, 21,500*l.*, so that your prompt wire will be required to make business." "We have two boats of the same dimensions, and are about contracting for another, and I think myself 27,000*l.* is a price you will not get offered again from anyone who knows enough." On the 16th June Wise, jun., writes that he would be in London, at Wood's Hotel, on a Saturday, wishing defendant to meet him there. The defendant did so, and terms were ultimately agreed, and the defendant's shares in the *Madras* sold to Learoyd. It appeared that White had received information from Hull that Wise was coming to town, and he also called upon him and pressed the purchase of the *Madras*. Wise led him to believe that he had declined the purchase, and was looking out for another vessel. It also appeared that after the treaty for the *Northumberland* had gone off, Wise left the firm of Wise and Son to carry on business on his own behalf as a shipbroker, and opened negotiations with Learoyd for a partnership. Learoyd was the person whom he referred to as the "buyer." The arrangement between them was that Learoyd was to bring in 5000*l.* as his share of the partnership capital, and that this was to be invested in the purchase of shares in a vessel, an ordinary means of securing a source of income to a firm of shipbrokers. I have recited the foregoing correspondence between Wise and the defendant at length, because of the imputation which was made and pressed on the jury at the trial that the defendant colluded with Wise to bring about a sale behind the back of the plaintiff, and to disguise it as a sale to a third party, in order to cheat the plaintiff of his commission. I am unable to discover any evidence whatever to support this suggestion; and, although the imputation was freely made, Mr. Day did not ask or suggest that this point should be put to the jury. It appears to me that the defendant acted in the matter with perfect good faith. But to proceed. On the 2nd Aug. the plaintiff wrote to defendant: "As I find the sale of the *Madras* has been completed, I beg herewith to inclose you account for commission, and will thank you for a cheque." The claim inclosed was 390*l.* 4*s.* 8*d.*, being commission at 2½ per cent. on 15,609*l.* 7*s.* 6*d.* The following correspondence then passed:—3rd Aug., defendant to plaintiff, inquiring his grounds for making such a claim, as he had nothing to do with the sale so far as the defendant was concerned. 5th Aug., plaintiff to defendant. In the correspondence between Wise, jun., and White, the former said that if a boat had been bought it would be for the account of himself and Mr. Percy Learoyd, of Huddersfield, and that they were prepared to pay 5000*l.* or 6000*l.* cash, and the value to be spread over a couple of years at 5 per cent. or 6 per cent. interest. "Although Mr. Learoyd is the registered owner, it is well known and can be proved that Mr. Wise, jun., is the manager, and that he has done certain acts and deeds beyond the usual province of a ship's husband. With these few words, and referring you to my letter of 11th March, and your reply on the 13th, I return you the account, and beg for cheque in course." These being the grounds of the claim the defen-

dant denied his liability, but as proceedings were threatened he required from Wise a guarantee, and the latter gave an undertaking that he had negotiated the sale and made the introduction between buyer and seller without the assistance of any third party, and that his undertaking to substantiate that was the basis of receiving payment of the 200*l.* commission. I declined at the end of the plaintiff's case to direct a nonsuit, thinking it safer to hear all the evidence on both sides. Mr. Day proposed two questions to the jury: 1. Was Wilkinson authorised to find a buyer? and 2. Was a buyer found through Wilkinson? The latter question involving, according to the contention of the defendant's counsel, and as I thought, matter of law as well as of fact, I put the question in the following forms: 1. Was the plaintiff employed by the defendant to find a purchaser for the *Madras?* 2. Was Wise induced to enter upon the negotiations by any information given him by White, or did he act upon his own knowledge previously or subsequently acquired from other sources? The latter question had reference to the evidence which Wise and other witnesses had given, but the finding of the jury makes it unnecessary to go into that evidence. The jury found, in answer to the first question, that the plaintiff was fully authorised to find a buyer for the defendant's interest in the *Madras*, if not employed according to my definition of that word. And in answer to the second question, that Wise was induced to enter upon the negotiation for the purchase of the *Madras* by the information he received from White. It occurred to me at the time with reference to the letter of the 13th March that there might be a distinction between the case of an agent who had been employed to look out for a buyer, and one who had merely at his own request obtained authority to do so. For the purpose of this case I do not think it needful to consider whether there is any such distinction or not. It must, of course, be taken upon the finding of the jury that Wise acted upon the information White gave him, what the vessel was, and that it was for sale. And the question is, assuming that to be so, did Wilkinson procure the buyer? Now it is clear that the buyer was Learoyd, and not Wise. The articles of partnership fully confirm what Wise stated that Learoyd's contribution to the partnership capital was 5000*l.*, which he was to provide in cash. How the partners invested the money was a matter which concerned themselves only. They did agree to invest it in the *Madras*, and to the extent of 5000*l.* the shares in the vessel became by Learoyd's act the property of the firm. But all beyond that was and remains the separate property of Learoyd. The instalments which he subsequently paid were paid with his money. Did Wilkinson then procure Learoyd to become the purchaser? He never had any communication with Learoyd, and never heard his name until after the purchase. Nor did White introduce Learoyd. He knew nothing of such a person, until after he wrote the letter of the 10th March. He mentioned the vessel to Wise as to a purchaser, not as to an agent, to look out for a purchaser for him, and Wise never thought of acting in any such capacity; and as far as appears, and as I believe, Wise at the time had no thought of treating for the purchase of the *Madras*, either as buyer or broker. Moreover, White was no agent of the defendant. The latter at first expressly refused to sanction White's sharing the commission, which he had agreed to pay Wilkinson, and he never went beyond merely withdrawing that prohibition. But White's authority, whatever it was, was derived solely from Wilkinson, and if ever it was within his competence to propose the vessel as one which he had, at all events that authority ceased when Wilkinson's authority ceased, and the letter of the 13th March was, I think, a revocation of that authority, or suspension of it till the vessel should arrive home. Such was the view taken of that letter by both parties, for Wilkinson made no endeavour afterwards to dispose of the vessel. The case, therefore, stands thus: White mentions the vessel to Wise with the view of his buying it, and let it be assumed that he does so as Wilkinson's agent. Wise declined to buy, Wilkinson's authority to look out for another purchase is revoked, and the whole transaction as between Wilkinson and the defendant is at an end. Afterwards Wise, having to find a vessel as broker for Learoyd, makes use in that capacity of the information he had before received from White, and treats with the defendant as an independent broker, stipulating for commission for himself. The defendant, in perfect good faith, treats with Wise as such broker acting on his own behalf, and undoubtedly he became liable to him for commission. It cannot be said, I think, under these circumstances, that Wilkinson by his agent procured Learoyd to become the buyer. The chain of continuity was broken. Even supposing White's act was Wilkinson's act, when he proposed the vessel to Wise, Wise's act in proposing it afterwards to Learoyd was not Wilkinson's act. It was his own act. In no sense was he agent to Wilkinson. Wilkinson's information to Wise must be taken to have been only the *causa causans*, and that is not enough. If a year had elapsed, and Wise having then become broker, and calling to mind the information he had received a twelvemonth before that this ship was for sale, had written to the defendant to inquire if it was still for sale, and upon hearing that it was negotiated as broker or purchaser for a customer, could it then be said that Wilkinson would be entitled to commission? Or supposing he had not undertaken brokerage business, but had casually mentioned to a broker who was looking out for a ship for his customer that this one was for sale a twelvemonth before, and this had led up to a bargain between the broker and the defendant, could Wilkinson be heard to say that he had found that purchaser? I apprehend not; and if not, I do not know where else the line is to be drawn than at the point where the action of the broker ceases and the buyer comes in under another who stands in no relation of privity to that broker. The conclusion that I come to is, that Learoyd was not in fact introduced either by Wilkinson or by any agent of his, and I am therefore of opinion that, notwithstanding the finding of the jury, judgment must be entered for the defendant, which will of course be with costs.

From this judgment plaintiff now appealed.

Day, Q.C. and *A. L. Smith* for plaintiff.

Willis, Q.C., *Webster*, Q.C., and *Hindmarsh* for defendant.

The Court gave the following judgments, reversing the decision of Lush, J.

Bramwell, L.J.—With the greatest respect for the opinion of my brother Lush, I do not think this judgment can be sustained.

We have two distinct facts: first, that there was an agreement between the plaintiff and the defendant that if the plaintiff should find a buyer for the ship the defendant would pay him a certain commission, that is to say, if the plaintiff should introduce the ship to the notice of some person, or should introduce some person to the defendant, and as the result of such introduction such person should become the purchaser of the ship, that then the defendant would pay to the plaintiff the commission agreed on. This I take to be the bargain as found by the jury in the finding that Wilkinson was authorised to find a buyer. In the next place we have it found that either the plaintiff, or White acting for him, did find a purchaser, who, in consequence of their introduction, did purchase the ship either for himself or for some one else. That this purchaser Wise had some interest in the purchase I do not for a moment doubt, but I will for the present assume that he was the agent of Learoyd to purchase, and that he was introduced to make this purchase by information which came to him from the plaintiff. Then it is said that at the time that this introduction was effected the plaintiff's authority to find a purchaser for the ship had ceased, having been revoked by the letter written by the defendant to him on the 13th March to the effect, "There is no use doing anything herein until the return home. No one will buy a ship at sea," &c. I do not consider this a revocation of authority, or anything at all like it. It simply means "it is no use doing anything in the matter at present." And moreover, even had this letter been, as contended, a revocation of the authority, it would have been too late, for the authority had been acted upon, and the introduction had already taken place before the date of that letter. It was said in the judgment of my brother Lush, and was also put forward by Mr. Willis, with his usual ability, that the claim of continuity was broken; that although the defendant employed the plaintiff, and the plaintiff employed White, who introduced the ship to Wise, that there it stopped, and that even supposing White's act was the plaintiff's act when he proposed the ship to Wise, Wise's act in proposing it to Learoyd was not the plaintiff's act but his own act. It may have been that Wise was intending to act on his own account, and intended if he could, to win the commission on the sale, and to supplant Wilkinson. But any acts done between the defendant and Wise are immaterial as between the plaintiff and the defendant, and cannot disentitle the plaintiff to his commission if he was already entitled, as I say he was. It is my opinion that Wise was purchasing on his own account, and not as agent for Learoyd, but as there is no finding of the jury to this effect, I do not found my judgment upon this assumption; the result is the same if he was acting only as agent for the purchaser. There is no fresh departure; the case stands exactly as if the communication had been made direct to Learoyd, and the purchase had been made by him. I wish now to refer to the judgment of my brother Lush, not for the purposes, by any means of criticising, but in order to show in what manner I am led to come to a different conclusion. After stating the facts he says: "The case therefore stands thus: White mentions the vessel to Wise with the view of his buying it, and let it be assumed that he does so as Wilkinson's agent." So far we are all agreed. "Wise declined to buy. Wilkinson's authority to look out for another purchaser is revoked, and the whole transaction between Wilkinson and the defendant is at an end." Here I am unable to agree with him. He then proceeds: "Afterwards Wise, having to find a vessel, as broker for Learoyd, makes use, in that capacity, of the information he had before received from White and treats with the defendant as an independent broker stipulating for commission for himself." Now, Wise was not in this position after the 13th March any more than he was before. He was just as much then broker for Learoyd as before. If he did treat with the defendant as an independent broker and stipulated for commission for himself, he was none the less already agent for Learoyd, and nothing else. The judgment proceeds: "The defendant, in perfect good faith, treats with Wise as such broker acting on his own behalf, and undoubtedly he became liable to him for commission." It may well be that the defendant thought that Wise was an independent broker and did act *bonâ fide*, but that does not affect the position of Wilkinson. "It cannot be said, I think under these circumstances, that Wilkinson, by his agent, procured Learoyd to become the buyer. The chain of continuity was broken. Even supposing White's act was Wilkinson's act when he proposed the vessel to Wise. Wise's act in proposing it afterwards to Learoyd was not Wilkinson's act, but was his own act." No doubt it was his own act, but only as agent of the buyer, and the subsequent purchase by Learoyd was as much the consequence of what White had done as if the introduction had been made to Learoyd in person, and he had himself come and bought in consequence. The judgment concludes: "The conclusion that I come to is that Learoyd was not in fact introduced either by Wilkinson or by any agent of his, and I am therefore of opinion that notwithstanding the finding of the jury judgment must be entered for the defendant." Now it seems to me, with great respect that the fallacy or mistake of the judgment is here in saying that Learoyd and Wise are not identified as the persons who were introduced by Wilkinson or his agent. Wise being Learoyd's agent was introduced by Wilkinson and White, and the introduction of Learoyd's agent was the introduction of Learoyd. It is hard to lay down any definite rule for these commission cases, but here we have the simple state of facts that Wilkinson was employed by the defendant upon the terms that if he introduced a purchaser and the sale was thereby effected he should receive a commission on the purchase money. He did introduce a purchaser, a sale was thereby effected, and therefore he is entitled to receive his commission.

Brett, L.J.—I am also of opinion that this appeal must be allowed.

The plaintiff was employed by the defendant to find a buyer for the defendant's vessel upon the terms that if he did so he should receive a certain commission. The plaintiff

fulfilled the conditions to entitle him to the commission if he did introduce the ship to a person who became the purchaser, although all the subsequent negotiations were carried on between that person and the defendant without any further act or intervention on the part of the plaintiff. Now the plaintiff was not bound to effect this introduction or to give the necessary information by word of mouth; he was entitled to employ White, and if White found a purchaser it would be the same as if the plaintiff had done so himself. We are to take it as a fact that White did propose the ship to Wise, and that Wise acted upon the information he received from White. It is beyond a doubt that Wise was at least the agent of Learoyd, if no more, and therefore the case is the same as it would be if the information had been given to Learoyd. It is true that all the subsequent negotiations were carried on between Wise and the defendant alone, but that does not affect the plaintiff, for the plaintiff had fulfilled his part of the contract when the introduction was effected and if this resulted in a sale he had earned his commission. The learned judge in the court below held that the continuity was broken because Wise was not the agent of Wilkinson or of White to find the actual purchaser, who was Learoyd. But he, Wise, was the agent of Learoyd, and therefore information given to him was given to Learoyd. As all these questions of commission are difficult, and must be decided on the facts of each case as they arise, I give no opinion on any facts which do not here arise, and therefore I will say nothing as to what would be the result if Wise had not been agent of Learoyd. With regard to the contention that the authority of Wilkinson was revoked by the letter of the 13th March, I do not think that that letter can be said to have had that effect, but even if it had it would have been too late, for the person who became the buyer had been already introduced.

Cotton, L.J.—I also am of the same opinion, and am unable to agree with the conclusion of Lush, J.

The facts of the case on the findings are, first, that the plaintiff was duly authorised to find a buyer, and upon the terms that if he succeeded in doing so he should receive a commission on the purchase money. Upon this it was argued by the defendant that, according to the true meaning of the contract with Wilkinson, he could not be considered entitled to his commission unless he gave the name of the person who should become purchaser; but this argument cannot be maintained, for the real meaning of the contract is that Wilkinson should receive his commission if by his means the ship was introduced to a person who should afterwards become the buyer. The second fact is that Wise was induced to enter upon negotiation for the purchase of the ship by the information he received from White. Now it is conceded that White was the agent of Wilkinson, and that any act done in the matter by White was, as between Wilkinson and the defendant, the act of Wilkinson. Further, it may be stated as a rule of law that if a person in the position of Wilkinson under such a contract introduces the ship to the agent of the buyer, that is equivalent to an introduction direct to the buyer himself, because as between the agent of the buyer and the seller the agent is the buyer, and any communication made by the agent of the vendor to him is a communication made to the buyer for the purposes of the commission. The communication was made at a time when Wise was the agent of Learoyd. Wise was not the agent of Wilkinson, and Wilkinson is entitled to recover his commission, not because Wise in making the communication to Learoyd was acting as the servant or agent of Wilkinson, but because the communication made to Wise was a communication made by Wilkinson. But then it is said that when this communication was made to Wise the plaintiff was no longer in the position of agent to the defendant, but that his authority had been revoked by the letter of March 13. But even if this letter could be treated as a revocation of the authority, which in my opinion it cannot be, yet it could not defeat the plaintiff's right to commission, because at that date the plaintiff had done all that he had to do to introduce a buyer. There was at that time a contract that if what the plaintiff did resulted in a sale he would be entitled to his commission. That letter could not be treated as equivalent to a revocation of the authority, but was only an expression of opinion that nothing could then be done in the matter. As the word fraud has been mentioned in the course of the argument before us, I wish to add that I am not influenced by any feeling that the defendant was guilty of any fraud. The only question is on the contract, and on the contract alone have I decided.

Appeal allowed with costs. Judgment entered for plaintiff for amount claimed.

Solicitors for plaintiff, *Ingledew, Ince,* and *Greening.*

Solicitors for defendant, *Lumley* and *Lumley.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. Poyser, Esq., Barrister-at-Law.

Saturday, June 28, 1879.

(Before Cockburn, C.J. and Lush, J.)

The Secretary of the Board of Trade (app.) *v.* Sundholm (resp.).

Ship and shipping—"Hurt or injury" to seaman—Illness of seaman owing to bad provisions—"Service of the ship"—Liability of master or owner—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104) *ss.* 228 *and* 236.

A seaman who, from the effects of bad food supplied on board ship, becomes seriously ill and is landed at a port abroad, and is there tended in hospital, the expenses for such attendance and for his passage home being paid by the Board of Trade, or on their behalf, has received an injury in the service of the ship, within the meaning of the Merchant Shipping Act 1854, *sect.* 228, *sub-sect.* 1, *and the Board of Trade are not entitled, on receiving his wages to deduct therefrom such expenses.*

The respondent was a seaman on board the British ship Crown Prince, *and was shipped in London in* 1875. *In Nov.* 1876, *while the* Crown Prince *was at sea, the respondent was taken ill, owing to the bad provisions which were supplied to the*

crew. The Crown Prince *put into Port Stanley in Jan.* 1877, *and all the crew being sick were taken to the hospital there. The respondent remained there wholly incapacitated until Aug.* 1877, *when he was sent to England as a distressed seaman. The appellant declined to pay the expenses incurred by the respondent at Port Stanley, and for his passage home, and deducted them from a sum of* 81*l.* 12*s.* 6*d. due to the respondent as wages. Upon a summons taken out by the respondent to recover that amount, the appellant, as Secretary to the Board of Trade, was convicted and fined one penny, and ordered to pay forthwith to the respondent the sum of* 81*l.* 12*s.* 6*d. Against this conviction the present appeal was brought.*

Held, that the conviction was good, as the words "hurt or injury in the service of the ship," in the 228*th section of the Merchant Shipping Act* 1854, *were wide enough to apply not only to any hurt sustained by a casualty, but to any illness brought on a seaman while doing his duty in the service of the ship.*

THIS was a case stated by a police magistrate, under 20 & 21 Vict. c. 43.

The following are the material parts :—

1. The summons was issued against the appellant under sect. 236 of 17 & 18 Vict. c. 104, for that the appellant having received 81*l.* 12*s.* 6*d.*, the moneys of the respondent, a British seaman, did not return the same, nor pay the value thereof, when required so to do by the respondent after deducting what was legally due from the respondent for board or lodging, or otherwise.

2—3. In Jan. 1875 the *Crown Prince*, a British ship, left London for Melbourne and other ports, with a crew of fifteen men, including the respondent, who was shipped in the United Kingdom.

4. The respondent signed the ship's articles, by which he was to receive from the owners of the *Crown Prince* 5*l.* per month as wages, and to be supplied by them with provisions during the voyage.

5. In Nov. 1876, whilst the *Crown Prince* was at sea, the respondent and thirteen others of the crew were taken ill, first with vomiting and then with partial paralysis. The provisions supplied to the crew had been bad for several months before that time—the pork was green and black, and the sugar tasted of kerosine. The fourteen (including the respondent) who were taken ill with the same symptoms had all eaten of the pork, the one seaman who did not eat of the pork was not taken ill in the same way.

6. On the *Crown Prince* putting into Port Stanley in the Falkland Islands in Jan. 1877, all the crew being sick were taken to hospital, six died from the illness that attacked them on board, and the respondent being seriously ill from the same cause was left by the master at Port Stanley, and remained in the hospital there wholly incapacitated until Aug. 1877, when he was sent to England as a distressed seaman.

7. When the respondent left the *Crown Prince* in 1877, there was due to him for wages the sum of 81*l.* 12*s.* 6*d.* The amount was paid over to the appellant as Secretary to the Board of Trade by the owners, as the ascertained wages due and payable to the respondent at the time when he was left on shore, subject to such expenses incurred on his behalf as the respondent was legally liable to pay.

8. The expenses, incurred in respect of the subsistence and passage home of the respondent from the date of his being left at Port Stanley until he was brought to a port in the United Kingdom, have been paid by the appellant, and amount to 10*l.*

9. At the hearing, the appellant contended that he was not liable in law to pay the amount claimed in the summons, as the respondent was bound to pay and allow the said expenses on account with the Board of Trade, inasmuch as they were not expenses incurred from respondent having received a hurt or injury whilst in the service of the *Crown Prince* for which the owners were liable under sect. 228 of the Merchant Shipping Act.

10. I found as facts, that the sickness of the respondent arose directly and immediately from the bad provisions supplied to him while at sea by the owners of the *Crown Prince*, and that such sickness was a lasting injury to his health. I considered that the respondent, while serving at sea on board the *Crown Prince* under his agreement, was necessarily bound to maintain himself for the purposes of such service upon the provisions which the owners supplied to them. I held, therefore, that the injury received by respondent was an injury received by him in the service of the ship within the meaning of the 228th section, sub-sect. 1 of the Merchant Shipping Act 1854, and I held that, under the 210th section of that Act, the appellant was bound to deal with the 81*l.* 12*s.* 6*d.* as wages to which the respondent was entitled without any deduction.

I convicted the appellant under the 236th section of the Act, and I adjudged the appellant to pay the penalty of one penny, and ordered him to pay forthwith the said sum 81*l.* 12*s.* 1*d.* to the respondent.

The question for the opinion of the court is, whether the sickness of the respondent being such and arising as hereinbefore mentioned, is a hurt or injury received by him in the service of the *Crown Prince*, within the meaning of 228th section, sub-sect. 1 of the Merchant Shipping Act 1854.

The conviction to be affirmed or quashed in accordance with such opinion.

By 17 & 18 Vict. c. 104, sect. 228, sub-sect. 1 :

If the master, or any seaman or apprentice, receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice with attendance and medicines, and of his subsistence until he is cured or dies, or is brought back to some port in the United Kingdom, if shipped in the United Kingdom . . . . and of his conveyance to such port . . . . shall be defrayed by the owner of such ship without any deduction on that account from the wages of such master, seaman or apprentice.

Sub-sect. 2 :

If the master, or any seaman or apprentice, is, on account of any illness, temporarily removed from his ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns to his duty, the expense . . . . shall be defrayed in like manner.

Ravenhill (*Mackenzie* with him) for the appellant.—The facts here are agreed upon, but

what the appellant contends is that this case, being one of illness, should be dealt with under the second sub-section of sect. 228 of 17 & 18 Vict. c. 104, and not under the first sub-section. The hurt or injury in that clause must be some hurt or injury in the ordinary sense of the words incurred, whilst doing some duty in connection with the service of the ship—illness is dealt with differently in the second sub-section; in the 229th section we find, "if any such expense in respect of the illness, injury, or hurt are to be borne, &c.," showing that illness is regarded as one thing, injury or hurt as an entirely different thing. [LUSH, J.—We must assume that the word injury and the word hurt are used with a different meaning.] The expression may be tautological, but it is distinguished from illness. I submit the words refer to any accident—such as the fall of a piece of timber upon a man while engaged in his work. [LUSH, J.—The man might fall from the mast. That would clearly come within the words—moreover, a "hurt" may cause illness. It appears to me that the 4th sub-section applies to the case where a man becomes ill from natural causes; but if a sailor is taken ill, and it is necessary to remove him for the convenience of the ship, then the 2nd sub-section applies; but neither case contemplates a sailor having to pay the expenses of the attendance of a medical man to cure him from having taken poisoned food which they have given him on board.] The injuries must have been received in the course of the discharge of his duty by the seaman, that would scarcely apply to eating. This appeal was brought in consequence of the construction I contend for having been put upon the Act by the law officers of the Crown. (*a*)

The respondent was not called upon.

COCKBURN, C.J.—This appeal must be dismissed. I must say I am struck by the use of the word "medical," as contradistinguished from "surgical" in the sub-section we are asked to construe. The words are "the expense of providing the necessary surgical and medical advice," which would seem not merely to apply to a hurt as from something falling upon a man, or his falling over something; but they seem to contemplate illness. The illness here is an illness brought upon the respondent while in the service of the ship. The illness might be certainly the result of physical injury or hurt, or it might be an illness to which the term "medical" attendance would be more applicable than "surgical." On that account, probably, the Legislature has inserted medical attendance in the sub-section, as well as surgical. The word "injury" may include illness, and therefore we must interpret it as distinguished from "hurt;" and such clearly ought to be the interpretation where a man receives a gross injury of this kind while in the service of the ship. With regard to the latter phrase, I am of opinion that the words "in the service of the ship" are intended to distinguish such a case as this from a hurt or injury which a man may receive while on shore. If the Legislature had intended otherwise the words while discharging his duty in the service of the ship, or other words to the same effect might have been used: but they have not been so used. As the section stands, the owners would clearly not be liable where a sailor met with an accident while on shore for his own pleasure, though they might be liable if the man were on shore in the service of the ship. I think the opinion of the magistrate is right, and should be affirmed.

LUSH, J. concurred. *Appeal dismissed.*

Solicitors for the appellant, *the Solicitors to the Board of Trade,*

(*a*) In the book of "Instructions" issued by the Board of Trade for the guidance of consuls and custom's officers abroad, p. 27, the section in question is thus interpreted: "We are of opinion that the liability of the shipowners . . . . is confined to expenses incurred in respect of 'hurts or injuries' occasioned by wounds, bruises, fractures, or other *casualties* to body or limb of a like character, such injuries being received 'in the service of the ship,' that is in the course of discharge, by master, seaman, or apprentice, of the duty assigned or belonging to him on board of the ship on which he is serving.

COMMON PLEAS DIVISION.

Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

Saturday, March 29, 1879.

(Before LINDLEY, J.)

HILL *v.* WILSON.

General average—Adjustment—Place for making—Breaking up of voyage at intermediate port—Pro ratâ freight.

An average adjustment cannot be made at a port prior to the port of discharge, unless the original voyage was in fact terminated at such prior port through the occurrence of circumstances beyond the control of the shipowner, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view.

FURTHER CONSIDERATION.

This was an action tried before Lindley, J., at the Michaelmas Sittings 1878, when a verdict was found for the plaintiffs, and judgment reserved for further consideration. The facts are fully stated in the judgment.

J. C. Mathew (*Butt* Q.C., and *Watkin Williams*, Q.C., with him), for the plaintiffs, cited

Simonds v. *White*, 2 B. & C. 805;
2 Arnould on Insurance, 5th edit. 872;
Benecke on Indemnity, edit. 1824, p. 326.

Edwyn Jones (*Webster* Q.C., with him), for the defendants, cited

Fletcher v. *Alexander*, L. Rep. 3 C. P. 375; 18 L. T. Rep. N. S. 432; 3 Mar. Law Cas. O.S. 69;
Mavro v. *Ocean Marine Insurance Co.*, 2 Asp. Mar Law Cas. 361, 590; L. Rep. 9 C. P. 595; 10 C. P. 414; 31 L. T. Rep. N. S. 186; 32 L. T. Rep. N. S. 743;
Parsons on Shipping, 465, 2 Ib. 366;
2 Phillips on Insurance, 8th edit. s. 1414.

Cur. adv. vult.

LINDLEY, J.—The plaintiffs in this action are the indorsees of certain bills of lading of goods shipped in Nov. 1876, at Riga, on board the *Virago*, for carriage to and delivery at Hull. The defendants are the owners of that ship. The *Virago* sailed from Riga with a general cargo, and was stranded and injured. Part of her cargo was saved, part was washed out and lost, and part

was jettisoned, in respect of this part a claim for general average arose. The ship was got off, and was towed into Copenhagen on the 9th Dec. 1876. Her cargo was there discharged on the 3rd Jan. 1877. She was repaired at a large expense between the 13th and 31st Jan., and on the 7th Feb. was sent on to Hull, where she arrived on the 10th. The plaintiffs' goods arrived at Copenhagen, but, being much damaged, were there sold; and it is admitted that they were properly sold. The present action is brought for the amount realised by the sale, after deducting such charges and general average expenses as the defendants would be entitled to deduct by English as distinguished from Danish law.

As a matter of fact, the general average expenses had been ascertained at Copenhagen. The average had been thus adjusted according to Danish law; and the adjuster had charged the plaintiffs with *pro ratâ* freight from Riga to Copenhagen. The result was more favourable to the defendants than would have been the case if the adjustment had been made according to English law, and the defendants claimed to deduct from the proceeds of the sale of the goods a larger sum than the plaintiffs considered them to be entitled to. The defendants paid 146*l.* 4*s* 9*d.* into court; and it was admitted that that sum was sufficient if the defendants were correct in their contention. It was also agreed that, if they were in the wrong, the accounts should be referred to some third person for re-adjustment.

The *Virago's* cargo, when she left Riga, consisted of 1893 tons of goods: of these, 30 tons were jettisoned, and 1643 were sold at Copenhagen. There then remained 220 tons. of these, part was forwarded by the *Mito* on the 13th Dec. 1876, part by the *Otto* on the 31st Jan. 1877, and part by the *Mito* on the 31st Jan. 1877. the rest amounting to 127 tons) came to Hull in the *Virago* herself. The *Mito* and the *Otto* both belonged to the defendants; and full freight (by which was understood the full original freight from Riga) was paid for that part of the cargo which came home in them. Full freight was also paid for so much of the 127 tons brought home in the *Virago* as did not belong to the defendants themselves. But about 50 out of these 127 tons consisted of lathwood which had been abandoned to the defendants as underwriters thereof; and in respect of these fifty tons no freight was payable. It thus appears that the ship with part of her original cargo on board arrived in Hull, the original port of discharge, and that the defendants received the original full bill of lading freight for such cargo, except for that part of it which belonged to themselves and paid no freight. A long correspondence was put in evidence, and was referred to, and I have read the whole of it. That correspondence and the defendants' answers to the plaintiffs' interrogatories show: first, that the cargo forwarded from Copenhagen was forwarded by the instructions of the consignees or the underwriters; secondly, that the whole of the undamaged cargo might have been brought on to Hull in the *Virago* herself after she had been repaired; thirdly, that the plaintiffs never assented to, but always protested against, an adjustment of the average at Copenhagen.

Under these circumstances, I am of opinion that it is incumbent upon the defendants to show that the Danish adjustment is binding upon the plaintiffs; it is incumbent on the defendants to show that the voyage was terminated at Copenhagen by the occurrence of circumstances which necessitated or justified such termination, and, as a consequence, necessitated or justified a general average adjustment at that port.

Very little information is to be obtained upon the question what circumstances terminate a voyage at an intermediate port, when the ship with part of her cargo on board arrives at her original port of discharge. The only cases reported in our own books on this point are *Fletcher* v. *Alexander* (L. Rep, 3 C. P. 375; 18 L. T. Rep. N. S. 432; 3 Mar. Law Cas. O. S. 69), and *Mavro* v. *Ocean Marine Insurance Company* (2 Asp. Mar. Law Cas. 361, 590; L. Rep. 10 C. P. 414; 32 L. T. Rep. N. S. 743). In *Fletcher* v. *Alexander* a ship laden with salt sailed from Liverpool to Calcutta. She got ashore, and returned to Liverpool. The whole cargo, except 100 tons, was lost or so damaged as to be worthless; and the 100 tons were not forwarded. The ship herself after being repaired went on to Calcutta, her original port of destination, but with an entirely new cargo, and in fact on a totally different voyage. It was decided, amongst other things, that, the voyage having been broken up at Liverpool, Calcutta was not the place for adjustment. The arrival of the ship at Calcutta, and the possibility of forwarding the undamaged salt to the same place, did not prevent the court from holding the voyage to have been broken up at Liverpool, and from holding Liverpool to be the proper place for adjustment. In *Mavro* v. *Ocean Marine Insurance Company* (*ubi sup.*), a ship laden with wheat sailed from Varna for Marseilles. She became disabled, and put into Constantinople. Part of the cargo, which was damaged, was sold there; the rest was transhipped and sent on to Marseilles. The ship was repaired at Constantinople after a lapse of two months; but whether she ultimately proceeded to Marseilles does not appear. The above steps were taken by direction of the Consular Court of Constantinople; and under its direction an adjustment of average was made there. This adjustment was made according to the law of France, which under any circumstances was the law applicable to the case. The court held that the voyage had been properly broken up at Constantinople, and that the adjustment there was binding, although some cargo arrived at Marseilles, and the ship was herself repaired and sent to sea. The real question in this case was the true construction of an English policy of insurance containing the words "general average as per foreign statement;" and the case does not throw much light on any other question. In this state of the authorities, it is necessary to consider the matter on principle.

The duty of the shipowner is, to complete the voyage if he can. If owing to perils of the sea he is compelled to put into an intermediate port for repair, his duty is, to refit, and carry on such part of the original cargo as is fit to be carried on. If this is done, a policy on the ship for the original voyage will cover a loss sustained after she has been repaired and is sailing from the port of repair to her original port of

destination, and a policy on her original cargo will still cover so much of such cargo as is being carried in her between the same ports. In a case of this description, the original voyage is not regarded as broken up into two, viz., first into one voyage from the port of sailing to the port of refuge, and, secondly, into another voyage from such port to the port of destination. Again, if the shipowner, being unable to repair his ship transhipps the cargo and sends it home in some other ship, which he may do, still, as between him and the original consignees of the cargo, the original voyage is treated as continuing, in the absence of some agreement to the contrary. This appears from *Shipton* v. *Thornton* (9 Ad. & E. 314), where the freight payable in such cases is discussed. Further, in a case of this description, a policy on the cargo for the original voyage will cover such cargo when transhipped in order to complete such voyage: (1 Arnould on Insurance, 2nd ed., 491.)

These considerations appear to me to show that, in order to uphold the Danish adjustment in this case as against the plaintiffs who have never assented to it, the defendant must prove two things, viz., first, that the original voyage was in fact terminated at Copenhagen, and, secondly, that it was so terminated either by agreement or by necessity, *i.e.* the occurrence of circumstances beyond the control of the defendants, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view.

As a mere question of fact, my opinion is that the voyage did terminate at Copenhagen. With respect to 90 tons of the original cargo, there was no termination whatever of the voyage at that port, but only a suspension of it whilst the ship was under repair. The plaintiffs' goods were no doubt sold at Copenhagen, and as to them the voyage obviously terminated there; but this of itself cannot make an average adjustment there binding on the plaintiffs, as will be seen at once by supposing all the rest of the cargo to have been brought home in the *Virago* after a short detention for repairs.

But assuming the original voyage to have in fact terminated at Copenhagen, neither the necessity for its termination there, nor its termination by any agreement binding on the plaintiffs, is proved. The desirability of having the average adjusted at Copenhagen, in order to obtain an allowance of distance freight, and the desirability of bringing about a separation of ship and cargo in order to obtain an adjustment at Copenhagen, were clearly seen by Hansen, and were pointed out by him to the defendants; and the correspondence satisfies me that the adjustment at Copenhagen was not the consequence of an inevitable breaking up of the voyage there, but was the cause of the voyage being broken up there, so far as it can be said to have been broken up with respect to the ship and the undamaged goods.

The letters which show this to have been the case are as follows: [His Lordship gave the references to certain of the letters set out in the correspondence in the case.]

In coming to this conclusion, I do not accuse the defendants of bad faith. Their letter of the 13th Jan. 1877, and a letter from Mr. Bott to them of the 4th July 1827 show that the defendants were under the impression that the proper place for adjusting the average was where the damaged goods were sold, or that the defendants as shipowners had some option in the matter. This was in my opinion an erroneous view; and, for the reasons already stated, I decide that the plaintiffs are not bound by the Copenhagen adjustment.

The defendants, however, contend that, irrespective of this adjustment, they are entitled to charge the plaintiffs *pro ratâ* freight on the goods which were carried from Riga to Copenhagen and there sold. This contention can only be supported by establishing some contract, express or implied, binding the plaintiffs to pay *pro ratâ* freight. Express contract there is none; and the only grounds relied upon for implying a contract are that the plaintiffs' goods were sold at Copenhagen with their consent given expressly or impliedly to Hansen, who acted for the best for all parties. But, assuming this to be so, the goods were in fact sold because they were so damaged as not to be worth forwarding; and a sale under such circumstances, whether approved by the plaintiffs beforehand, or ratified afterwards by claiming the proceeds of sale, is not enough by English law to render distance freight payable: see *Hopper* v. *Burness* (3 Asp. Mar. Law Cas. 149; L. Rep. 1 C. P. Div. 137; 34 L. T. Rep., N. S. 528), and the cases there cited. To have that effect, the circumstances must be such as to give the cargo owner an option of having his goods sent on to their destination, or of accepting them at the intermediate port. If, having that option, he accepts the goods at the intermediate port, he is bound to pay *pro ratâ* freight: (see McLachlan on Shipping, 2nd ed. p. 446.) But here the plaintiffs had no such option; there was nothing equivalent to a voluntary acceptance by them of the goods at Copenhagen.

Upon both points, therefore, my judgment is for the plaintiffs, with costs, the amount to be referred to an English average-adjuster.

Judgment for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for the defendants, *Lowless* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, June 19, 1879.

(Present: The Right Hons. Sir J. W. COLVILE, Sir ROBERT PHILLIMORE, Sir BARNES PEACOCK, and Sir R. P. COLLIER.)

THE BYFOGED CHRISTENSEN *v.* THE WILLIAM FREDERICK.

Collision—Sailing vessels—Crossing ships—Regulations for preventing collisions—Articles 12 *and* 15.

To leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public, and they ought not to be required to exercise such discretion except in cases of extreme necessity.

Where one vessel close-hauled on the port tack is approaching another on the starboard tack with the wind free, so that the former cannot at any particular time come to a distinct conclusion that the latter is not about to obey article 12 *of the regulations for preventing collisions, the former is entitled to keep his course, under article* 18, *till the last moment, when luffing is a proper manœuvre.*

The Commerce (3 *W. Rob.* 287) *discussed.*

THIS was an appeal from the Vice-Admiralty Court of Admiralty.

The appellants were owners of a barque called the *Byfoged Christensen*, and the respondents were the owners of a three-masted schooner called the *William Frederick*. The appellants sued the respondents in the Vice-Admiralty Court for the recovery of damages in respect of a collision which took place between the *Byfoged Christensen* and the *William Frederick*, and the respondents instituted a cross action in respect of the same collision; and the two actions were by consent heard at the same time, and on the same evidence, and one judgment was pronounced, and one decree given in the two causes.

The collision occurred on the 26th Aug. 1878, in the Straits of Gibraltar, under the circumstances detailed in the judgment of their Lordships.

Butt, Q.C. and *Stubbs* (*W. G. F. Phillimore* with them) for the appellants.

Milward, Q.C. and *Clarkson* for the respondents.

The judgment of their Lordships was delivered by

Sir J. W. COLVILE.—The collision out of which these appeals have arisen took place a few miles from Cape Spartel, on the 26th Aug. 1878, about five o'clock in the afternoon. The colliding vessels were the *Byfoged Christensen*, a Norwegian barque, and the *William Frederick*, an American three-masted schooner. The former vessel was bound on a voyage from Majorca to New York, and was therefore coming out of the Mediterranean. The other vessel was bound on a voyage from New York to Venice, and was therefore entering the Mediterranean. They were sailing and crossing vessels, and the sailing rules applicable to the case are the 12th and the 18th.

Both parties are agreed that the American vessel was on the port tack, and had the wind on the port side, whatever was the precise direction from which the wind was coming. Hence the appellants have correctly contended that it was only in case the *Christensen*, which had the wind on the starboard side, was free, that it would be her duty to keep out of the way; and that, if she were not free, it would be the duty of the American ship to keep out of her way.

The case is peculiar, because each vessel seems, up to the moment of collision, or at least up to the time when the collision became inevitable, to have kept its course, and to have acted as if it were the duty of the other vessel to keep out of its way. The question which of the vessels was right in throwing that obligation on the other depends upon the question what was the real direction of the wind. The *Christensen* contends that the wind varied from north and by west to north; the other vessel says that it was from north north-east to north, and by east. The difference between them is not less than one, or more than three, points of the compass. Their Lordships have no difficulty in coming to the conclusion that, if the direction of the wind was north and by east, or north-north-east, or anywhere between those two points, the *Christensen* would have been free within the meaning of the 12th rule. The learned judge of the court below has, upon very conflicting evidence—each crew swearing pretty consistently to the direction for which each contended—found that the wind was to the east of north, and their Lordships would not, without having strong grounds for coming to a contrary conclusion, be disposed to interfere with that finding of fact. An argument on the part of the appellants was founded on the following passage in the judgment under appeal. The learned judge there says: "I feel therefore compelled, but after much hesitation to decide that the *Byfoged Christensen* had the wind, if not altogether free, at all events some points more in her favour than the *William Frederick*, and that, according to the 12th rule of the road, she ought to have given way to the *William Frederick*." Upon this passage it was argued by Mr. Stubbs that it is inconsistent with the hypothesis that both vessels were close-hauled vessels, in which case it would be the duty of the vessel which had the wind on the port side to give way. There may be some ambiguity in the first part of the sentence; but, taking the whole sentence together, their Lordships cannot but think that it amounts to a finding that the *Christensen* was a free vessel within the meaning of the 12th rule of the road; and even if there had been greater ambiguity in the expression of the learned judge's judgment than their Lordships think there is, they would still think that, if the direction of the wind was properly found to be what he found it to be, the *Christensen* would have been a free vessel, and in that opinion they are confirmed by their nautical assessors.

The next question is, whether the finding as to the direction of the wind was justified by the evidence. It seems to their Lordships that it was so. The most plausible point made against that finding was the argument of Mr. Butt as to the position of the vessels at the time of the collision. He contended that, had the wind not been as it was stated by those on board the *Christensen* to be, that is, varying from north to north and by west, the vessel would not, ac-

cording to the ordinary course of navigation, have been so near Cape Spartel as she was when the collision took place. But, on consultation with the sailing-masters, their Lordships find that she was upon the course which a vessel bound to New York and getting out of the Mediterranean would naturally have taken, and that her position at the time of the collision was by no means inconsistent with the fact that the wind was in the quarter in which the American vessel and its crew say that it was.

That being so, their Lordships have no difficulty in affirming the decision that it was the duty of the *Christensen*, according to the rule of the road, to keep out of the way of the other vessel, and that she failed to do so.

The question raised by the cross appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that, although the duty of keeping out of the way lay upon the *Christensen*, those on board the *William Frederick*, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manœuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding relied on the case of *The Commerce* (3 W. Rob. 287) before Dr. Lushington. Their Lordships desire to remark that, though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence. In the present case their Lordships think that the principle of the decision in the case of *The Commerce* is not applicable. There is no *constat* at what particular time the master of the *William Frederick* ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his *primâ facie* duty. Their Lordships cannot infer from the facts proved in the case that he was bound to come to such a conclusion before the moment at which it appears he luffed up in the wind; and, after consulting with the sailing-masters, they have come to the conclusion that that was the best thing which, under the circumstances, he could have done; that if he had tried by any other manœuvre actively to get out of the way of the other vessel, there would still have been a collision, and that the consequences of that collision might have been aggravated owing to the greater way which his vessel would have had upon it. Their Lordships therefore think that no case of contributory negligence has been made out against the *William Frederick*, and they must humbly advise Her Majesty to allow the cross appeal, to reverse the decision of the court below, to pronounce that the *Byfoged Christensen* was alone to blame for the collision, to dismiss the suit of the owners of that vessel, and to condemn them to bear and pay the whole amount of the damages sustained by the *William Frederick*, and further to pay the costs of both suits in the court below, and also the costs of these appeals.

Solicitors for the appellants, *Stokes, Saunders*, and *Stokes*.

Solicitors for the respondents, *Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

(Before JAMES, BAGGALLAY, and COTTON, L.JJ.)

THE CARTSBURN.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY.)

*Practice—Third party—Trial—Issues—Plaintiff and defendant—Plaintiff and third party—Defendant and third party—*36 & 37 *Vict. c.* 66, *s.* 24 (3); 38 & 39 *Vict. c.* 77, *Order XVI., rr.* 17, 18, 20, *and* 21.

When in a collision cause the defendant claims indemnity from a third party, and such third party appears and defends, the court may find the original defendant solely to blame, notwithstanding he does not plead or appear at the trial, but unless issues are directed between the defendant and the third party the court cannot make a decree deciding questions of liability between them.

Semble: It is competent to the court to order such issues between the defendant and a third party to be tried either at the same time as those between plaintiff and defendant, or after they have been decided.

The position of the defendant in the original action is the same whether a third party is cited or not.

THIS was a motion in the Admiralty Division in an action of damage to amend the decree by striking out certain portions thereof.

The collision out of which the action for damage arose took place soon after midnight on the night of the 3rd May 1879, in Penarth Roads, between the ship *Cartsburn*, which was being towed in from sea by the steam-tug *Leader*, and the Austrian barque *Slavia*, which was lying at anchor. In consequence of the collision the *Slavia* lost all her masts, and suffered other damage.

On the 5th May the owners of the *Slavia* instituted a suit *in rem* against the *Cartsburn*, and filed their preliminary act on the 13th June 1879. The owners of the *Cartsburn* appeared, and a preliminary act was filed on behalf of the *Cartsburn*, and on the 14th June the plaintiffs delivered their statement of claim, paragraph 4 of which was as follows:

4. The said collision and damage were occasioned by the neglect, default, or mismanagement of the *Cartsburn* and her tug, or of one of them, and were not occasioned or contributed to by any neglect, default, or mismanagement of the *Slavia* or of any of those on board her.

On the 10th June, the defendants, owners of the *Cartsburn*, obtained leave to serve a notice on Andrew Bain, the owner of the steam-tug *Leader*, in accordance with Order XVI., r. 18, App. B., Form I. Notice was served on him on June 18th, of which the material parts were as follows:

Take notice, that this action has been brought *in rem* by the plaintiffs against the defendants' ship or vessel the *Cartsburn*, claiming 3000*l*. for damage alleged to have been sustained by the said plaintiffs by a collision which occurred in Penarth Roads. . . . between the plaintiffs' barque or vessel *Slavia* and the *Cartsburn*. The defendants, the owners of the said ship or vessel *Cartsburn*, claim to be indemnified by you against liability in respect of the said alleged damage on the ground that the liability of the ship or vessel *Cartsburn* in respect of the said alleged damage (if any) arises from the negligence and improper navigation of the master and crew of the steam-tug *Leader* in tow of which steam-tug the *Cartsburn* was, and that the *Leader* was owned and possessed by you, and was being navigated by your servants. And take notice, that if you wish to dispute the plaintiffs' claim in this action as against the said ship or vessel *Cartsburn*, or the said defendants, you must cause an appearance to be entered for you within eight days of the service of this notice. In default of your so appearing you will not be entitled in any future proceeding between the defendants and yourself to dispute the validity of the judgment in the action, whether obtained by consent or otherwise.

On the 25th June an appearance was entered for Andrew Bain in pursuance of the above notice, and leave was obtained to examine the plaintiffs' witnesses, the registrar drawing up an order in the following terms:

The registrar having heard solicitors on all sides, allowed defendants a week's further time to deliver the statement of defence, and directed plaintiffs to give security for the defendants' and the intervener's costs jointly in the sum of 300*l*., and he gave leave to the plaintiffs to open the preliminary acts forthwith, and to examine their witnesses orally in court on Saturday the 28th inst.

On the 24th June the defendants gave notice to the plaintiffs and Andrew Bain of an application for directions as to the mode of having the questions in the action determined (Order XVI., r. 21). The application was made on the 27th June, *W. G. F. Phillimore* for the defendants, and *E. C. Clarkson* for the plaintiffs, Andrew Bain not being represented, when the Judge made the following order:

The judge having heard counsel for plaintiffs and defendants, owners of *Cartsburn*, ordered that Andrew Bain, of Newport, Monmouth, owner of the steam-tug *Leader*, the party served with notice under Order XVI., r. 17, be at liberty to appear and defend, being bound as between him and the said defendants by any decision the court may come to in this action.

On the 28th June, on the application of *Myburgh* for Andrew Bain, and with the consent of counsel for the defendants, the order was amended by adding to it the words "as to the cause of the collision."

On the 29th June certain of the plaintiffs' witnesses were examined in court by counsel for the plaintiffs, and cross-examined by counsel for Andrew Bain, the defendants not being represented.

On the 10th July the defendants solicitors served the solicitors of Andrew Bain with a copy of a summons served on them by the plaintiffs to show cause why the defendants should not forthwith deliver their defence, and why an early day should not be fixed for the trial. At the hearing of the summons the defendant did not appear, and the registrar made an order that Andrew Bain should deliver a statement of defence within a week, and fixing the 6th Aug for the trial.

On the 19th July a statement of defence on behalf of Andrew Bain was, in pursuance of the registrar's order, filed, which, after stating that the *Leader* was towing the *Cartsburn* under a contract, alleged,

3. Under these circumstances those on board the *Leader* observed two barques lying at anchor in the Middle Pool, riding to the flood tide, one of which (the *Slavia*) was lying farther away on the port-quarter of the other without having any riding light exhibited. The *Leader* and the *Cartsburn* in tow of her passed the nearer of the said barques on her starboard side, and under reduced speed proceeded to round under the said barque's stern, under a port helm, the *Leader* having previously directed the *Cartsburn* to follow her round. When those on board the *Leader* saw that the *Cartsburn* was not following her, they sung out to those on board the *Cartsburn* to port their helm, and afterwards to hard a-port. The *Cartsburn* neglected to port her helm, or follow the *Leader*, and was proceeding so as to involve risk of collision with the *Slavia*, and although she was loudly hailed by those on board the *Leader* to let go her anchor, and although the *Leader* went full speed ahead, and those on board her did all they could to bring the *Cartsburn* round, the *Cartsburn* with her stem struck the *Slavia* on her starboard side.

6. The said collision was not caused by any neglect or default on the part of those on board the *Leader*.

7. The said collision was caused by the neglect or default of those on board the *Slavia*.

On this defence the plaintiffs joined issue, and the case was heard by the judge assisted by Trinity Masters on the 6th Aug.

Clarkson and *Lush* for plaintiffs.

Butt, Q.C. and *F. W. Raikes* for Andrew Bain.

The defendants were not represented.

After hearing evidence and after consultation with the Trinity Masters, the Judge gave judgment as follows: I pronounce in this cause that the *Cartsburn* is to blame for the collision between her and the *Slavia*, and that the *Leader* is not to blame. The usual consequences will follow. The *Leader* will be entitled to her costs, and the *Cartsburn* will not be entitled to indemnity or damages against the *Leader*.

And the following form of decree was drawn up:

The Judge, being assisted by Capt. Thomas Narramore Were and Capt. G. C. Burne, two of the Elder Brethren of the Trinity Corporation, and having heard counsel for the plaintiffs and for C. and Co.'s parties (solicitors for Andrew Bain), pronounced the collision in question in this action to have been occasioned solely by the fault or default of the master and crew of the vessel *Cartsburn*, and for the damage proceeded for, and comdemned the owners of the said vessel *Cartsburn* and their bail in the said damages and in costs, and he referred the said damages to the registrar assisted by merchants to report the amount thereof. The judge further pronounced that the defendants, the owners of the *Cartsburn*, were not entitled to any contribution or indemnity against the co-defendants, the owners of the steam-tug *Leader*, in respect of the said damage or costs, and he condemned the said defendants and their bail in the costs incurred by the co-defendants.

On the 6th Sept. the defendants' solicitors gave notice to the third party that they should, on the first motion day of the then next sittings,

Move the judge in court that so much of the judgment rendered on the 6th Aug. 1879 in this action as declares that the defendants, the owners of the *Cartsburn*, are not entitled to any contribution or indemnity against the third party, Andrew Bain, or decides anything as between the said defendants and the said Andrew Bain, or gives direction consequential upon such declaration or decision, be struck out, and that the said Andrew Bain pay the costs of and incidental to this application.

The notice was not served on the plaintiff.

The motion came on for argument on Nov. 4.

Dr. *W. G. F. Phillimore*, for the defendants, owners of the *Cartsburn*, read an affidavit of the clerk to the defendants' solicitors which set out the various steps in the action as given above, and contained the following allegations:

7. The said order of the 27th June was duly served upon the solicitors for the said Andrew Bain, the owner of the said steam-tug *Leader*, but no other pleading whatever was delivered to the solicitors for the said defendants, owners of the said vessel *Cartsburn*, by or on behalf of the said Andrew Bain, or on behalf of the said plaintiff in the said action, in addition to the said statement of claim delivered by the said plaintiff as aforesaid.

8. On the 30th July 1879 the said Messrs. F. and S. (solicitors for the defendants) received from the solicitors for the said plaintiffs notice of trial in this action. (The notice was in the usual form, S. C. J. Act 1865, Sch. I., App. B., Form 14.)

9. The said third party, Andrew Bain, the owner of the said tug *Leader*, did not serve the solicitors of the said defendants, owners of the *Cartsburn* with any notice of trial in the said action.

13. The parts of the said judgment which the said defendants, owners of the *Cartsburn*, are advised should be struck out were obtained on the application of counsel acting on behalf of the said third party, Andrew Bain, the owner of the said steam-tug *Leader*, as aforesaid.

The effect of a third party appearing pursuant to our notice (Jud. Act 1875, Sch. I., App. B., Form 1) is that he steps into the shoes of the original defendant; he may defend the action or not as he likes, but if he chooses to defend he does so on behalf of the real defendants, not on any issue that may arise between the defendant and himself. The rules under the Judicature Act on this matter (Order XVI., rr. 20, 21) make no provision for the trial of questions between the defendant and a third party, but only of questions in the action that is the action brought by the plaintiff against the defendant.

Myburgh for third party, Andrew Bain.—The decree is perfectly correct. The *Slavia* brings an action against the *Cartsburn*, and the *Cartsburn* endeavours, after the statement of claim is delivered, to shift the blame of the collision on to the *Leader*. The *Leader* thereupon defends herself, and also raises a defence available for the *Cartsburn*. Order XVI., rr. 17-21, are only the regulations for carrying out the provisions of the Judicature Act 1873, s. 24 (3), by which "every person served with any such notice (App. B., Form I.) shall henceforth be deemed a party to such cause or matter, with the same rights in respect of his defence or petition as if he had been duly sued in the ordinary way by such defendant." And that section clearly gives us a right to defend against the claim of the defendant, and to get a decree on the issue raised by his notice to us. It is not necessary that the question between plaintiff and defendant, and that between defendant and third party, should be identical:

Swansea Shipping Company v. *Duncan and others*, 3 Asp. Mar. Law Cas. 166, 345; L. Rep. 1 Q. B. Div. 644; 35 L. T. Rep. N. S. 879.

Besides, in this case the process was invoked by the defendant, and the order under which this trial was had and decree made was made at his request, and he cannot therefore now take exception to its regularity.

W. G. F. Phillimore in reply.—The position of a third party is defined by the rules, and they only relate to the decision of questions between plaintiff and defendant. Order XVI., r. 18, is the rule really applicable to this case, and the position of a third party brought in under that rule is clear: "If a person, not a party to the action, is proceeded against under rule 18, he may enter an appearance in the action if he chooses. What if he does not? . . . . 'He shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise.' . . . . if he does not come in. . . . he is to be bound by the judgment, and cannot afterwards dispute it, if liable to the action for contribution or indemnity or other relief which the first defendant would have against him:" (per Cockburn, C.J., *Horwell* v. *London Omnibus Company*, L. Rep. 2 Ex. Div. pp. 365, 382; 36 L. T. Rep. N. S. 637.) An action is brought against us for negligence, and we assert that if there was any negligence it was that of the tug; she can only defend in the action to show that there was no negligence at all, and therefore nothing out of which a claim could arise against her, and if she does not do so, she would not be able on a future occasion to dispute the negligence altogether, but would be bound by any judgment obtained against us:

Benecke v. *Frost*, L. Rep. 1 Q. B. Div. 419; 34 L. T. Rep. N. S. 728.

Cur. adv. vult.

Nov. 11.—*Myburgh* applied for leave to file an affidavit on behalf of Andrew Bain, having reference to what occurred at the various applications in the cause.

Sir R. Phillimore refused to allow such affidavit to be filed.

Nov. 18.—Sir R. Phillimore.—The question now to be decided arises under the rules relating to third parties to an action comprised in Order XVI. of the Rules of the Supreme Court.

A collision took place between two vessels, the *Slavia* and the *Cartsburn*, on the 4th May last, in Penarth Roads, Cardiff. At the time of the collision the *Slavia*, which is owned by the plaintiffs, was lying at anchor, and the *Cartsburn*, which is owned by the defendants, was in tow of a steam-tug named the *Leader*, owned by Andrew Bain.

The plaintiffs commenced an action *in rem* against the *Cartsburn* in the district registry at Cardiff, but the action was shortly afterwards transferred to the principal registry of this court, and appearances were entered for both parties. On the 10th June there came before me in chambers a summons issued by the defendants, on which the following order was made: "The judge having heard both solicitors gave leave to defendants to issue a notice to the owners of the vessel *Leader* that they claim to be indemnified by the owners of the said vessel in respect of all damages and costs proceeded for in this action, or incident thereto, and he directed the said defendants to file their preliminary act within three days."

On the 13th June the defendants' preliminary act was filed, on the 14th the plaintiffs' statement of claim was delivered, and on the 18th what is known as a third party notice was, together with a copy of the statement of claim, served by the defendants on Andrew Bain, the owner of the tug *Leader*. This notice, and

the service of it, appear in all respects to have been in conformity with Order XVI., r. 18. On the 25th June an appearance in the action was entered on behalf of Andrew Bain, and on the 27th, on the application of the defendants, the following order was made by me: "The judge, having heard counsel for plaintiffs and defendants, owners of the *Cartsburn*, ordered that Andrew Bain, of Newport, Monmouth, owner of the steam-tug *Leader*, the party served with notice under Order XVI., r. 17, be at liberty to appear and defend, being bound as between him and the said defendants by any decision the court may come to in this action." The next day, on the application of counsel for Andrew Bain, the words "as to the cause of the collision" were added to that which I have just read. Such order as amended was duly served upon Andrew Bain.

Two of the plaintiffs' witnesses were examined in court on the 29th June. On the 12th July the registrar, having heard the solicitors for the plaintiffs, and Andrew Bain, directed the latter to deliver his statement of defence within a week, and appointed the 6th Aug. for the trial. On the 19th July the statement of defence of Andrew Bain, the owner of the steam-tug, was delivered to the plaintiffs' solicitors' who filed printed copies of it on the 2nd Aug., four days before the trial. In this statement of defence the *Slavia* was charged with neglect which led to the collision, but blame was also imputed to the *Cartsburn*, who it was alleged disobeyed the orders given her from the steam-tug.

Andrew Bain did not deliver to the solicitors for the defendants, owners of the *Cartsburn*, any pleadings, or serve them with notice of trial, but they received, on the 30th July, a notice of trial fixed for the 6th Aug., purporting to be addressed to them and to the solicitors for Andrew Bain. The trial took place as appointed on the 6th Aug. The plaintiffs and Andrew Bain appeared and produced evidence, but the defendants, the owners of the *Cartsburn*, did not appear. The minute of the judgment given is as follows: [His Lordship here read the decree set out above.]

The present application on the part of the owners of the *Cartsburn* is to strike out so much of this judgment as declares that such owners are not entitled to any contribution or indemnity against the third party Andrew Bain, or decides anything as between the said owners and the said Andrew Bain, or gives directions consequent upon such declaration or decision, and to direct that the costs of this application be paid by Andrew Bain.

The owners of the *Cartsburn* appear to have no substantial ground for their application. They introduced the owner of the steam-tug as a party to the action, and they were or ought to have been aware that the whole question as between the three parties would be disposed of at the trial. The objects of these rules relating to the introduction into a suit of third parties as prescribed by the Judicature Act of 1875 was, to adopt the words of the Master of the Rolls in *The Swansea Shipping Company* v. *Duncan* (3 Asp. Mar. Law Cas. 166, 345; 35 L. T. Rep. N. S. 879; L. Rep. 1 Q. B. Div. 644), "To prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and defendant in the action, and as between the defendant and a third person, and in such a case the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all." If the *Cartsburn* were to be allowed now to raise an issue between herself and the steam-tug as to the facts of the collision, the result would be precisely what it was the intention of the Legislature to obviate; the case would, substantially, be heard twice over.

With regard to the technical point of procedure that has been raised, I cannot see that there has been any material departure from the course prescribed by Order XVI., rr. 17, 18, 20, and 21. The order of the 27th June giving to Andrew Bain, the owner of the tug, liberty to defend. The notice of trial of the 30th July, addressed to Andrew Bain as well as to the other defendants, and his statement of defence imputing blame to the *Cartsburn* which was filed on the 2nd Aug., were sufficient notice to the owners of the *Cartsburn* that they would have to meet, at the trial on the 6th, the cases set up both by the *Slavia* and by the steam-tug. They did not choose to appear. It would seem as if they meant, in the event of the *Slavia* being found to blame, to have the advantage of this finding, and on the other hand, if the *Cartsburn* was found to blame, to deny that she was affected by the sentence.

I dismiss this application with costs.

From this decision the defendant appealed, giving notice at the same time "that if necessary the defendants will ask to treat this notice of motion as also a notice of motion by way of appeal from such parts of the said judgment."

No notice of the appeal was given to the plaintiffs, owners of the *Slavia*.

The appeal came on for hearing as an appeal from an interlocutory order on the 13th Jan. 1880, and was heard on that and the following day, before James, Baggallay, and Cotton, L.JJ.

At the commencement of the argument, a question was suggested by the court as to whether the mode of procedure was regular, and whether the case ought not to have gone into the list of appeals from final orders; but, on counsel for the respondent's stating that they had considered the point and were willing to waive any irregularity of form for the sake of having the question at issue finally settled, the case was allowed to proceed.

Cohen, Q.C. and Dr. *W. G. F. Phillimore* for appellants, owners of the *Cartsburn*.—The object of Order XVI., r. 18, is to bind the third party by the decision of questions in the action between the plaintiff and defendant to prevent the questions in that action being fought twice over. The rule does not say that, in the event of the third party not appearing, he will be held liable to indemnify the defendant, but that he shall be bound by the decision of questions between plaintiff and defendant. If the third party had not appeared, and judgment had been given by default or otherwise, we could not have recovered from him, in consequence of our notice to him that we claimed to be indemnified, without subsequent proceeding. The only effect would be that in such subsequent proceedings he would not be allowed to say that we had not been liable to pay for the damage claimed in the original action. No doubt the Judicature Act 1873, sect. 24 (3), allows a rule of court to be made which would sanction the trial of questions between the

defendant and the third party; but the rule of court which has been made to carry out the provisions of the Act, and under which these proceedings are taken, has advisedly (as is shown by comparing Supreme Court of Judicature Act 1873, sched. r. 12, with the rules now in force) not given all the powers which it might have done: (*Treleven* v. *Bray*, L. Rep. 1 Ch. Div. 176; 33 L. T. Rep. N. S. 827; 45 L. J. 113, Ch. Div.) Had the plaintiff chosen, under Order XVI., r. 3, to have joined the present defendants and the present third party, he could have done so, and then the court could have decided in that action whether we or the third party had to pay the plaintiff; but he has not done so, and therefore all the court could do was to say that the plaintiff was entitled to recover in this action, leaving the question of ultimate liability between the defendant and third party to be settled in subsequent proceedings. The whole of the rules (17-21) at the end of Order XVI. relate to questions in the action, not to questions between defendant and third party:

Horwell v. *London Omnibus Company*, L. Rep. 2 Ex. Div. 365; 36 L. T. Rep. N. S. 637.

[Cotton, L.J.—Is it not a question in the action whether the tug or the tow is in fault?] If it were I should be wrong, but it is not. It would be no defence to an action against the tow that the master of the tug gave a wrong order, and therefore it is not a question in the action. [James, L.J.—But when the third party has appeared and pleaded, questions as to the orders given by or to the tug can be raised between the plaintiffs and the third party, and in the judgment it would be found whether the tug or the tow was in fault.] Before a judgment could be given in favour of third party against defendant issues must have been joined between them here. There never was any pleading at all on the part of defendant, and the third party never even served their statement of defence on defendant. If in an action brought against us, and in which we have not appeared, questions are to be decided behind our backs between ourselves and third parties, there is a very serious miscarriage of justice.

Myburgh and *F. W. Raikes* for the third party, owner of *Leader*.—The judgment is perfectly valid; the fact that the defendant did not plead cannot benefit him. There was no reason why he should not plead, but as he did not do so formal issues could not be raised on the pleadings between him and third party, but in our pleadings we allege acts which are available as a defence for him, whilst at the same time we deny the claim he makes against us for an indemnity, and he had notice of that denial, being a party in the cause, and having appeared, he had access to all proceedings filed in the action, and he had moreover admittedly notice of trial. All that was done by us—our appearance, our pleading, and our presence at the trial—was in consequence of the defendant's application, and it was in consequence of his further application for directions as to the mode of trial of the cause of the collision that this decree was made. Besides, the question as to our liability is a question in the original action. The 4th paragraph of the statement of claim alleges that "the said collision and damage were occasioned by the neglect, default, or mismanagement of the *Cartsburn* and her tugs, or one of them." The plaintiffs objected to the defendant's application, but the defendant insisted that the only defence available for them was the negligence of the tug, and therefore the negligence of the tug or of the *Cartsburn* was really the only question in the action. No injustice can be done; the *Cartsburn* not having pleaded, the plaintiff is entitled to judgment against her, and the evidence at the trial which we, being summoned, gave, shows that the plaintiff would not have been entitled to judgment against us, and therefore, as, had we been to blame, the plaintiff could have proceeded against us for that very damage, the defendant is and ought to be precluded from doing so.

Cur. adv. vult.

Jan. 26.—The judgment of the Court was delivered by

James, L.J.—We are of opinion that to a considerable extent the application of the owners of the *Cartsburn* ought to have been acceded to in the court below, and ought now to be acceded to. So much of the judgment as pronounced that the owners of the *Cartsburn* were not entitled to any contribution or indemnity against the owner of the *Leader* must be struck out, as being a decision of a question not properly before the court for determination.

There was no *litis contestatio* between the parties, and the matter was *coram non judice*. The only thing in the nature of a pleading between the owners of the *Cartsburn* and the owner of the *Leader* is the notice served on the owner of the *Leader* on the 18th June. [His Lordship read the notice, the material parts of which are set out above, and continued:] That only refers to the claim made by the owners of the *Slavia* against the *Cartsburn*, and contains no claim by the owners of the *Cartsburn* against the *Leader* which could be decided in this action. There is nothing in it which the owners of the *Cartsburn* could have recovered judgment against the owner of the *Leader* without another action, if the *Leader* had been found in this action to have caused the collision; and if the *Cartsburn* could not recover against the Leader, it follows that the *Leader* cannot get a judgment against the *Cartsburn*.

Having received this notice, however, the owner of the *Leader* appears, and then an order is made which was perfected on the 28th June in the following terms. [His Lordship read the order as to the mode of trial set out above, and continued:]

Now, it was at that time competent to the court to have made an order on the *Cartsburn* to bring in a claim against the owner of the *Leader*, and then when the question between the *Slavia* and the *Cartsburn* was decided to have decided that also between the *Cartsburn* and the *Leader*; but the court did not direct that course to be taken, and therefore the decree cannot supply that which was requisite, namely, the constitution of an action, the *litis contestatio* between the *Cartsburn* and *Leader*, and therefore the part of the decree which decides anything as between the *Cartsburn* and the *Leader* must be struck out.

But it has been contended that this court ought to go further still, and strike out also that part of the judgment which decided that the collision was occasioned solely by the fault or default of the master and crew of the *Cartsburn*. We think

however, that we are not now in a condition to interfere with that part of the judgment. It was a finding as between the plaintiffs, owners of the *Slavia*, and the defendants, owners of the *Cartsburn*, and it is the finding on which the judgment against the *Cartsburn* is based. If there was anything wrong in it, if it was not supported by the evidence, or if there was anything wrong in the conduct of the trial, the only way of getting rid of it would have been by a regular appeal or by a motion for a new trial. It was a finding as between the plaintiffs and the owners of the *Cartsburn*, and the finding in consequence of which the plaintiffs are entitled to recover against the *Cartsburn*. Any interference with it in the absence of the plaintiffs would be an injustice to them. The judgment was as between the plaintiffs and the owners of the *Cartsburn*, though it was also obtained in the presence of the owner of the *Leader*, and this court has nothing to do now with its consequences. If the finding as to the "cause of the collision" were struck out there could not have been any finding by which the owner of the *Leader* would have been bound as the finding on that question was the very matter on which he was to be bound.

That portion of the decree, therefore, which pronounced "the collision in question in this action to have been occasioned solely by the fault or default of the master and crew of the vessel *Cartsburn*" must remain: but that portion which pronounced "that the defendants, the owners of the *Cartsburn*, were not entitled to any contribution or indemnity against the co-defendants, the owners of the steam-tug *Leader*, in respect of the said damages or costs," must be struck out.

Under the circumstances, seeing that the whole difficulty appears to have arisen from some mistake as to the meaning of the order, we are of opinion that the justice of the case will be met by giving no costs occasioned by this application to either side either in this court or in the court below. There might have been a difficulty in this court dealing with the case at all in the absence of a regular notice of appeal from the judgment, but the third party, being anxious for the case to de decided, has not desired to raise the objection. It is very desirable that in these cases, where a "third party" is brought in under the powers given by the Judicature Acts and Rules, the order of the court as to the mode of trial should be so framed as to put the matter in a proper train for deciding the questions between the defendant and the third party.

Baggallay and Cotton, L.JJ. concurred in the above judgment.

Baggallay, L.J. added:—My present opinion is that it was perfectly competent to the court below to have decided the question between the *Cartsburn* and the *Leader*, if it had in the order of the 21st June directed issues between those parties either by amendment of pleadings or the delivery of fresh pleadings between them, and perhaps it was thought that the order actually made on the 28th June would have accomplished that purpose,

Solicitors for plaintiffs: owners of the *Slavia*, *Ingledew*, *Ince* and *Vachell*; for appellants, owners of the *Cartsburn*, *Fielder* and *Sumner*; for respondent, owner of the *Leader*, *Clarkson*, *Son*, and *Greenwell*.

July 14 *and* 15, 1879.

(Before James, Brett, and Cotton, L.JJ., with Nautical Assessors.)

The Bywell Castle.

APPEALS FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damage — Collision — Contributory negligence — Error of judgment — Imminence of collision.

Where a ship has by improper navigation rendered a collision imminent, and executes wrong manœuvres when close to another vessel, such other vessel will not be held guilty of contributory negligence, or in any way to blame for the collision, if the master under the pressure of circumstances executes or orders a manœuvre which is not the right one under the circumstances. Ordinary skill and care are all that are expected of persons in charge of vessels, and not ability to see at once the best possible course to pursue under the pressure of extreme peril, brought about by the wrongful act of another.

Observations as to the application of the sailing rules in sinuous rivers.

This was an action for damages arising from a collision which took place between the paddle-steamship *Princess Alice* and the screw steamship *Bywell Castle*, off Tripcock Point, in the river Thames, on the evening of the 3rd Sept. 1878.

The action was brought by the London Steamboat Company, owners of the *Princess Alice*, and the owners of the *Bywell Castle* appeared and counter-claimed in respect of the damage sustained by that vessel in the same collision.

The circumstances of the collision and the cases set up by the plaintiffs and defendants respectively appear sufficiently from the judgment of Sir Robert Phillimore.

The case was heard before Sir Robert Phillimore, assisted by two Elder Brethren of the Trinity House, on Nov. 27, 28, 29, 30, and Dec. 2, 3, and 4, 1878.

Webster, Q.C., Dr. *W. G. F. Phillimore*, and *Stubbs*, for the plaintiffs, owners of the *Princess Alice*.

Butt, Q.C., *Clarkson*, and *Myburgh*, for defendants, owners of the *Bywell Castle*.

After hearing the evidence and arguments of counsel, judgment was reserved.

Dec. 11.—Sir R. Phillimore.—The horrible consequences of this collision are, I believe, without parrallel or precedent. It swept away by a sudden and terrible death about 600 or more human beings in the full enjoyment of life and happiness. This circumstance ought not of course in any way to affect the conclusion at which it is the duty of the court to arrive with respect to the author or authors of this dreadful catastrophe. It certainly was not the result of inevitable accident, but was caused by the bad navigation of one or both of the colliding vessels.

There is a claim and a counter-claim, but in this case the plaintiffs are the owners of the *Princess Alice*, the vessel on which so many passengers perished.

The *Princess Alice* was a paddle-steamship of 158 tons net tonnage, and 140 horse-power, narrow and long, 220ft. long by 20ft. beam, used exclusively for carrying passengers between Sheerness, Gravesend, Rosherville, and London. She had a fore and aft raised saloon, under which was a main deck

and gangway in front all round the saloon, which had a large window. The steering bridge was between the two funnels, the captain's bridge above over the top of the two paddle-boxes, and the wheel was 2ft. above the roof of the saloon. The crew consisted of the captain, the first and second mates, four seamen, two boys, an engineer, and four firemen. On the 3rd Sept. in this year she was bound on a return excursion trip to London. She had gone down to Gravesend and Sheerness, called at several piers, put out and taken in passengers, and was returning home, calling at Gravesend and Rosherville; more than 100 passengers got on board at the latter place; and it appears upon the whole there were about 800 passengers on board; the tide at the time of the collision was about one and a half hours ebb; the weather fine and clear. About seven o'clock the spring boy put up the lights, and the mate told him to go forward and keep a good look-out. The captain was on the bridge; the second mate was on the lower deck, and it was his duty, according to the first mate, when not at the wheel, to be on the look-out. There were two men at the wheel, namely, Ayres and Creed; the latter has been drowned, but the former has been examined as a witness in this cause. The call boy was stationed, under the captain's eye, on the saloon. The *Princess Alice*, going full speed, at the rate of about eleven knots, came up Barking Reach on the north shore, and passed over to the south shore, getting about fifty or sixty yards from the south shore. She then saw a screw-steamer ahead of her, called the *Spartan*, attended but not towed by a tug called the *Enterprise*, coming round Tripcock Point. The *Spartan* passed on the starboard side of the *Princess Alice*. The *Princess Alice* was a little below the point when she passed the *Spartan*, and an order was given to starboard the helm for the purpose of rounding the point. The first mate is certain that she answered the starboard helm. She got round the point. There was a powder magazine ship, the *Talbot*, moored at about 100 yards at high water from the south shore, and 250 yards above the point. As the *Princess Alice* got round the point and straightened up Galleon's Reach, and a little to the north of the powder ship, the mate says that he then observed the green and white lights of the *Bywell Castle* two points on the starboard bow; that the *Princess Alice* was then rather astern of the powder ship, on her port beam. The *Bywell Castle* was then, the mate thinks, about 300 yards distant.

The *Bywell Castle*, a screw-steamship of 891 tons, with a crew of twenty-two hands, left the Milwall Dock about 6.30 p.m., and the collision took place about 7.45. She came out of the dock stern foremost. The distance from Millwall Dock to the place of collision is about seven miles. The *Spartan* and her tugs came out of the dock a few minutes after the *Bywell Castle*, and went down the river ahead of her. The *Bywell Castle*, not swinging readily, occupied about five minutes in getting her head round to go down the river. Her master was on the upper bridge with the pilot; the bridge was before amidships, and 15 ft. above the main deck. The ebb tide was just beginning to make, and at the time of the collision was running at the rate, as agreed upon, of two to two and a half knots an hour. The greatest speed of the *Bywell Castle*, which never exceeded half speed, was a little over five knots through the water, and this not unimportant fact is well proved. There was little or no wind, and she carried no sails. According to the evidence of her master and the pilot she went down Galleon's Reach, keeping about midstream; she was about one-eighth mile down the reach, and a quarter of a mile below Bull's Point, when the red and white lights of the *Princess Alice* were seen, over the land, two points on the starboard bow and about three-fourths of a mile to a mile off. The captain was at that time on the starboard side of the bridge, and the pilot amidships of the bridge. They saw the *Princess Alice* pass the pitch of the point, still showing her red and white lights. The captain says she kept on his starboard bow, but crossing and drawing ahead. He had previously observed the *Spartan* half a mile ahead when she passed the starboard side of the *Princess Alice*. The *Princess Alice* was then well over on the south shore. According to the captain's evidence in this court, when the two ships were at a distance of a quarter or half a mile from each other, the pilot ordered "Port a little," and after that the *Princess Alice* got on his port bow and squared up the reach, a point on his port bow still only showing her red and masthead lights. He says: "We were then red to red, and I did not think there was any danger; when within 100 yards I first thought there was any danger." The captain then proceeds to say that, when the *Princess Alice* was in mid-channel, or thereabouts, a point and a half on his port bow, she starboarded across his course, and thereby caused the collision. The *Princess Alice* ascribes the collision to the improper porting of the *Bywell Castle*.

I have now stated a summary of the cases contended for by each party. I must say a word on a portion of the evidence which has been the subject of much comment. The captain and mate of the *Bywell Castle*, but especially the former, have made, with respect to a part of the history of the transaction, statements which cannot be reconciled with their evidence given in this court. In his deposition before the Receiver of Wreck, the captain said that he saw, after the *Princess Alice* had rounded the point, that she was paying off to the port helm, her red light being visible, and that the *Bywell Castle's* helm was kept hard a-port. In this court he has said that Dix, the pilot, ordered the helm hard a-port after seeing the three lights of the *Princess Alice*, that is, after the *Princess Alice* had actually starboarded and shown three lights. In the log it is stated that the *Princess Alice* was observed in Barking Reach showing red and masthead lights, and that the *Bywell Castle* ported to keep over to Tripcock Point. In his evidence in this court, in cross-examination, the captain has said that his helm was not ported when the *Princess Alice* was in Barking Reach, and not until her red light had got ahead of him. He has also said in this court that "it was the porting of my helm that brought the *Princess Alice* on my port bow." Dix, the pilot, in his deposition before the Receiver of Wreck, has said that, being then about a quarter of a mile off, he ordered the engines to be stopped and sounded the whistle; and he has also said that when the *Princess Alice* was 300 to 400 yards distant she showed her red and green lights quite two points on the port bow, and that he then ordered the helm hard a-port, and the engine full speed astern; and that

after this had happened the *Princess Alice's* red lights suddenly disappeared, and the green light only was visible. Now in his evidence before this court he has deposed that his helm was put hard a-port fifteen seconds before the collision; and I must also observe that his statement as to having ordered the engines to be put astern is contradicted, or at least not supported, by the evidence of the engineers, who received no such order. These contradictions in the evidence given by the master and pilot of the *Bywell Castle* have been duly weighed, and the testimony given by the witnesses examined has been carefully reviewed by the Elder Brethren and myself, and we agree in the following conclusions.

First, as to the *Princess Alice*. It was competent to the *Princess Alice*, after rounding Tripcock Point, to have run up on either side of Galleon's Reach, due regard being had to the ordinary rules and practice of navigating the river. When the tide is adverse, as it was in this instance, it is usual for vessels, after rounding a projecting point, to go across the river for the purpose of what is called "cheating the tide," the tide being slack on the opposite shore as far as the next point on that side. We believe this course to have been pursued by the *Princess Alice* on the evening of the 3rd Sept. last, and that she did pass over from Tripcock Point, or from thereabouts, towards the north shore. If she had intended to proceed up on the south shore of Galleon's Reach, it was her duty to have straightened up the reach immediately after rounding Tripcock Point so as to make her intention manifest by showing her green light to vessels bound down the river. According to the evidence of Long, the surviving mate, this is what the *Princess Alice* did; but we think this evidence is overborne both by the testimony of other witnesses, such as that of the witness from the *Ann Elizabeth*, and the *Plymouth*, vessels moored off the north shore, and from the tug *Enterprise*, which was running down, and also from the fact that the collision took place at a very short distance to the south of mid-channel, and that therefore the *Princess Alice* must have been over to the north of mid-stream when she suddenly starboarded. It appears to us that, when the *Princess Alice* was on a parallel course with the *Bywell Castle*, red light to red light, if their respective courses had been continued they would have passed at a safe distance from each other; but when a very short distance, variously stated at from 100 to 400 yards, intervened between the two vessels, the master of the *Princess Alice* ordered the helm to be put hard a-starboard, by which he brought his vessel athwart the bows of the *Bywell Castle*, and this fearful collision ensued. The captain of the *Princess Alice* having been unfortunately among the number of those who were drowned, it is impossible to ascertain the motive which induced him to give this order; but I may say that the Elder Brethren strongly incline to the belief that he was misled by seeing the green light of the tug *Enterprise*. There is, however, no trustworthy evidence on this point. It appears to us moreover, that the *Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations respecting look-out and speed. In our opinion the *Princess Alice* is to blame for this collision.

It remains to be considered whether the *Bywell Castle* in any way contributed to it. She appears to have been navigated with due care and skill till within a very short time of the collision. But the evidence certainly establishes that, having seen the green light of the *Princess Alice*, she hard a-ported into it. There is no doubt that this was not only obviously a wrong manœuvre, but the worst which she could have executed. The only defence offered for it is, that it was executed so very short a time before the collision. There have been several cases decided in this court, in which it has been holden that a wrong manœuvre taken at the last moment had really no effect upon the collision, on account of the proximity of the two vessels, and I have consulted anxiously with the Elder Brethren whether the wrong action of the *Bywell Castle* can be placed in this category. They are of opinion that, if the obviously wrong order of hard a-porting had not been given and obeyed, though the *Princess Alice* might have received some injury, she would not have sunk, and the lives of her crew and passengers would probably have been saved.

I am bound, therefore, to pronounce both vessels to blame for this collision. Each vessel to pay half the damages sustained by the other and no costs on either side.

From this decision the owners of the *Bywell Castle* appealed, and the appeal was heard before James, Brett, and Cotton, L.JJ., assisted by two nautical assessors, on the 14th and 15th July 1879.

Butt, Q.C., *Clarkson* and *Myburgh* for appellants, owners of the *Bywell Castle*.

Webster, Q.C. and Dr. *W. G. F. Phillimore* for respondents, owners of the *Princess Alice*.

July 15.—James, L.J.—Upon the point which is first to be considered, namely, whether the *Princess Alice* was in fault or not, we have the direct finding of the judge of the Court of Admiralty, and of the Trinity Masters who assisted him. They find in distinct terms that the *Princess Alice* was at one time on a course parallel with that of the *Bywell Castle*, red light to red light, and that if their respective courses had been continued they would have passed at a safe distance from each other; but that when a very short distance, variously stated at from 100 to 400 yards intervened between the two vessels, the master of the *Princess Alice* ordered his helm to be put a-starboard, by which he brought his vessel athwart the bows of the *Bywell Castle*. That was the finding of the judge and the Trinity Masters who heard all the evidence, the comments on it, and any defence suggested by it. They came to that conclusion, and it would require a grest deal to satisfy me that we, sitting as a Court of Appeal, could, on any considerations that have been suggested to us, overrule that finding of fact. My own opinion, moreover, is that the evidence supports it. Then with regard to the general conduct of the *Princess Alice*, on which I have not heard a comment made in support of her, the court says, "It appears to us, moreover, that the *Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations respecting look-out and speed." That is not to be questioned; therefore, upon the issue, whether the *Princess Alice* was to blame, there can

be no doubt that we must affirm the judgment of the court below. The judge of the court below then says that the *Bywell Castle* appears to have been navigated with due care and skill till within a very short time of the collision; and I understand our assessors to agree with those in the court below in that opinion. The only question is as to the last act of the *Bywell Castle* before the collision, which is that she, in the very agony of the collision, just at the time when the two ships were close together, hard a-ported. The learned judge and both of the Trinity Masters were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that opinion also; but they advise us that it could not, in their opinion, have had the slightest appreciable effect upon the collision. Everything else had been done that the few seconds allowed time for. Now, that opinion, if adopted by us—and I think that it should be adopted—is sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right, after, by its own misconduct putting another ship into a situation of extreme peril, to charge that other ship with misconduct or contributory negligence, if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong. A wrong manœuvre, under such circumstances, would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude in giving effect to such judgment under such circumstances, are not to be expected. You have no right to expect persons in charge of ships to be something more than ordinary men. I am therefore of opinion that the finding of the court below that the *Bywell Castle* was, for the purposes of this suit, to be considered to blame, must be overruled, and that the *Princess Alice* was alone to blame.

Brett, L.J.—In this case the Admiralty Court has found that both ships were to blame, and there are practically cross appeals. The judgment of the Admiralty Court is made to depend on four principal findings, some of which are findings of fact, and the others are judicial opinions as to the manœuvres which were or ought to have been employed. The four principal findings seem to be these: First, that at one moment these ships had come on to courses which might be called parallel courses—red light to red light—so that if the respective courses had been continued they would have passed at a safe distance from each other; that is a finding in favour of the *Bywell Castle*, and the appeal of the *Princess Alice* is practically against that finding. Secondly that the *Princess Alice* was going at full speed, and the *Bywell Castle* at something like half speed. Thirdly, that the *Bywell Castle*, up to a very short time before the collision —which, taken in conjunction with the evidence and the first finding, seems to mean up to the time of putting her helm hard a-port—was navigated with due care and skill; that is a finding in favour of the *Bywell Castle*, and therefore is challenged by the appeal of the *Princess Alice*. Fourthly, that though up to that moment the *Bywell Castle* was right, and although the red light of the *Princess Alice* had been on her port bow, yet when the green light of the *Princess Alice* was opened on her port bow, she did wrong in ordering her helm hard a-port, that is a finding against the *Bywell Castle*.

Now, there being in the judgment of the Admiralty Court four distinct and fundamental findings we are asked to review them. We ought not, in accordance with the rules that govern the Court of Appeal, to overrule any one of these findings unless we are convinced that it is wrong. Therefore, applying that rule to the findings which are in favour of the *Bywell Castle*, we must consider whether we can say that the Admiralty Court was wrong in holding that at some particular moment these vessels were on parallel courses, red light to red light, and that up to the time of the order being given to put the helm hard a-port the *Bywell Castle* had been navigated with due care and skill. So far from being able to say that the court was wrong, it seems, on the balance of evidence, tested by the probabilities of the case, that the findings were right; but there was this suggestion—very well put by Dr. Phillimore in the course of the argument—that both ships were going round Tripcock Point on the south shore of the river in parallel circles, and he said that a vessel going up the river on the ebb tide may pass on the inner circle when coming round a point; and if she does so the other vessel ought to keep on the outer circle, the one coming up the stream on the inner or southern circle, and the other going down on the outer or northern circle. If so, at the first moment of sighting each other, the ship coming up the river would be showing her red light, but as she came round the circle it is obvious that she would show her green light, and then they ought to pass starboard side to starboard side. But there is another course which a vessel coming up the river, and approaching such a point, may take if she wishes to cheat the tide; she can go, not necessarily on a straight course to the other side without turning up into the next (Galleon's) reach, nor on a straight line to the next (Bull's) point but round the point under a starboard helm she will be by this means taken nearer to the north shore, and so cheat the tide. Now, that she may do; and not only is that what she may do, but, on the whole, with an ebb tide, it is more than probable that that is what she will do. With regard to a vessel going down, the course will be to go as near as possible down the centre of the stream; and if no other vessel is coming up she will round Tripcock Point, keeping out in the tide, and therefore, when going down Galleon's Reach, she will, for her own advantage, not port her helm at all. Those being the probabilities, we have the evidence here on the one side that no doubt the *Princess Alice* did come close round Tripcock Point, and her case is that she did take, or intend to take, a course which is not improbable, coming close round the magazine, and keeping on the south side; and that, under those circumstances, she did show her green light to the *Bywell Castle* on the starboard bow, and that the *Bywell Castle* showed her green light as she was coming down. But the evidence on the other side is, that the *Princess Alice* came close to Tripcock Point to pass under the stern of the floating magazine, and did not straighten herself up the river so as to run past alongside of it; and that when she passed by the stern of it she was going directly towards the north shore. She would, therefore, when in mid stream and without starboarding, show her red light to the *Bywell Castle* before coming up to the point, and after clear-

ing the point and the powder magazine, she would be drawing her red light on ahead, so that finally it came right ahead of the *Bywell Castle*. That is what the *Bywell Castle* says did happen, that the red light drew across the river to the north side, and came ahead of her. That would, it seems to me fully indicate to the *Bywell Castle* that the *Princess Alice* was going a course which would take her across to the north side; and the answer to the argument that the *Bywell Castle* ported without having any regard to the *Princess Alice* is, that it is a very unlikely thing for her to do, but that if she saw this red light passing on until it came ahead of her, it is not unnatural that she would slightly port her helm. It seems a natural and proper thing to do that which she says she did, and for the reason which she gives, there being no reason why she should do it for any other purpose. Therefore the argument that she executed a wrong manœuvre fails. I agree with the finding that it was not wrong. Then the *Princess Alice* would naturally keep on her course until she got more to the north, as it is said she did. No doubt the slight porting of the *Bywell Castle* would bring the *Princess Alice* more on the port bow; so would the fact of the *Princess Alice* keeping on crossing the river. It has been argued if she was then under a starboard helm, though she got on to the port bow of the *Bywell Castle*, that the *Bywell Castle* nevertheless ought to have starboarded or kept straight down the reach. It seems to me that that is to propound a most dangerous rule, that if two vessels are coming round a point in opposite directions, one under a starboard helm, if she crosses so that her red light is on the port bow of the other, she shall have the right to pursue her course and to keep her helm to starboard. It seems to me that the rule that both ships ought to pass port side to port side applies, and it would be dangerous to hold the contrary. It was the duty of the *Princess Alice*, if under a starboard helm to ease it at once, so as to pass port side to port side. According to the argument she did not do that. It seems to me that not only could I not legally say that the finding of the court below was wrong; but, taking the evidence and the probabilities, I should have decided in the same way, that the red light of the *Princess Alice* had got on the port side of the *Bywell Castle*, and that it was her duty to ease her helm. I cannot indeed have a doubt that the *Princess Alice* was in the wrong. She was in the wrong for not keeping on the port side of the *Bywell Castle*, having once got there, and she was also in the wrong in going at the time at full speed; therefore she was doubly wrong. Then, if that be so, of course she was still more wrong if, instead of easing her starboard helm, she kept on that helm, and if she did ease it, she was still more wrong in putting it again to starboard if she was on the port side of the *Bywell Castle*. By her wrong act she put the *Bywell Castle's* captain into an extreme difficulty in showing him a green light on his port bow when close to him.

The next question is whether the *Bywell Castle*, being put into that difficulty, did what was wrong. It is said that she did so in two respects; but what is the wrong that the court is bound to find she did? Not merely that she did a wrong thing, but that she was guilty of a want of that care or skill which she ought to have shown under such difficult circumstances. I am clearly of opinion that, when one ship by her wrongful act puts another ship into a position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances; but any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible. What the pilot did was to give the orders to stop the engines and to put the helm hard a-port: and the order to stop was carried out. He says that he gave the order not only to stop, but to reverse. I agree that, if he had time to do it, he ought to have done it. There was some dispute as to who did give the order, and it is said that if he did give the order it was not obeyed; but again we must consider the circumstances. He was not called upon to give the order to stop and reverse until the other ship had done the wrong thing. Where did she do it? She did it close to him. The court below has not found that there was any wrong order as to the stopping or reversing, though it has found that the order to port was wrong. We are, however, advised that the order to put the helm hard a-port had no practical effect upon the collision. If that be so, of course it follows that the last wrongful act of the *Princess Alice* was done so near to the *Bywell Castle* that it was impossible by any manœuvre to avoid the collision. If the fact of ordering the helm hard a-port had no effect upon the collision, it is immaterial whether it was given or not. Even if it had an effect and was wrong, we have come to the conclusion that the captain of the *Bywell Castle* was suddenly put into an extremely difficult position, and assuming that a wrong order was given, that it ought not, under the circumstances, to be attributed to him as a thing done with such want of nerve and skill as entitles us to say that by negligence and want of skill the *Bywell Castle* contributed to the accident. Therefore, though agreeing with all the other findings as to the *Princess Alice*, we must come to a different opinion as to the last finding, the result of which is that we must hold the *Princess Alice* solely to blame.

Cotton, L.J.—After the very full way in which Brett, L,J. has entered into the case it is unnecessary for me to say more than that I have come to the same conclusion, but I wish to add a few words. There are in this case two questions to consider. First, was the judge of the court below right in finding that the *Princess Alice* was in fault? We here are only dealing with the evidence which was brought before the judge of the court below, who had the benefit of seeing and hearing the witnesses. We have not had that opportunity of testing the evidence, and that in this case is of very considerable importance, because a great deal of the argument on behalf of the *Princess Alice* consisted in commenting on alleged discrepancies in the evidence of the witnesses for the *Bywell Castle*, and asking us practically to discredit their evidence. In such a case, in order to overrule the finding of a judge of the court below, we ought to be satisfied that his finding cannot upon the evidence be sustained.

This in the present case I cannot say, because, on the evidence which we have heard, I should have arrived at the same conclusion, as the learned judge of the court below. [His Lordship then commented on the evidence, and concluded that he agreed with what in substance was the evidence on behalf of the *Bywell Castle*, that the *Princess Alice* going over to the point on the north shore had got on the port bow of the *Bywell Castle*, and that she did alter her course by starboarding and hard a-starboarding her helm.] On the other point, that the *Bywell Castle* did not contribute to the accident by hard a-porting before the collision, I agree with the view expressed by Brett, L.J. Our assessors tell us that it could not in any way have been contributory to the accident, which in their opinion, was then inevitable. Even if the collission had not been unavoidable at the time when the helm of the *Bywell Castle* was put hard a-port, I should not have held that vessel liable, for in my opinion the sound rule is, that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency, caused by the default or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper, although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best. In this case, though to put the helm of the *Bywell Castle* hard a-port was not in fact the best thing to be done, I cannot hold that to do so was under the circumstances an act of negligence on the part of those who had charge of that vessel.

James, L.J. added:—I may say that we should have arrived at the same decision as to the effect of the manœuvre of hard a-porting independently of the advice of our assessors. There is, however, another more general proposition suggested by the counsel for the *Princess Alice* as the result of the cases decided in the Privy Council (*The Velocity*, L. Rep. 3 P. C. 44; 21 L. T. Rep. N. S. 686; 3 Mar. Law Cas. O.S. 308; *The Esk*, 1 Asp. Mar. Law Cas. 1; L. Rep. 3 P.C. 436; 24 L. T. Rep. N. S. 167), that the ordinary rules of navigation do not apply in a sinuous river like the Thames. I endeavoured on a previous occasion to explain what I understood was the meaning of those cases; that is, that in a sinuous river the position of a ship and the direction of her head in the act of rounding a point is not to be taken to show that the direction of her head will be the same and the consequent position of the ship will be the same when the point is rounded.

Solicitors for appellants, owners of *Bywell Castle*, *Thomas Cooper* and *Co.*

Solicitors for respondent, owners of *Princess Alice*, *Newman*, *Stretton*, and *Hilliard*.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins and A. H. Bittleston, Esqs., Barristers-at-Law.

Wednesday, Dec. 3, 1879.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Hayton *v.* Irwin.

APPEAL FROM THE COMMON PLEAS DIVISION.

Charter-party—Vessel to proceed to port "or so near thereto as she can safely get"—Custom inconsistent with charter-party.

A custom of a port, that charterer is not bound to take delivery of cargo elsewhere than at port of destination, cannot be set up in answer to a claim by shipowner on a charter-party, which provides that the ship shall proceed to a certain port, or so near thereto as she can safely get, and deliver.

Judgment of Grove, J. affirmed.

Demurrer to defence.

The statement of claim alleged that the plaintiff was the managing owner of a vessel called the *Elizabeth Ostle*, and was a partner in the firm of Hayton and Simpson of Liverpool; that the defendant was a merchant in London; and the plaintiff through his said firm chartered the *Elizabeth Ostle* to the defendant for a voyage from Japan with a cargo of rice in bags, or such other merchandise, being measurement goods, as the charterer's agent might wish. The charter-party went on to provide that the vessel, "being so loaded, shall therewith proceed to a safe port in the United Kingdom or on the Continent between Havre and Hamburg, both ports included, as ordered at Queenstown or Falmouth, within forty-eight hours after receipt of telegrams or letter of advice of arrival, or so near thereto as she can safely get, and deliver the same on being paid freight at the rate, &c. . . . The cargo to be brought to and taken from alongside the ship at merchant's risk and expense." The statement of claim continued as follows:

Paragraph 4.—The *Elizabeth Ostle* was loaded by the defendant at Japan under the said charter, and was ordered to Hamburg.

5. She sailed for Hamburg, but her draught of water with the said cargo on board was so great that she could not get up the river to Hamburg. Stade was as near thereunto as she could safely get, and when at Stade the plaintiff in accordance with the terms of the said charter was willing to deliver the said cargo to the said defendant there, or to deliver to him there so much of the said cargo as would lighten the ship sufficiently to enable her to proceed up the river to Hamburg.

6. The defendant refused to take delivery of the said cargo or any part thereof at Stade, and refused to perform and broke the said charter.

7. The plaintiff, for the purpose of completing the said voyage, and earning freight, discharged part of the said cargo into lighters at Stade, and the same was delivered from the said lighters to the defendant's agent at Hamburg. When lightened, the *Elizabeth Ostle* proceeded to Hamburg, and there delivered the remainder of the cargo to the defendant's agent.

8. The lighterage expenses necessarily incurred by the plaintiff in consequence of the defendant's breach of the said charter-party amounted to 38*l.* 13*s.* 5*d.*

The plaintiff claimed the amount of the lighterage expenses.

Statement of defence:

Paragraph 5.—By the custom of the port of Hamburg the defendant was not bound to take delivery of the cargo, or any part of it, at Stade, or elsewhere than at the port of Hamburg, nor were lighterage expenses incurred by the plaintiff for the purpose of lightening his

vessel and enabling him to proceed up the river to Hamburg, and there complete the unloading of the cargo, in the absence of special agreement recoverable from the defendant by the plaintiff.

Demurrer to paragraph 5 of the statement of defence, on the ground that it set up a custom inconsistent with the charter-party.

Nov. 8, 1879.—*French* for the plaintiff.—A special agreement between parties to a charter-party cannot be overridden by a custom of a port to which the ship happens to be ordered :

Wigglesworth v. *Dallison*, 1 Smith's Leading Cases, 8th edit. p. 605, and notes thereto ;
Norden Steam-shipping Company v. *Dempsey*, L. Rep. 1 C. P. Div. 654 ;
Robinson v. *Mollett*, L. Rep. 7, H. of L. 802.

The arrival at Hamburg, so as to give delivery there of the whole cargo without lightening being impossible, the custom is not applicable. If the custom could override the agreement, it would not apply without an express allegation that such custom was known to the plaintiff :

Kirchner v. *Venus*, 12 Moore P. C. C. 361.

Wilberforce for the defendant.—There is nothing in the custom set up inconsistent with the charter-party ; the facts stated show that the ship had not got within the "ambit of the port," which is, without which she cannot be said to have gone as near thereto as she could

Schilizzi v. *Derry*, 4 E. & B. 873 ; 24 L.J. 193, Q.B.;
Metcalfe v. *Britannia Ironworks Company*, L. Rep. 1 Q.B. Div. 613 ; 2 Q.B. Div. 423 ; 3 Asp. Mar. Law Cas. 313, 407.

If the plaintiff was unable to get up to Hamburg without lightening, he was bound to bear the expense of such lightening himself:

Hillstrom v. *Gibson and Clark* (Scotch Court of Session), 21 L. T. Rep. N. S. 302 ; 22 L. T. Rep. N. S. 248 ; 3 Mar. Law Cas. O.S. 302, 362.

French in reply.

Grove, J.—This demurrer must be allowed. By the case as it appears on the face of the pleadings, the vessel being loaded is to proceed "to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, both ports included, as ordered at Queenstown or Falmouth, within forty-eight hours after the receipt of telegrams or letters of advice of arrival, or so near thereto as she can safely get." It is then further provided that the cargo is to be brought to, and taken from, alongside the ship at the merchant's risk and expense. The statement of claim avers that the ship's draught of water was too great to allow of her getting up the river higher than Stade, and that she could not therefore reach Hamburg. The plaintiff then took the other alternative ; he got as near to Hamburg as he could, that is, he went to Stade, and then offered to deliver the cargo to the defendant, or at least as much of it as would lighten his ship sufficiently to enable him to proceed up the river to Hamburg. If the plaintiff had refused to deliver his cargo or any part of it until such time as he could deliver the whole at Hamburg, knowing that it was impossible to reach that place at all so long as he drew so much water, such a course would have been unreasonable. The plaintiff, however, got as near to Hamburg as he could safely get with his full cargo on board, and then offered to deliver the whole or part of his cargo. The statement of claim alleges a refusal by the defendant to allow the ship to be lightened at Stade, but that in spite of the refusal part of the cargo was, in order to save freight, put into lighters and carried up to Hamburg, being followed by the rest in the lightened ship, where the whole was delivered to defendant's agent. The defendant contends that he was not bound to accept any part of the cargo at any other place than Hamburg, and that is equivalent to saying that the custom of the port of Hamburg overrides the express agreement in the charter-party, or, in other words, the defendant argues that the plaintiff was bound to deliver at Hamburg whether he could reach that place or not. If that plea contained in the 5th paragraph of the defence were allowed to remain, I should be deciding that the custom of the port of Hamburg could override the agreement made between the parties. I confess I was at the time impressed by Mr. Wilberforce's remarks on *Hillstrom* v. *Gibson* (*ubi sup.*), but on examination that case will be found not to effect the present. I think the demurrer must be allowed, with liberty to the defendant to amend repayment of costs, and the question of lighterage expenses can be settled at the trial.

The defendant appealed.

Dec. 3, 1879.—*Wilberforce*, for the defendant, argued as below.

French, for the plaintiff, was not called upon.

Bramwell, L.J.—This is a case in which a demurrer is useful, as it raises the question in dispute between the parties in a way which may save expense. I am of opinion that the judgment is right, and ought to be affirmed.

Brett and Cotton, L.JJ. concurred.

Judgment affirmed.

Solicitors for the plaintiff, *Prior, Brigg, Church,* and *Adams*, for *J. B. Wilson*, Liverpool.

Solicitor for the defendant, *J. M'Diarmid.*

Nov. 20, 21, *and Dec.* 18, 1879.

(Before Bramwell, Brett, and Cotton, L JJ.)

E. Pellas and Co. *v.* The Neptune Marine Insurance Company.

Marine insurance—Money owing to underwriters by assured—Defence in action by assignee of the policy—31 & 32 *Vict. c.* 86.

In an action by an assignee of a marine policy against the underwriters, the defendants are not entitled under 31 & 32 *Vict. c.* 86, *s.* 1, *to set up a counter-claim for money owing to them by the assignor at the time of the assignment, but in respect of matters not arising out of the policy.*

The policies of Marine Assurance Act 1868 (31 & 32 *Vict. c.* 86), *which enables assignees of marine policies to sue thereon in their own names, provides that "the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom, or on whose account, the policy had been effected."*

Held, in an action by the assignees of a policy, that the underwriters were not entitled, under this provision, to set off a debt due to them from the person by whom the policy had been effected, the action being one for unliquidated damages in which a set-off could not be pleaded before the Judicature Acts, and those Acts not making a

set-off or counter-claim a defence within the Policies of Marine Assurance Act 1868.

Judgment of the Common Pleas Division (Denman and Lopes, JJ.) reversed.

This was an action upon a policy of marine insurance, tried before Lord Coleridge, C.J. at the Guildhall. The plaintiffs were merchants in London, and the defendants were an insurance company carrying on business at West Hartlepool, in the county of Durham.

On the 7th April 1876, Anthony Harris and Co., of Newcastle, effected a policy of insurance (in the usual form) for 300*l.* on a cargo of coals (and cash advances) shipped on board the ship *Toivatar*, for a voyage from the Tyne to Genoa. The defendants became insurers to Harris and Co. for 300*l.* Harris and Co. were at the time of the making of the policy, and thence up to the date of the agreements hereinafter mentioned, interested in the coals and cash to the amount of all the moneys by them insured thereon, and the policy was made on their account, and for their use and benefit.

On the 22nd May 1876 the policy was assigned by Harris and Co. to M. L. Questa, of Genoa; on the 30th of the same month it was assigned by Questa to Pastorini and Co., of Genoa, and on the 10th May 1877 it was assigned by Pastorini and Co., to the plaintiffs, by virtue of which assignments all the right, title, and interest in the policy passed to the plaintiffs. The coals were duly shipped on board the *Toivatar* in the Tyne, to be carried to Genoa. The *Toivatar* during her voyage met with disasters, and did not reach her port of discharge until March 1877. A notice of abandonment was given on the 12th May 1877, and was ultimately accepted by the defendants. Between the 1st Jan. and the 1st Feb. 1877 Harris and Co. became indebted to the defendants in the sum of 40*l.* for premiums on policies other than that sued on in this action. The defendants had no notice that the policy had been assigned by Harris and Co. until after the debt of 40*l.* had been contracted. Harris and Co. filed a petition for liquidation on the 15th Feb. 1877. The writ of summons was issued on the 24th Aug. 1877. The defendants, against the claim to recover 300*l.* for a total loss, by way of set-off pleaded that "at and previous to the date of the writ, and at the time when the loss in the statement of claim mentioned arose, Harris and Co. were, and they still are, indebted to the defendants in the amount of 40*l.* 4*d.* in respect of moneys due by Harris and Co. to the defendants for premiums on policies other than the policy in the statement of claim mentioned, effected by Harris and Co. with the defendants, and the defendants claimed to set-off that sum against an equal amount of the plaintiffs' claim, paying the balance into court. The only question in dispute, therefore, was whether the defendants were entitled to deduct the above-mentioned sum of 40*l.* odd from the 300*l.* payable by them in respect of the total loss. Lord Coleridge decided against the plaintiffs on this question, and directed the jury to find a verdict for the defendants.

A rule for a new trial was subsequently obtained in the Common Pleas Division by the plaintiffs, on the ground of misdirection of the learned judge in holding that the set-off could be maintained against the present plaintiffs; but, after argument, the rule was discharged (4 Asp. Mar. Law Cas. 136; 40 L. T. Rep. N. S. 428).

The plaintiffs now appealed from the judgment of the Common Pleas Division, discharging the rule.

Murphy, Q.C. and *R. E. Webster*, Q.C. for the plaintiffs.—It is admitted that, if the words of the 31 & 32 Vict. c. 86 are to be read in their extreme literal sense, then the judgment of the Common Pleas Division is right, and the plaintiffs are wrong. By that Act, "Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom and for whose account the policy sued on was effected." This is an action for unliquidated damages, and before the Judicature Acts there could be no set-off in such an action. Supposing this had been a suit in equity before the passing of the Policies of Marine Assurance Act 1868, would the defendants have been allowed to set off this sum? [Bramwell, L.J. referred to *Higgs* v. *Northern Assam Tea Company*, L. Rep. 4 Ex. 387; 21 L. T. Rep. N. S. 33.) The intention of the Act, it is submitted, is to give the defendants the benefit of all the defences arising upon the policy itself, such as concealment, &c., but not to burthen an assignee with the private debt of his assignor. This is not an action under sub-sect. 6 of sect. 25 of the Judicature Act 1873, because under that section an assignee must have given notice of the assignment before he can sue in his own name. This is an action under the Policies of Marine Assurance Act 1868. The defendants must be taken to have agreed that no defence such as this now relied upon should be set up, having issued an instrument which is legally assignable. The general rule that an assignee of a *chose in action* takes subject to the equities attaching thereto must be qualified in some cases. It is submitted that Lord Coleridge should have given judgment for the plaintiff, and that this court, having all the materials before them, should do so now. They cited

Pickard v. *Sears*, 6 Ad. & E. 469;
Re Agra and Masterman's Bank; Ex parte Asiatic Banking Corporation, L. T. Rep. 2 Ch. 391, 397, per Lord Cairns; 16 L. T. Rep. N. S. 162;
Re Blakely Ordnance Company, Ex parte New Zealand Banking Corporation, L. Rep. 3 Ch. 154; 18 L. T. Rep. N. S. 122;
De Mattos v. *Saunders*, L. Rep. 7 C. P. 570; 27 L.T. Rep. N. S. 120;
Judicature Act 1875, Order XIX., rule 3.

[Bramwell, L. J. referred to the statutes of set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5.]

A. L. Smith and *Chalmers* for the defendants.—Two objections have been taken to this set-off. First, it is said that it is only available against Harris, and that this section is not brought by him. Secondly, that this is an action for an unliquidated sum, in which no set-off is allowable. The first objection is disposed of by 31 & 32 Vict. c. 86. Further, the defendants had no notice of the assignment here, and they are, therefore, entitled to deal with this claim as if it was a claim by the assured (*Cavendish* v. *Deaves*, 24 Beav. 163). As to

the second, it is admitted that before the Judicature Acts a set-off could only take place between liquidated sums; but by Order XIX., rule 3, a defendant may now set off or counter-claim against either liquidated or unliquidated claims. Consequently, a liquidated debt may now be pleaded as an answer to an unliquidated claim. A counter-claim is not necessary, unless the defendant's claim is also unliquidated, or unless he seeks to recover something from the plaintiff, and not simply to use his claim as a defence to that of the plaintiff's.

Murphy, Q.C. did not reply.

Cur. adv. vult.

Dec. 18.—Bramwell, L.J.—We are of opinion that the appeal must be allowed. The plaintiffs are the assignees of a policy of marine insurance, and they have brought an action on it against the defendants, who have pleaded a set-off founded upon a debt due to them from the original assured. The question is whether this is any defence in point of law, and we are of opinion that it is not. The defendants rely upon the last clause of sect. 1 of 31 & 32 Vict. c. 86, and their defence is based upon the words, "and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy was effected." This is a statute relating to procedure only: and I do not think that such words as I have read can make any difference as to the rights of the parties in an Act of Parliament relating to procedure. Without the aid of the statute the assignee might have sued at law in the name of the assured, and in a court of equity in his own name. The statute was passed because the Legislature wished to give the assignee a more convenient remedy, and intended that he should be in the same position as if he had sued in a court of equity; no alteration in the rights of the parties was contemplated, and in equity I have high authority for saying that such a set-off as this would be no defence. The assignee would be allowed to sue in a court of equity in his own name, because there was a technical objection to his suing in his own name in a court of law, but in equity the underwriter would not be permitted to set up any defence which he could not plead in a court of law. At the time this Act (31 & 32 Vict. c. 86) passed, this set-off would have been no defence either at law or in equity.

It has been argued that by Rules of the Supreme Court 1875, Order XIX., r. 3, the set-off is admissible as a defence on the ground that that rule is to be read together with 31 & 32 Vict. c. 86, s. 1. The House of Lords have decided that a general statute may repeal a particular statute; nevertheless I do not think that this rule alters 31 & 32 Vict. c. 86, which did not allow such an answer as this. The rule does not authorise a "defence" within the meaning of 31 & 32 Vict. c. 86. It is true that it speaks of "set-off" and "counter-claim," but these are different remedies from "set-off" under the statutes, 2 Geo. 2 c. 22, s. 13, and 8 Geo. 2 c. 24, s. 5. Under those statutes set-off never gave the defendant a judgment for any amount; he never could recover anything from the plaintiff. The former plea of set-off merely alleged that the plaintiff's claim did not overtop the defence. But the argument for the defendants was that whatever was a defence to a liquidated claim has been made by Order XIX., r. 3, a defence to an unliquidated claim. I cannot assent to that argument. According to it, if A. sues B. for damages for breaking his leg, B. may set up as a "defence" a claim against A. as the acceptor of a bill of exchange; is it possible to say that that can be deemed a "defence?" The rule does not authorise such an answer as this, and I am confirmed in this opinion by its concluding words, which allow a court or judge to refuse the defendant permission to avail himself of it. It is hardly to be supposed that this provision can refer to a defendant's right to defend himself. The orders and rules under the Supreme Court of Judicature Acts 1873, 1875, are matters of procedure, and are not intended to alter the law or the rights of the parties. If before those statutes the plaintiffs would have been entitled to maintain the action for the full amount from which the defendants seek to deduct 40*l.*, the plaintiffs can maintain it now.

Brett and Cotton, L.JJ. concurred.

Appeal allowed.

Solicitors for plaintiffs, *Lowless* and *Co.*

Solicitors for defendants, *Shum, Crossman*, and *Pritchard*, for *Turnbull* and *Tilly*, West Hartlepool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by W. Cowell Davies, Esq., Barrister-at-Law.

Friday, Jan. 23, 1880.

(Before Bacon, V.C.)

McStephens and Co. *v.* Carnegie and others.

Practice—Service out of the jurisdiction—Contract—Rules of Court 1875, *Order XI., r.* 1.

In an action by a first mortgagee of a British ship and her freight against a second mortgagee, the mortgagor and puisne incumbrancers claiming an account, the plaintiff, the first mortgagee, discovered part of the mortgaged property in the hands of R. and Co., a firm of Antwerp merchants, who claimed to retain it as against a debt due to them from the second mortgagee. The plaintiff thereupon obtained an order for leave to amend by adding R. and Co. as defendants, and for leave to serve them with notice of the writ. On motion by defendants to discharge this order,

Held, that the court had jurisdiction to make the order for service of notice of the writ on R. and Co. under Order XI., r. 1, *on the ground that the contract in respect of which the action was brought was an English contract.*

This was a motion on behalf of some of the defendants Messrs. Ruys and Co., a firm of merchants at Antwerp, to discharge an order made at chambers directing service upon them at Antwerp of notice of a writ of summons in the above action.

The plaintiffs were the first mortgagees of a British ship the *India*, and her freight, by virtue of a mortgage executed by both parties in London.

The several defendants were—the second mortgagee of the ship and freight; his trustee in liquidation; the master of the ship; the trustee in bankruptcy of the mortgagor; the owners of the ship, Messrs. Baldwin; Law, Surtees, and Co., who claimed a charge on the freight for advances under a letter subsequent in date to the plaintiff's mortgage; and Ruys and Co. (the moving defendants), the holders of the freight, who also claimed to retain the freight as against a debt due to them from the second mortgagee.

The plaintiff's mortgagee was executed in January or February 1877, and the defendant Carnegie's second mortgage in March following. In June 1877 the *India* arrived at Antwerp from the Mediterranean, and proceedings were commenced at Antwerp in the name of Wetherell, the master, under which a sum of 30,000 francs as freight was ordered to be paid, according to the plaintiff's contention, to Wetherell, as representing the owner Baldwin, but according to the contention of the defendant Carnegie, to Ruys & Co. as agents for him, as assignee of the freight. The fund eventually found its way into the hands of Messrs. Ruys & Co. The *India* afterwards came on from Antwerp to London, where she was sold, in pursuance of an order of the Admiralty Division, for the purpose of paying the wages of the crew and the wages and disbursements of the master. The plaintiff's claim was for an account of what was due to them on their mortgage, an account of what was due to them for wages of the crew of the *India*, and for expenses in taking charge of her down to the time of her sale, and for costs in the Admiralty action, a declaration that they were entitled to payment out of the freight, and for a receiver thereof, and an injunction to restrain the defendants from dealing with the same.

An order had been obtained in Chambers for leave to amend by making Ruys & Co. parties, and for leave to serve upon them notice in lieu of service of the writ of summons. The statement of claim as amended alleged that Ruys & Co. claimed to retain the freight against a debt due to them by Carnegie.

Everitt, for the motion.—These defendants are foreigners out of the jurisdiction, and the subject-matter of the action as against them is not situate within the jurisdiction. The case is not within any one of the alternatives mentioned in Order XI., r. 1. The court has therefore no jurisdiction, and the plaintiff, if he sues Ruys & Co., must sue them in the foreign court:

Schibsby v. *Westernholz*, L. Rep. 6 Q. B. 155;
Cresswell v. *Parker*, 40 L. T. Rep. N. S. 599; L. Rep. 11 Ch. Div. 601;
Tottenham v. *Berry*, L. Rep. 12 Ch. Div. 797.

H. Burton Buckley, for the plaintiffs.—The main causes of action arose within the jurisdiction, and the relief claimed against Ruys and Co. is merely subsidiary, so that the fact of the cause of action against them having arisen out of the jurisdiction is immaterial. The plaintiff's proceedings are perfectly regular; notice of the writ must be served, not the writ, and there is nothing to prevent the issue of a writ against the foreigners:

Westman v. *Aktiebolaget Ekmans, &c.*, L. Rep. 1 Ex Div. 237.

That is a common law case, but the same rules apply in the Chancery Division.

Padley v. *Camphausen*, L. Rep. 10 Ch. Div. 550;

In *Tottenham* v. *Barry* (*supra*) and *Cresswell* v. *Parker* (*supra*),

The defendants were resident in Ireland and Scotland respectively, and Scotland and Ireland are provided for in other ways, therefore this court had no jurisdiction. These decisions are not authorities for the present case.

Everitt in reply.

BACON, V.C.—I cannot accede to this application. I am of opinion the court has full jurisdiction under Order XI., r. 1, to make the order the defendants now seek to set aside, for the contract upon which the claim is based is an English contract. The case presents itself to me thus. A first mortgagee claiming against the mortgagor and puisne incumbrancers finds part of the property in the hands of a firm of Antwerp merchants, who make some claim to it, because the second mortgagee owes the money; the first mortgagee's right, which is paramount to that claim, is the right interfered with so that it cannot matter where the contract between the second mortgagee and Ruys and Co. was entered into. The order for service of notice of the writ of summons on these defendants is perfectly right, and the motion must therefore be refused, with costs.

Solicitors: *Lyne* and *Holman*; *W. W. Wynne*.

QUEEN'S BENCH DIVISION.

Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

Nov. 23 *and Dec.* 20, 1879.

(Before LUSH, J.)

CROOKS AND CO. *v.* ALLAN AND ANOTHEE.

General average loss—Duty of shipowner—Exemption from damages capable of being covered by insurance.

The plaintiffs' goods, shipped in a steamer of the defendants to be carried further by railway, were injured by water used to extinguish a fire on board. The defendants refused to give any assistance to the plaintiffs to get an average statement made out or to recover contribution, on the ground that the ship was not liable to contribution by reason of a clause in the bill of lading to the effect that the shipowner and railway company were not to be liable for any damage to any goods which was capable of being covered by insurance.

Held, by Lush, J., upon further consideration, that this clause had reference to and qualified the defendants' liability as carriers only, and did not preclude contribution to general average; also that the plaintiffs' loss by the defendants' refusal was recoverable in this action.

THIS was an action tried before Lush, J. at the last Liverpool Summer Assizes, and was argued afterwards upon further consideration.

Herschell, Q.C. and *J. C. Matthew* for the plaintiffs.

C. Russell, Q.C. and *French* for the defendants.

The facts and arguments are sufficiently stated in the judgment. *Cur. adv. vult.*

Dec. 20.—LUSH, J.—The plaintiffs are the shippers of goods on board the *Sardinian*, a steamer belonging to the defendant company, for conveyance from Liverpool to Montreal. In the

course of the voyage a fire broke out in the hold, which made it necessary to scuttle the ship in order to protect the whole from destruction. The water materially damaged the plaintiffs' goods, and occasioned a general average loss. The ship returned to Liverpool, the cargo was discharged, and handed over by the defendants to the Liverpool Salvage Association to be distributed and disposed of as might be most for the benefit of the parties concerned.

The complaint against the defendants is that they refused to give any assistance to enable either the association or the underwriters, or the persons whose goods were so damaged, to get an average statement made out or to take any steps to enable the plaintiffs to recover contribution. They delivered up the cargo without taking the usual security from any of the owners of cargo, and the plaintiffs were not only without the benefit of such security, but without the means of ascertaining in what proportions the several cargo owners were liable to contribute or even who, besides the defendants, were the contributing parties. The defendants' reason for adopting so unusual a course avowedly was because they considered the ship not liable to contribution, and they based their claim to immunity from general average on a clause in the bill of lading. By this instrument the defendants undertake to deliver the goods at the port of Montreal (unless prevented by certain specified perils) unto the Grand Trunk Railway, by them to be forwarded, "upon the conditions before and after expressed," thence per railway to the station nearest to Toronto, and at the said station delivered to the consignees at a through tonnage freight. Then follow a number of minute stipulations and exemptions, amongst which is the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor in any case for more than the invoice or declared value of the goods whichever shall be the least." The case is, in my opinion, not distinguishable from *Schmidt* v. *The Royal Mail Steamship Company* (*a*) (45 L. J. 641 Q.B.). Although the words "fire and the consequences thereof," which are the words relied on in that case, are here found in the previous enumeration of perils, the words in

(*a*) QUEEN'S BENCH DIVISION.

May 12, 1876.

(Before BLACKBURN and LUSH, JJ.)

SCHMIDT *v.* THE ROYAL MAIL STEAMSHIP COMPANY.

SPECIAL CASE.

1. The plaintiff is a merchant carrying on business in London, Paris, and San Francisco, under the firms Henry Schmidt and Co., and Schmidt, Greenebaum, and Co.

2. The defendants were and are the owners of the British steamship *Nile*.

3. On or about Dec. 1874 the plaintiff delivered to the defendants a case of goods marked, &c., to be carried and conveyed *vid* Colon (Aspinwall) and Panama to San Francisco, upon the terms of a bill of lading, of which the following is a copy:

"Shipped in good order and well conditioned by H. Ceske in and upon the steamship *Alice*, whereof Mabb is master for the present voyage, or whoever else may go as master in the said ship, and now lying in the port of Havre, and bound for Southampton. Six cases goods being marked and numbered as per margin, the said goods to be transhipped or landed and reshipped on board the Royal Mail steam-packet appointed to sail for the West Indies on the 17th day of Dec. 1874, and failing shipment by her then by any subsequent steamer in which there is space, for the West Indies, to be carried and conveyed to Colon (Aspinwall) and Panama to San Francisco, that is to say, by arrangement between the Royal Mail Steam Packet Company and Pacific Mail Steamship Company, to be carried to Colon (Aspinwall) by the packets of the said Royal Mail Steam Packet Company from Colon (Aspinwall) to Panama by the said Panama Railroad Company, and thence to the port of destination by the Pacific Mail Steamship Company, with leave to tow and assist vessels in distress, to sail with or without pilots, to tranship from one to another of the packets of the Steam Packet Company, and to lighter from steamer to steamer, and from steamer to shore, and to load at port or ports, and to be delivered in such good order and condition as aforesaid (the act of God, enemies, pirates, robbers, and thieves by land or at sea, privateers, letters of marque, or reprisals, rising of passengers, restraint of princes, governments, rulers, and people, vermin, barratry, collisions at sea or in port, fire on board, in hulk, or craft, on wharf, in warehouses or cars, or on shore, lighterage in the bay of Panama, all accidents, loss and damage from machinery, boilers, and steam, or from accidents or perils of the seas, or of land or rivers, or of sail or steam navigation, of whatever nature or kind soever, or from any act, neglect, or default whatsoever of the pilot, master, or marines, in navigation being excepted), the parties hereto being in no way liable for any consequences of the causes above excepted at San Francisco under Messrs. C. Schmidt, Greenebaum, and Co., or his or their assigns. Freight at the rate stated in margin. All responsibility on the part of the above-mentioned companies is to cease on the happening of any of the above excepted contingencies, or on the delivery of the above-mentioned packets at the ship's tackles at the port of San Francisco; and freight and primage is to be considered as earned ship lost or not lost." [The rest of the bill of lading set out is not material to the points decided.]

4. The *Nile* sailed for Colon with a general cargo, including the said goods. In the course of the voyage, and while the said goods were so on board the *Nile*, a fire accidentally broke out in the vessel's hold, and in order to extinguish it a large quantity of water was thrown down or pumped into the hold by the defendant's servants, and some of the defendant's said goods were damaged by the water. None of the plaintiff's goods were on fire.

5. By the means aforesaid the fire was extinguished and the *Nile* completed her voyage, and the said goods were subsequently delivered to the plaintiff at San Francisco.

6. The value of the *Nile* at termination of the said voyage was 60,000*l.* and upwards. The plaintiff contends that the steps taken to extinguish the fire as in paragraph 4 mentioned were taken for the preservation of the vessel her cargo and freight and the whole adventure and gave rise to a claim for general average, and that the plaintiff is entitled to contribution in general averages from the defendants as owners of the *Nile* to the damage so occasioned to his said goods.

The defendants contend that the above steps do not give rise to any claim on the part of the plaintiffs to general average as against the defendants; and that, according to the true construction of the said bill of lading and the 503rd section of the Merchant Shipping Act 1854, (I), the defendants are protected from and are not liable to make any such contribution.

The court is to have power to draw any inference of fact that a jury could draw.

Cohen, Q.C. (*J. C. Mathew* with him).

Bult, Q.C. (*Day*, Q.C., and *Sutton* with him).

BLACKBURN, J.—The position of the parties is a very simple one. The defendants have carried goods belonging to the plaintiff under a bill of lading, and the goods have been injured during the voyage in the way described in the case. Now centuries before the bills of lading or policies of insurance was invented, the rule was in existence that where some goods are sacrificed for the general benefit, the loss was not to be borne by the owner of those goods alone, but the loss incurred for the sake of all shall be made good by the contribution of all. Here

question must, like those, be construed to have reference to and to qualify their liability as carriers. I adopt the words which I used in that case, and repeat that "the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average," and unless the contrary appears the words used must be so construed. The argument receives additional force in the present case from the fact that in the clause in question, the carriage on board the ship, and the carriage by railway are linked together. Goods may be damaged in their transit in ship or on the railway, but general average contribution can only arise in respect of damage on ship.

It was stated by the counsel for the defendants in the course of the argument that these words were introduced in order to get over the case just referred to, and to relieve the shipowner from general contribution. If the words fairly bore that construction, another and a more serious question would have arisen, a question which might equally have arisen if the claim was one strictly within the meaning of this clause. The long list of excepted perils and the much longer list of exemptions and qualifications of which the clause in question is one, and which seem designed to exonerate the shipowners from all liability as carriers, and to reduce them substantially to the condition of irresponsible bailees, are printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely-packed small-type lines without a break sufficient to attract notice. If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution—a clause which not only deprives the shipper of an ancient and well-understood right, but which might avoid his policy, and deprive him also of recourse to the underwriter—he ought not only to make it clear in words, but also to make it conspicuous by inserting in it such type and such a part of the document as that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only the evidence of the contract, and it does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them or is not informed in the course of the shipment that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms. Notwithstanding the concluding sentence of these small-typed thirty lines, which says, "In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all the stipulations, exceptions, and conditions, whether written or printed," I should have thought it right, if the stipulation in question bore the meaning contended for, to give the plaintiff an opportunity of supplying, by means of an official inquiry, information as to the circumstances under which the goods were shipped and the bill of lading was taken, and whether the special clauses of this remarkable document were brought to their notice or were read by them before they accepted it. It is necessary in the present case to ascertain these facts, because the clause has not the meaning which the defendants ascribe to it, and the only question is the liability of the ship to contribute.

The next question is whether a shipowner is bound to exercise the power he is invested with when a general average loss has arisen, and to afford the means in his power for adjusting the average claims and liabilities, and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been decided in America in favour of the shipper. (*a*) I am not aware that it has ever been judicially questioned here, and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require, before he parts with it, security for its due payment. In early times the master, when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind. The ordinary course now is, and has been for a very long time, for the shipowner to require, before he delivers the cargo, an average bond or agreement for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require this security.

(*a*) See Parsons on Shipping, vol. i. pp. 475, 477; *Gillett* v. *Ellis*, 11 Illinois Rep. 599, 582; *Dupont du Nemours* v. *Vance*, 19 Howard's Rep. 162.—ED.

the defendants have carried the goods and the loss has been sustained. But then by the bill of lading they have extended the exceptions of matters for which they shall not be liable to fire and its consequences. That is, they say our obligation on the contract to deliver these goods is subject to these exceptions enumerated. I am perfectly certain on the true construction of the bill of lading that this is the meaning, namely, that their contract as common carriers is subject to the specified exceptions, and it is not that their liability to contribution in general average as owners of the ship is to be taken away. Another point has been raised under the 503rd section of the Merchant Shipping Act. I think the answer to it is exactly the same. The matter on account of which the shipowner is to be excused from his obligation to deliver is these things happening, but there is no intention to say if the whole of the adventure be imperilled at sea and the danger be from fire, that when under such circumstances a sacrifice of a certain part of the cargo is properly made to save the rest of the ship, that loss is to be borne by the one only. We decided the very point in *Aspinwall* v. *The Merchant Shipping Company* (not reported) on Tuesday last, and rightly, as I have no doubt, and I decide it again. I will only say further than I said there, that a wilful sacrifice, as in this case, is equally the same as if the loss had occurred in any other less direct manner.

LUSH, J.—I am of the same opinion. The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average where a loss has been occasioned by a sacrifice properly made for the general benefit.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Waltons, Bubb,* and *Walton.*
Solicitors for the defendant, *Wilson, Bristow,* and *Carpmael.*

[This point seems never to have been raised in the United States, there being no trace of it in the text books or reports.—ED.]

The right to detain for average 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 this law, and has become part of the common law of the land.

I am therefore of opinion, first that the bill of lading does not exempt the shipowner from contribution to a general average loss, and secondly that he is liable to this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment. This is all which I am required to decide, and my judgment will therefore be entered for the plaintiffs, with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs, *Waltons, Bubb*, and *Walton.*

Solicitors for defendants, *Gregory, Rowcliffe*, and *Co.*, for *Hill* and *Dickinson*, Liverpool.

Saturday, Dec. 20, 1879.

(Before Lush, J.)

Forwood *v.* North Wales Mutual Marine Insurance Company.

Marine insurance—Constructive total loss—Absolute damage caused by perils insured against.

A shipowner claimed against the insurance company, of which he was a member, upon a policy of insurance incorporating the bye-laws of the company. A constructive total loss of the ship was admitted, but the defendants disputed the claim on the strength of a bye-law which provided that, in the event of any ship being stranded or damaged and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which in no case was to exceed the sum insured:

Held, by Lush, J., on further consideration, that this bye-law was no answer to the action.

This was an action tried before Lush, J., and argued upon further consideration. The plaintiff claimed upon a policy of marine insurance on his ship in respect of a constructive total loss.

Herschell, Q.C. and *Barnes* for plaintiff.

Russell, Q.C. and *Trevelyan* for defendants.—The facts and arguments are sufficiently referred to in the judgment.

Cur. adv. vult.

Dec. 20.—Lush, J.—The only question raised before me in this case is whether the defendants are liable upon the policy stated in the pleadings for a constructive total loss. It is candidly admitted in the statement of defence that the vessel was, whilst the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more than the ship would have been worth when repaired; that a prudent uninsured owner would not have repaired her, but would have sold her unrepaired, and that the plaintiff within a reasonable time gave notice of abandonment, that in effect there was a constructive total loss; but the contention of the defendants is that the policy read in connection with the bye-laws excluded such a liability, and confined the assured in such a case as this, where the ship remained, and might have been repaired as a ship, to claim as for a partial loss only.

There is nothing in the policy itself which sanctions such a defence. It states that in consideration of the person effecting it agreeing to become a member of the company, and to pay all contributions and other sums which, in respect of such insurance, shall become payable to the company, and in all other respects to observe and perform all things to be observed and performed on the part of the assured according and subject to the bye-laws indorsed thereon, the company insured, lost or not lost, 1000*l.*, on the ship valued at 3600*l.* After enumerating the perils insured against, it expressed it to be thereby declared and agreed that the acts of assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment.

This is the whole of the policy, and so far from favouring the notion that constructive total loss was to be excluded, it assumes the contrary, and in view of such an event protects the assured on the one hand from being supposed to have waived his abandonment, and to have resumed the property be endeavouring to save it from utter destruction, and protects the assurer on the other hand from having any attempts which he might make for the same purpose interpreted against him as an acceptance of the abandonment. The argument therefore rests on the 24th bye-law, which is taken to be incorporated in the policy. It is not necessary to consider what would have been the rights of the assured if the bye-law had been at variance with anything found in the policy, for I am of opinion that the bye-law does not affect to deal with a constructive total loss, but with a different state of things. The first bye-law directs the form of the policies, and the bye-laws are indorsed upon it, and it would be strange if either of those bye-laws should contain anything contradictory of or inconsistent with the policy. Any construction which the words admit of must be adopted rather than this. There is, however, nothing ambiguous in them. They are, "Every loss, by stranding or otherwise, shall, without delay be made known to the manager, and all protests, vouchers, surveys, and other statements relating thereto shall be sent to the manager and laid before the directors, and be subject to the stipulations contained in these bye-laws. In the event of any ship being stranded or damaged, and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and any owner or his representative refusing the co-operation of the agents of this company for the safety of such ship shall suffer a deduction of not less than 25 nor over 50 per cent., as the directors shall determine in the settlement of the claim. And it is hereby pro-

vided that no acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and the company under any circumstances shall only pay for the absolute damage caused by the perils insured against, which in no case is to exceed the sum insured."

The object of this bye-law undoubtedly was to limit the amount which the company would have to pay in the event of damage by the perils insured against, not, however, as I think, by excluding constructive total loss, but in the first place by securing the prompt removal of the damaged ship to a place of safety; and secondly by depriving the assured of the right he would otherwise have to claim any extraordinary expenditure by way of salvage or otherwise in addition to the cost of repairs. To this end it requires immediate notice of the loss to be given to the company, and empowers the company to take upon themselves the office of salvors without compromising their right to question the propriety of any abandonment which might have been made, and to charge the assured his proportion of the expense. The proviso shows that the rule has no reference to a total loss, but contemplates a partial loss only; and the last clause, upon which the company mainly rely, declares that the cost of repairs only shall in such case be recoverable. The alternative, in my opinion, is not between partial and total loss, but between cost of repairs simply and cost of repairs *plus* salvage or other expenditure incurred in conveying the ship to a port of refuge.

I am therefore of opinion that upon the question submitted to me the plaintiff is entitled to judgment.

Judgment for plaintiff.

Solicitors for plaintiff, *Waltons, Bubb*, and *Walton*.

Solicitors for defendants, *Forshaw* and *Hawkins*.

Dec. 8, 1879 *and Jan.* 23, 1880.

(Before Field, J.)

Glyn, Mills, Currie, and Co. *v.* East and West India Dock Company.

Bills of lading—Sets of three—Rights of indorsee—Entry under second bill—Liability of warehousemen.

The consignees and owners of a cargo to arrive in London indorsed and delivered the first of three bills of lading to the plaintiffs as a collateral security for money advanced. These bills of lading had been signed by the master of the ship in the usual set, marked respectively "First," "Second," and "Third," and they represented the goods as deliverable to the said consignees or their assigns, that freight was made payable in London, and that the master had affirmed to three bills of lading, "the one of which bills being accomplished, the rest to stand void." When the ship arrived the consignees made entry of this cargo, and it was placed in defendants' warehouses. The master on the same day lodged with the defendants a copy of the manifest of the cargo, with an authority to defendants to deliver the goods to the holders of the bills of lading, and on the following day notice to detain the cargo until the freight should be paid. Upon receipt from the consignees of the second of the bills of lading, the defendants entered the consignees in their books as enterers, importers, and proprietors of the goods, and after removal of the stop for freight delivered the goods to persons other than the plaintiffs, on delivery orders signed by the consignees, the plaintiffs having no knowledge of any dealings with the cargo.

Held (by Field, J.), that upon resorting to their security, the plaintiffs were entitled to recover from the defendants the value of the goods placed with them under the bills of lading.

This action was tried on the 8th Dec. before Field, J. without a jury, when the points of law were argued.

Herschell, Q.C. and *J. C. Mathew* for plaintiffs.

Watkin Williams, Q.C. and *Pollard* for defendants.

The facts and arguments are sufficiently referred to in the judgment.

Cur. adv. vult.

Jan. 23.—Field, J,—This action was tried at the last Guildhall sittings before me, sitting without a jury, and after argument I reserved my judgment. The question raised on it is, whether the plaintiffs are entitled to recover as against the defendants the value of some West India produce represented by bills of lading, of which they are the *bonâ fide* indorsees and holders for value under the following circumstances:

On the 15th May 1878 the plaintiffs advanced the sum of 13,000*l.* to Messrs. Cottam and Co. upon the security of a large quantity of produce of which Messrs. Cottam and Co. were the consignees and owners, and the bills of lading representing which they indorsed and delivered to the plaintiffs by way of collateral security for the advance. A part of the produce consisted of sugar which had been shipped at Jamaica, and was then at sea on board the *Mary Jones*, and, as the facts in reference to this sugar are substantially identical with those relating to the rest of the produce, it was agreed upon the argument that the produce *ex Mary Jones* should represent the whole. The bills of lading thus indorsed and delivered had as usual been signed by the master in a set of three, and each of the set was conspicuously marked as "first," "second," and "third." They were dated the 15th April, and represented the goods as deliverable to "Cottam and Co. or their assigns," freight being made payable in London, and they contained the usual clause, by which it was witnessed that the master had affirmed to three bills, "the one of which bills being accomplished the rest to stand void." It was the "first" of the set which Cottam and Co. transferred to the plaintiffs, and it was the only one which they ever indorsed. Contemporaneously with the advance, Cottam and Co. also signed a memorandum of the deposit of the goods, by which the advance was made repayable on the 15th July. Liberty was given to the plaintiffs to realise the goods in the event of default or other "cause of need," and the memorandum contained provisions for the insurance of the goods by Cottam and Co. against fire, and for the application of any money recovered under the policy in part liquidation of the advance. The *Mary Jones*, which was a general ship, arrived in London, her port of discharge, on the 28th May, and on that day Cottam and Co. made entry of such of the goods on board

as were consigned to them, being the goods in question, and those goods, as well as the rest of the cargo, were landed and placed in the custody of the defendants in their warehouse. On the same day the master lodged with the defendants a copy of the manifest of the whole of his cargo, at the foot of which he signed an authority to the defendants to deliver the goods to the "holders of the bills of lading." On the following day, May 29th, the master lodged with the defendants notice, under sect. 68 of the Merchant Shipping Act Amendment Act of 1862, directing the defendants to detain the cargo until the freight should be paid. On the 31st May the consignees of the goods in question, Cottam and Co., produced to or lodged with the defendants the second part of the set of three of the bills of lading of the goods in question, and the defendants then entered Cottam and Co. under appropriate columns in their books as the "enterers," "importers," and "proprietors" of the goods. Nothing further appears to have been done as to the goods until the 7th June, on which day the stop for freight was removed, and the goods remained in the defendants' custody until the 3rd and 8th of July, on which days they delivered them to Messrs. T. E. Williams for their own use and benefit under delivery orders signed by Cottam and Co. on the 2nd July, and lodged by them with the defendants on the following day. In the case of some of the other produce, forming part of the plaintiffs' security, the defendants made out warrants in favour of Cottam and Co. upon orders lodged by them, and the deliveries were as per the indorsements on the warrants to third parties. These orders for warrants and for delivery were lodged by Cottam and Co., and the deliveries under them were made entirely without the knowledge of the plaintiffs, and Cottam and Co. having filed their petition for liquidation on the 15th Aug. with a large balance due by them to the plaintiffs, the latter proceeded to resort to their security. On application, however, to the defendants the plaintiffs discovered the dealings which had taken place with their goods as above detailed, and having made a subsequent demand of delivery, with which of course the defendants could not and did not comply, the present action was brought.

The question involved is the one so often unfortunately raised in courts of justice, as to which of two innocent parties is to suffer by the dishonest dealing of a third, and the only course open to a court in such a case is to ascertain upon which of the parties the loss is cast by operation of the rules of law applicable to the case, and to decide accordingly. In this action the question is one of considerable mercantile importance, and I have taken time to consider the authorities applicable to it, but the legal result of the facts has always seemed and now seems to me reasonably plain.

By the pledge by Cottam and Co., who were unquestionably the owners of the goods, to the plaintiffs, on the 15th May, and the delivery to them of the indorsed bill of lading, the plaintiffs as indorsees unquestionably became entitled to all Cottam and Co.'s rights. This is established (if authority be necessary) by the case of *Meyerstein* v. *Barber* (16 L. T. Rep. 569; L. Rep, 2 C. P. 39; 2 Mar. Law Cas. O. S. 420, 518; 3 *Ib.* 449), cited in the argument. It is true, however, that the plaintiffs' right of immediate possession was subject to one limitation, viz, the payment of freight on the arrival of the goods, but upon payment of the freight on the 8th June, or at all events after the subsequent demand and refusal, the right of immediate possession as well as of property was clearly vested in them. It is certain that the plaintiffs have never in any way intentionally parted with either of their rights, and the only mode by which the defendants can justify their delivery of the goods upon the order of Cottam and Co. must be by some act or conduct of the plaintiffs either of omission or commission, whereby they have held out to the defendants and induced them reasonably to believe that Cottam and Co. were the owners of and entitled to deal with the goods as their own property, or by some title paramount to that of the plaintiffs, by the coming into effect of which their title was divested. It was admitted by the learned counsel for the defendants upon the argument that the plaintiffs had not been guilty of any laches or negligence so as to estop them from setting up their title; and after a careful consideration of the evidence, I am unable to find that there was any act or conduct done or pursued by them whereby they in any way held out Cottam and Co. to the defendants as authorised, or induced the defendants to believe that they were authorised, to deal with the property in the goods. The omission to inquire for or take possession of the "second" part of the bill of lading or to give notice of the indorsement to them of the "first" were urged by the defendants' counsel as thus operating, but similar arguments were also unsuccessfully relied upon in the case of *Meyerstein* v. *Barber* (2 Mar. Law Cas. O. S. 420, 518; 3 *Ib.* 449), and I can give such contention no better answer than it then received in the judgment of Lord Hatherley.

It was in argument further admitted upon the authority of *Meyerstein* v. *Barber* (*ubi sup.*) that as against the persons who took the goods under the warrants or delivery orders, the plaintiffs' rights of property were sufficient to entitle them to recover the value of the goods; but it was said that this was not so as against the defendants, in whose case the question was not one of property but of contract, and it was urged that the delivery of the goods to Cottam and Co.'s order, which was the act complained of, was justified by the terms of the bill of lading (subject to which the plaintiffs admittedly took the goods), the defendants being, as was said, in the same position as the master of the *Mary Jones*, the goods being, as was said, in the same position as if they were still in her hold. This contention was based upon the fact that the freight remaining as it did unpaid on the 29th May, the master had availed himself of the provisions of the Merchant Shipping Act 1862 by lodging with the defendants the notice to detain the goods, and that was said to have constituted the defendants the agents of the master for delivery. The alleged right of the master to deliver to Cottam and Co. rested upon the contention that as he had for (as it was said) the convenience of the merchant made three copies of the bill of lading whereby the goods were deliverable to Cottam and Co. by name "or assigns," the presentation by Cottam and Co. of any one copy, although unindorsed without notice of any previous indorsement of any other part of the bill, would have rendered it compulsory upon the master to deliver, or, at all events, have justified him in

delivering the goods to the consignees notwithstanding that they had previously assigned the bill to the plaintiffs. It was urged that there would be a great hardship in making the master liable to the previous indorsee in such a case, as it would compel him to decide upon conflicting claims, without the means of deciding which of them was best founded, and it was said, by the presentation of one copy by the consignee, the bill of lading became by the very terms of it "accomplished," and so the plaintiffs' copy stood "void." No direct authority in support of the proposition as between the master of a ship and a consignee named in a bill of lading, who, having a right to indorse, had previously transferred his property in the goods and indorsed the bill of lading for value to a third party, was cited. Mr. Herschell, indeed, at the close of his argument referred to certain authorities on which, as he anticipated, Mr. Watkin Williams would rely for the defendants; but, although the latter to some extent urged propositions in the direction of which those authorities tend, he did not cite them in support of his argument. I have, however, thought it my duty to examine them, and this seems to be the result. The earliest case is that of *Fearon* v. *Bowers* (1 Sm. L. C. 5th edit. p. 705), which was cited by Lord Loughborough with appproval in his celebrated judgment in *Lickbarrow* v. *Mason* (1 Sm. L. C. 5th edit. p. 601), in which in a case of stoppage *in transitu* by the vendor, where the prior indorsee for value from the purchaser brought an action against the master who had delivered to the vendor's agent upon production of a copy subsequently indorsed to him by the vendor, the master was held by Lee, C. J. entitled to succeed. In this case a mercantile usage is reported as having been proved that, when bills of lading are indorsed to different persons, the master has a right to deliver to whichever he thinks proper, and is discharged by a delivery to either, and is not obliged to consider the merits of the different claims, and it was upon that evidence that Lee, C. J. directed a verdict for the defendant. This case was cited in the argument, with approval by Dr. Lushington, in the case of *The Tigress* (1 Mar. Law Cas. O. S. 323; 32 L. J. 97, P. M. & A.). The latter case was cited in the argument of *Meyerstein* v. *Barber* (L. Rep. 4 H. of L. 317; 3 Mar. Law Cas. O. S. 449), and, although it was not noticed in the judgment, Lord Westbury is reported to have said that possibly the shipowner might be justified, in cases like that before him between two indorsees of the bill of lading, in delivering to the person producing the bill of lading. It is, however, to be observed that the views of these two eminent judges were not necessarily the foundation of their judgment in either case; and in *Meyerstein* v. *Barber* (2 Mar. Law Cas. O. S. 420) Willes, J. appears to have entertained a different opinion, and the doctrine thus enunciated seems to conflict strongly with the general doctrine of the liability of wharfingers, warehousemen, and other bailees, who, it is clear, are under the obligation under similar circumstances to decide between rival claimants at their peril, or to interplead (see per Willes, J. in *Meyerstein* v. *Barber*; *Wilson* v. *Anderton*, 1 B. & Ad. 450).

In the present case it is not, however, necessary for me to decide this question, for I am of opinion that the defendants did not at the time that they delivered the goods upon Cottam and Co's orders, occupy the position or have vested in them any such right or obligation of the master if it exist.

It seems to me that the only authority conferred upon the defendants by the master was to detain until payment of the freight, and then to deliver to the holder of the bill of lading. Upon the release of freight on the 8th June the interest and duty of the master ceased, and the defendants became either simple agents for the holders of the bill of lading or mere bailees of Cottam and Co. under the entry of the goods made by them. In support of this first view of their character, even if that be not the implication of law resulting from the facts, it is to be observed that, on the day before the master lodged the stop freight, he had lodged a copy of his manifest in a printed form supplied by the defendants for use at their docks. By the terms of this document, as originally printed, the master purported to give an authority to the defendants to deliver the goods to the "consignees or holder of the bill of lading," and it also contained directions applicable to a case in which the master himself, in default of the consignees taking delivery of the cargo, deposits the goods with the dock company under the provisions of the Merchant Shipping Act Amendment Act, but, as in this case, the consignees, Cottam and Co., took delivery, and entered the goods, the master, before signing the copy manifest, struck out all the latter part, and also struck out the words "consignees," leaving therefore the authority merely to deliver to the "holder of the bill of lading"—in other words, to the plaintiffs—who alone filled that character, and of whom, therefore, after the payment of the freight the defendants would become the agents.

If, on the other hand, the defendants are to be regarded, as it seems to me they are, as the warehousemen or ordinary bailees of Cottam and Co., then they have no better title as against the plaintiffs than their bailors, and cannot justify the delivery to the orders of the latter: (*Balut* v. *Hartley*, 1 Asp. Mar. Law Cas. 337; L. Rep. 7 Q. B. 594.)

If it is said to be a hardship on the defendants that they should be liable for delivery upon the production of the second part of the bill of lading without any knowledge of a previous indorsement, it may be observed that they had the remedy in their own hands, as the part so produced was conspicuously marked "second," and they had only to require the production of the "first" part, which, as is well known, is usually sent to the consignee, and in case of the non-production of it to take an indemnity before delivery. Indeed, that is the course pursued by the defendants in their East India trade, in which the original bills of lading only are accepted, and in case of loss the defendants require satisfactory proof of title and an indemnity; thus showing that in that trade at least precautions are taken which, if taken by the defendants in the present case, would have protected them against loss. If the law were held to be different from the result at which I have arrived, the consignee who had sold or dealt with goods to arrive would only have to avail himself of his almost necessary earlier knowledge of the arrival of the goods to anticipate, by production of his bill of lading, any production by the indorsee of the original previously indorsed, and thus most seriously affect the transaction of any such dealings which are

effected solely in reliance upon the shipping documents. The only remaining question is, whether the defendants have been guilty of what is technically called a conversion so as to entitle the plaintiffs to recover from them the value of the goods.

The various cases cited in *Hollins* v. *Fowler* (L. Rep. 7 H. of L, 757) were referred to by the defendants for the purpose of contending that in the present case they had done no more than that which is ordinarily done by packers, carriers, wharfingers, warehousemen, and other bailees, who, when they have merely carried the goods, or dealt with them in the way of their trade, or delivered them to their bailors consistently with the purpose for which they were bailed, have not been held liable for the value of the goods. But the facts in the present case are in no way analogous to those, for here the defendants have absolutely delivered the produce upon the orders of Cottam and Co. to third parties, purchasers, or others, intending to sell or use them for their own benefit. The defendants, therefore have recognised a title, and assumed and exercised a dominion over the goods utterly inconsistent with the plaintiffs' rights as proprietors, which are to take them wherever and when they please, and by this act of the defendants the plaintiffs have been permanently deprived of their property. That such acts entitle the plaintiffs to recover in this action the value of the property seems to me clear, and I therefore give a verdict and judgment for the plaintiffs for the amount which the parties have undertaken to fix.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Murray, Hutchins,* and *Stirling.*

Solicitors for defendants, *Freshfields* and *Williams.*

Feb. 20 *and* 24, 1880.

(Before LUSH and MANISTY, JJ.)

CAPPER AND CO. *v.* WALLACE BROTHERS.

Charter-party—As near to safe port as ship can safely get.

By a charter-party the plaintiff's ship was to proceed with a full cargo of merchandise to a safe port in the United Kingdom or on the Continent, between Havre and Hamburg, as ordered on signing bills of lading, or so near thereto as she might safely get, and deliver the cargo on payment of a specified tonnage freight; the cargo was to be brought to and taken from alongside at merchant's risk and expense. The master was to sign bills of lading without prejudice to the defendants; and, by the bills of lading, the ship was ordered to Koogerpolden, about thirty miles from the mouth of the North Holland Canal. The ship drew too much water to get through the canal without discharging more than a third part of her cargo; and no agent of the charterers or the consignees was at hand to give directions.

Held, upon a case stated, that, under the circumstances, the master was justified in considering the voyage at an end, and in treating the mouth of the canal where he was anchored as the place of discharge; and that the defendants were liable for the lighterage from that place.

THIS was a special case, the facts of which are fully stated in the judgment of the court.

Feb. 20.—*Herschell,* Q.C. (with him *A. L. Smith*) argued for plaintiffs.

Butt, Q.C. (with him *Arbuthnot*) for defendants.

The arguments, like the facts, sufficiently appear in the judgment. *Cur. adv. vult.*

Feb. 24.—LUSH, J. delivered the judgment of the court (Lush and Manisty, JJ.):—This is an action for the cost of lightering a cargo from Nieuwedeep through the North Holland Canal to the port of Koogerpolden, which is situated at the extremity of the canal, and about thirty miles from its mouth.

By a charter-party between the plaintiffs, as owners of the *Aberaman,* and the defendants, it was agreed that the vessel should take in at Bombay a full cargo of merchandise, and proceed therewith to a safe port in the United Kingdom, or on the continent between Havre and Hamburg, as ordered on signing bills of lading, "or so near thereunto as she may safely get," and deliver the cargo on payment of a specified tonnage freight. The only other material terms were, that the cargo was to be brought to and taken from alongside at merchant's risk and expense, and that the master was to sign bills of lading, as presented, without prejudice to the charter-party, at rates not less than those current at the port of loading. The ship was ordered to Koogerpolden, in Holland, and the master signed bills of lading, which stated that the cargo was to be delivered at the port of Koogerpolden. A marginal note stated the rate of freight, and to it were added the words "and all other conditions as per charter-party."

The *Aberaman* drew 19ft. 6in. of water, being about four feet deeper than the canal, consequently she could not get nearer to Koogerpolden than Nieuwedeep without discharging a considerable part of her cargo. Before the arrival of the vessel, the plaintiffs had opened a correspondence with the defendants, with a view to ascertain what course they proposed to adopt on the arrival of the vessel as near to Koogerpolden as she could safely get, stating what the draft was, and what was the capacity of the canal. The defendants, having sold the cargo afloat, refused to interfere, contending, that by the bills of lading the owners had admitted Koogerpolden to be a safe port, and had undertaken to carry the cargo there. The master had, therefore, no alternative on arriving at Nieuwedeep but either to lighter the whole of the cargo to the port of Koogerpolden or to discharge into lighters a sufficient portion to enable the ship to proceed there with the residue. He adopted the latter alternative, and procured lighters in which he discharged 573½ tons, and thereby reduced the draught to 15ft. 8in., and, having lightered that portion of the cargo to Koogerpolden, and discharged twenty of her crew, he had the vessel towed through the canal, and discharged the residue of the cargo at the port. The plaintiffs claimed the pilotage-harbour dues, and other expenses of going into port, as well as demurrage; but on the argument they consented to accept what it would have cost to lighter the whole, and this was agreed at 167*l.* The defendants paid into court sufficient to cover the lighterage of the 573½ tons, but denied their liability to the residue of the claim.

We are of opinion that the bills of lading have not the effect of altering the contract so as to bind the owners as against the charterers to deliver at the port of Koogerpolden. The master had no authority so to alter the con-

tract even if he had intended to do so, but we are satisfied that such was not his intention, but that he signed the bills of lading in the form presented to him, in compliance with and in order to carry out the terms of the charter-party. The only effect which can be given to the bills of lading as between these parties is to preclude the plaintiffs from objecting that Koogerpolden was a safe port, and to bind the plaintiffs to the same extent as, and no further than, if Koogerpolden had been named in the charter-party as the port of discharge.

It cannot, we think, be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words "as near thereto as she can safely get" must receive a reasonable, not a literal application. The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed, and the ship sufficiently lightened without exposing her to extra risk, or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case, if the consignee is at hand to receive the surplus cargo and to relieve the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the Court of Session in the case of *Hillstrom* v. *Gibson* (8 Sess. Cas. Scotland, 3rd Series, 463). In that case the master, who was bound to Glasgow, was unable to proceed beyond a point near Greenock with its full cargo on board. The consignee, being at hand, requested him to discharge what was necessary and to lighten the ship and to proceed with the residue. The majority of the court held this to be a reasonable request under the circumstances. The master complied with the request, and it was held that his going on to Glasgow was in the course of his duty, and that he could not claim demurrage for the time taken in reaching the port.

In this case the circumstances are essentially different. We are not informed what the actual tonnage was, but the registered tonnage is stated to have been 1090 tons, and 573½ tons, which was at least one-third, had to be taken out before the draught could be sufficiently reduced to enable the ship to pass through the canal in safety. Moreover, the consignee was not at hand to receive. The charterer had refused to make any arrangement, and no one appeared to take delivery. Under these circumstances, we are of opinion that the master was justified in considering the voyage at an end, and in treating the mouth of the canal, where he was anchored, as the place of discharge. We, therefore, adjudge the plaintiffs to be entitled to 102*l.*, being the balance after deducting the sum paid into court, and give judgment for that sum with costs. *Judgment for plaintiffs.*

Solicitors for plaintiffs, *Ingledew, Ince,* and *Co.*

Solicitors for defendants, *Johnson, Upton, Budd,* and *Athey.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall, and F. W. Raikes, Esqs., Barristers-at-Law.

Nov. 22 *and* 26, 1879.

(Before Sir R. Phillimore.)

The Matthew Cay.

Practice—Costs—Compulsory pilotage—Merits.

Where a defendant in a collision action raises a defence on the merits, and also on the ground of legal exemption from liability by reason of the compulsory employment of a pilot, and succeeds in the latter defence alone, he will not recover his costs.

Query, whether in cases of inevitable accident, where the practice of the Admiralty Court as to costs before the Judicature Acts was different from that of the courts of common law, the Admiralty Division will now follow the practice of the courts of common law. In cases of compulsory pilotage the Admiralty Division will adhere to the practice of the High Court of Admiralty prior to the Judicature Acts as to costs.

This was a decision as to the costs of an action in which the plea of compulsory pilotage was sustained.

A collision had taken place between the paddle-steamer *Wye* and the screw steamship *Matthew Cay,* which had the assistance of a steam-tug as well as of her own engines, in the river Avon, below Bristol. An action for the damages occasioned by the said collision was brought by the owners of the *Wye.* The owners of the *Matthew Cay* defended the action on the merits, and also on the ground that at the time of the collision the *Matthew Cay* was in charge of a pilot by compulsion of law, and that the collision, if caused at all by the *Matthew Cay* was solely occasioned by some fault or incapacity of the said pilot.

The cause was heard on Nov. 22, 1879, by Sir Robert Phillimore, assisted by Trinity Masters.

Bompas, Q.C. and *Myburgh* for the plaintiffs, owners of the *Wye.*

Milward, Q.C. and *Clarkson* for the defendants, owners of the *Matthew Cay.*

The cases relied on on the question of costs appear in the judgment.

Sir Robert Phillimore, after detailing the circumstances of the collision, said:—Now the statement of defence contains two pleas, one upon the merits, and the other upon the law as to compulsory pilotage. With regard to the merits I am of opinion, on the evidence before me, that the cause of the collision was the speed of the *Matthew Cay* at the time she approached the *Wye,* and that the stopping of her engines was not sufficient to stop her way. It appears to me, therefore, that I must decide the question on the merits in favour of the *Wye.* But it also appears to me that the plea of compulsory pilotage on behalf of the *Matthew Cay* must be sustained, as it is proved that all the orders of the pilot were obeyed. As to the question about costs, I will take time to consider, owing to the peculiar state of the law arising out of the cases that have been cited from the Court of Appeal, and also in the

case in the Exchequer Division (*General Steam Navigation Company* v. *London and Edinburgh Shipping Company*, 3 Asp. Mar. Law Cas. 454), where the learned judges declined to follow the practice of the Court of Admiralty.

Nov. 26.—Sir R. PHILLIMORE.—This is a case in which the defendants pleaded by way of defence both the merits and compulsory pilotage. The court was of opinion that the plaintiffs were right on the question of the merits, and the defendants on that of compulsory pilotage, and the matter stood over for consideration on the subject of costs. Recent decisions in the Court of Appeal have not left that question in a very satisfactory state. The decision in the case of *The Daioz* (3 Asp. Mar. Law Cas. 477; 37 L. T. Rep. N. S. 137) was given in 1877. In that case the Master of the Rolls, in delivering the judgment of the court, stated the rule acted on in Admiralty causes to be that, "In a case like the present, when the owners of a vessel were relieved from liability on the ground of compulsory pilotage, no costs were given on either side either in the court below or in the Court of Appeal," and that the Court of Appeal constituted by the Judicature Acts would follow that practice. That was in a case where compulsory pilotage was pleaded. Then there is a later case on the question of inevitable accident (*The Condor* and *Swansea*, 4 Asp. Mar. Law Cas. 115; L. Rep. 4 P. Div. 115; 40 L. T. Rep. N. S. 442), decided in 1879, in which James, L.J. is reported to have said, that "It requires great consideration, and we should consider whether it can be right that there should be one rule as to costs in one branch of the High Court of Justice, and another rule in another branch of that court;" and afterwards that "It may be considered as settled that for the future there will be no difference as to the costs between Admiralty and other appeals." That was with regard to the question of inevitable accident. It appears to me that I must follow the rule laid down in the case of *The Daioz* (*ubi sup.*), and I think it would be found upon inquiry to work a great injustice if that rule was to be changed. I say nothing about the rule in cases of inevitable accident, but where compulsory pilotage is pleaded by way of defence together with a defence on the merits, I do not see how the vessel which suffers wrong is to know that there is a pilot on board, or that he is a duly licensed pilot, or that the crew did or did not obey his orders, or did not contribute by their negligence to the collision. There are many circumstances which seem to take the practice with regard to costs in cases where compulsory pilotage, together with a defence on the merits, is pleaded out of the rule laid down in the case of *The Condor* (*ubi sup.*) with regard to costs in cases of inevitable accident. Until better instructed I shall adhere to the ruling laid down in *The Daioz* (*ubi sup.*) in cases of compulsory pilotage, and therefore I shall dismiss this case without costs on either side; that is, I shall give no costs.

Solicitors for plaintiffs, *Luard* and *Shirley*.

Solicitors for defendants, *Ingledew, Ince*, and *Vachell*.

Jan. 24, 27, *and Feb.* 3, 1880.

(Before Sir R. PHILLIMORE.)

THE DON RICARDO.

Practice—Bail — Sureties — Sufficiency — Cross-examination — Release — Caveat — Damages—Costs—Security.

A plaintiff has a right to require the attendance of sureties, who have justified as bail for a ship in a suit in rem, for cross-examination; but he does so at his peril as to costs and damages occasioned by the delay of the ship under arrest pending such cross-examination.

Security for costs of suit will not, as a rule, be required from a foreign mate suing a foreign ship in rem for wages.

THESE were motions in an action *in rem* for wages instituted by the mate of the foreign vessel *Don Ricardo*, against that vessel in the sum of 150*l.*, and in which the *Don Ricardo* was arrested at Newcastle on the 20th Jan. 1880. The defendants, the owners of the *Don Ricardo*, entered an appearance and subsequently extracted Bail Papers (R. G. Ad. 1859, r. 39), which were executed and served on the plaintiff's solicitors on the 22nd Jan. the ship being then ready for sea; and after twenty-four hours' lapse of time, on the 23rd Jan., the papers were filed in the registry of the Admiralty Division, and a release of the vessel was asked for. It was then found that the plaintiff had entered a caveat against the release of the vessel. The defendants thereupon moved the court to order the vessel to be released, notwithstanding the caveat. The motion came on for hearing on Saturday, 24th Jan., but was adjourned to Tuesday, 27th Jan., to allow the plaintiff to file affidavits in reply to those of the defendants.

Jan. 27.—*Clarkson* for defendants.—We are entitled to a release of the ship. The sureties, who have justified on oath, are quite sufficient, and the plaintiff did not take objection to their sufficiency in proper time. The delay of the ship for this small claim, occasioned by the arrest, occasions great loss and inconvenience.

Verney for the plaintiff.—We only were aware of bail being tendered on the 22nd Jan., and we have used all possible expedition; but we are not as yet satisfied that the proposed sureties are people of substance, and we have a right to satisfy ourselves on that point before the vessel, which is a foreigner, and our only real security, is allowed to leave the country. We wish the sureties to appear before the registrar of the court for cross-examination on their affidavits of sufficiency.

Sir R. PHILLIMORE.—I cannot say that, under the circumstances, the plaintiff has no right to cross-examine the sureties on their affidavits. I shall make the order that they attend before the registrar to be cross-examined. The costs of and incident to the examination to be reserved, and the motion to stand over till after the examination.

The sureties accordingly attended before the registrar, who on the 30th Jan. made the following report:

In pursuance of the order of the court made on the 26th inst., J.T.L. and E.W., the sureties, attended before me this day to be cross-examined on their affidavits of justification; and I have now to report that the said sureties are persons of considerable means, and are sufficient sureties for a much larger sum than the amount in which they have given bail in this case, and in

my opinion the objection to their sufficiency has been vexatious and groundless.

The defendants on the 3rd Feb. renewed their application for a release of the vessel, and also moved for the costs and damages occasioned by the delay in releasing her, and for security for the costs of the action.

Sir R. PHILLIMORE.—In this case I must pronounce for the costs and damages occasioned by these proceedings, which it appears to me have no justification. The damages must be referred to the registrar to ascertain. But I shall not order the plaintiff to give security for the costs of the action; there is a difference between the case of a master and that of a mate whose condition approximates to that of a seaman, from whom, even when a foreigner, it is not customary to require security in wages suits.

Solicitors for plaintiff, *Sorrell* and *Sons*.

Solicitors for defendants, *Clarkson*, *Son*, and *Greenwell*.

Thursday, Feb. 19, 1880.

(Before Sir R. PHILLIMORE.)

THE TALCA.

Practice—Bail for safe return—Dissentient co-owners—Minority in interest.

The minority in interest of co-owners are entitled to bail for safe return of the ship as far as the value of their shares extends, if they object to the proposed employment of the ship.

It is not a bar to the claim that the manager or ship's husband who arranged the employment of the ship was appointed with their acquiescence. (*a*)

Semble, they must give reasonable notice of their objection to the employment of the ship.

THIS was a motion by the defendants in an action commenced in the Swansea District Registry on the 11th Feb. 1880, by an owner of eight sixty-fourth shares of the vessel *Talca*, against the other owners, claiming a bond for 625*l*. for the value of his shares in the said vessel.

The indorsement on the writ was as follows:

The plaintiff, as owner of eight sixty-fourth shares of the vessel *Talca*, being dissatisfied with the management of the said vessel, claims that his co-owners shall give him a bond in 625*l*. for the value of the plaintiff's said shares in the said vessel.

In this suit the *Talca* was arrested, and on the 17th Feb. the defendants' solicitors gave notice "to release the said barque and to condemn the plaintiff in the costs of the said motion and of such release." From the plaintiff's affidavits it appeared that the plaintiff, hearing at a meeting of the owners that it was intended to send the ship away under a charter-party procured by the managing owner, at once objected, and declined to participate in any way in the voyage. On the 19th Feb. the motion was heard in court.

Clarkson for the defendants.—The plaintiff has forfeited any right he may have had to arrest the ship to get bail for safe return by his own laches; the manager of the ship was properly appointed by the owners, of whom the plaintiff is one, and he obtained a beneficial charter-party for the ship before the plaintiff in any way repudiated his authority, and loaded her in accordance with it, which must therefore be taken to have been done with the plaintiff's acquiescence; it is too late for him, when it has been done, to revoke the authority under which it was done.

Gainsford Bruce for the plaintiff.—The plaintiff gave his co-owners notice of his objection to the voyage as soon as he knew it was decided on; he has not therefore been guilty of laches. As they persisted in sending the vessel on the voyage he was justified in obtaining his bail bond at any time before the ship sailed. The right of part-owners, even if a minority in interest, to bail for safe return to the extent of the value of their interest is absolute.

Sir R. PHILLIMORE.—The court has a discretion to exercise in these cases; and I am of opinion that on principle the bail for safe return should be granted, and that a release of the vessel should only be granted on a bail bond being given for the amount of the shares of the plaintiff for the safe return of the vessel. I do not see that the principle is in any way affected by the fact that the manager who negotiated the charter-party to which the plaintiff objects was appointed by the whole body of the co-owners without objection on the part of the plaintiff. The motion will therefore be dismissed with costs.

Solicitor for plaintiff, *John Davies*.

Solicitors for defendants, *Pritchard* and *Sons*.

(*a*) This decision is open to question. If the managing owner had the plaintiff's authority to procure employment for the ship, it is difficult to understand how that authority could be withdrawn after the employment had been obtained, and the ship chartered; had the authority been withdrawn before the chartering it would have been different. In a former case a ship was chartered by a managing owner, and the management was afterwards taken out of his hands by a majority of owners; thereupon the minority, including the late managing owner, objected to the ship being sent to sea under the new management, alleging that it would be prejudicial to their interests, and they commenced an action *in rem* for accounts, and also for bail for safe return; the ship being then loaded and ready to proceed to sea, the court, on the application of the charterers intervening, released the ship without bail to enable her to complete her charter-party, holding that the charter-party having been made by the late managing owner and with the privity and consent of the other plaintiffs, they could not be allowed to do anything to prevent the ship from completing her engagements. The two decisions seem inconsistent.—ED.

HIGH COURT OF ADMIRALTY, IRELAND.

Reported by F. BLACKBURNE HENN, Esq., Barrister-at-Law.

Dec. 2 *and* 3, 1879.

(Before TOWNSEND, J.)

THE ACACIA.

Conditional bail—Offer of by mortgagee refused.

A mortgagee, although entitled to intervene in a cause in rem for equipment and repair, is not entitled to claim a release of the vessel upon giving bail conditional to pay the claim of the material men, in the event of its being held to have priority over the mortgage.

THIS was an application by motion on the part of the Messrs. Hamilton, of Port Glasgow, as registered mortgagees of the steamship *Acacia*, for liberty to intervene in a suit for equipment and repairs instituted by the Messrs. Harland and Wolff, of Belfast, and defend for the purpose of raising the question of the priority of their own

mortgage over the plaintiffs' claim, and for liberty to give bail for the release of the said steamship as regards the claim of the Messrs. Harland and Wolff, which bail should be answerable for the payment of the claim of the Messrs. Harland and Wolff against the said vessel, in case the same should be found to take priority of the said mortgage.

The *Queen's Advocate* (Dr. Boyd, Q.C.) in support of the application, relied on the 70th and 71st sections of the Merchant Shipping Act as constituting the Messrs. Hamilton practically the owners of the vessel and investing them with an absolute right of sale. The mortgagees are interested in the vessel to the extent of 5800*l*., and, even assuming the right of the Messrs. Harland and Wolff to arrest the vessel, yet no claim for necessaries as against his client could be set up, unless at the time of the arrest a possessory lien could be established. He would give bail for the amount of the Messrs. Harland and Wolff's claim, but without prejudice to the priorities. He refered to

The Scio, L. Rep. 1 A. & E. 353; Mar. Law Cas. O. S. 527;
The Western Ocean. L. Rep. 3 A. & E. 38;
The Two Ellens, L. Rep. 3 A. & E. 345; 1 Asp. Mar. Law Cas. 40, 208.

Corrigan, LL.D., for the Messrs. Harland and Wolff.—Plaintiffs, in two causes of equipment and repair claiming 1400*l*., resist the application on the ground that there was already a defendant in both causes, the official assignees of the owners; that there might be other suits, that no consent of any defendant or plaintiff was shown, and that the court has not been informed whether there is any other detainer on the vessel, and the court must be satisfied that there is not before the motion can be granted. This is an attempt by motion to change the practice of the court with regard to ascertaining priorities between the Messrs. Harland and Wolff and the Messrs. Hamilton. There is no necessity for this motion, as the machinery of the court, of which we have correctly availed ourselves, is the proper method of ascertaining priorities. The question of a possessory lien, and therefore a conclusive question affecting priority, may arise in the Messrs. Harland and Wolff's cause. Again bail has been offered in one cause only, and there has been no appraisement of the ship, and her value is not known; and we are interested in any surplus if the question of priority be decided against us.

Martin Burke, for the official assignees of James S. Campbell, sole owner, a bankrupt, objected to the motion.

The *Queen's Advocate* in reply.—We cannot intervene now as a matter of course, but only by permission of the court. I stand on our strict legal rights, conferred by the 70th and 71st sections of the Merchant Shipping Act. The form of bail bond usually entered into will not suit here; the bond must be framed to suit this particular case.

Dec. 3.—TOWNSEND, J.—The application made to me yesterday is a novel one. In No. 732 the steamship *Acacia* has been arrested by warrant at the suit of the Messrs. Harland and Wolff in a suit for equipment and repairs; and subsequently in No. 738 a citation *in rem* has been issued against the same defendant vessel at the suit of the same plaintiffs, and a suit of mortgage has been instituted by a second citation *in rem* in No. 739 by the Messrs. Hamilton, who state that they are registered mortgagees for the sum of 5800*l*. The owner of the vessel has been declared a bankrupt, and his official assignees have appeared to defend in the two suits instituted by the Messrs. Harland and Wolff. This motion certainly cannot decide the priority of the claim of the Messrs. Harland and Wolff or that of the Messrs. Hamilton, who undertake to sell the vessel; and if at the hearing it be found that the Messrs. Harland and Wolff have priority, it will discharge their claim, and they are willing that the bail to be given by them should secure the probable amount of the surplus after payment of the mortgage debt and the claims of the Messrs. Harland and Wolff. It is contended for the Messrs. Hamilton that they are not only entitled to liberty to intervene, but that, under the 70th and 71st sections of the Merchant Shipping Act, they are in fact owners of the vessel, and it is also alleged that the sale would be more expeditious if conducted by the Messrs. Hamilton, and would produce larger funds than if carried out by the officers of the court. This application is resisted as being contrary to the practice of the court, and likely to render the claim of the Messrs. Harland and Wolff nugatory as against the surplus, and it is further contended that the sale should be carried out by the court on bail given for the full value of the vessel, and the motion is further resisted by the official assignees of the bankrupt owner. The Messrs Hamilton are clearly entitled to intervene, but perhaps at the present stage of the proceedings they could not do so without the permission of the court.

The question of giving bail as proposed is a new one. I have looked into the authorities which have been cited at the bar, and find that *The Scio* only decided the priorities of mortgages to material men who are not in possession, while in *The Western Ocean* no question of such bail as asked for here was raised. In *The Two Ellens* the bail given was unconditional, and for the full value of the ship. Had such bail been offered here *cadit questio*. It has been contended that were I to grant this motion, the ordinary form of bail bond would not answer, and it struck me that it would not. [His Lordship referred to the ordinary form of bail bond.] Although the Messrs. Hamilton offer to give bail in any form, it has not been shown to me what that form ought to be, and no authority has been cited to show me that I am at liberty to depart from the ordinary practice of the court. Nor has any authority been shown to me why I should accept conditional bail for the defendant ship. The 70th section of the Merchant Shipping Act does not appear to me to confer any special rights on the Messrs. Hamilton; while, on the authority of *The Chieftain* (Br. & L., p. 212), I think that if the owner were before the court he would have to give the ordinary bail, and I do not consider that the Messrs. Hamilton are in a better position than the owner, but are merely creditors, who, if they succeed in their demands, must be paid prior to the Messrs. Harland and Wolff. No doubt as between the several parties the offer of the Messrs. Hamilton may be a fair one, but the case is different as between the court and a suitor. I am called on to assume the responsibility of departing from the fixed practice of the court, and

of framing a special form of bail bond. I decline to assume this responsibility, and must adhere to the established practice, and therefore decline to permit this property to leave the custody of the court. I must refuse with costs so much of this motion as is connected with the question of bail; but I give liberty to the Messrs. Hamilton to intervene.

Being an interlocutory order, the *Queen's Advocate* applied for leave to appeal, which was granted by the learned judge.

Motion refused with costs.

Solicitors for the Messrs. Hamilton, *Seeds* and *Thompson.*

Solicitors for the Messrs. Harland and Wolff, *J. T. Hamerton* and *Son.*

Solicitor for the official assignees, *Jehu Matthews.*

Friday, Feb. 20, 1880.

(Before TOWNSEND, J.)

THE VILDOSALA; THE EMERALD; THE SATELLITE; THE TOILER.

Consolidation of several causes of damage by collision in respect of the same transaction—Practice of the court with respect to consolidation considered.

The court will, in the exercise of its discretion make such order for consolidation as it considers will meet the justice of the case, and protect the interest of the suitors.

THIS was a motion on the part of the owners of the *Vildosala*, that their five causes should be consolidated and heard at the same time, and on the same evidence, and on the pleadings and preliminary acts already filed.

It appeared from the affidavit on which this motion was moved that in the month of December, 1879, a collision occurred in the river Liffey between the steamship *Vildosala*, steaming outwards, and the two ships the *Emerald* and the *Satellite*, while the two latter ships were being towed up the said river by the steamtug *Toiler*. Causes of damage had been instituted on the 23rd Dec. 1874, by the *Emerald* and the *Satellite* against the *Vildosala*, and cross actions subsequently by the *Vildosala* against them, and the *Vildosala* had also instituted a cause of damage against the *Toiler*.

It also appeared that the pleadings were concluded on the original causes by the *Emerald* and the *Satellite* against the *Vildosala*, that no pleadings had been filed in the cross action, and that in the cause instituted by the *Vildosala* against the *Toiler*, preliminary acts only had been filed. On the 5th Feb. a consent was served by the *Vildosala* on the *Emerald*, *Satellite*, and *Toiler*, by which it was sought to be agreed that all the said causes should be consolidated, and should be heard at the same time and on the same evidence, and that the *Vildosala*, as plaintiff, should file in the causes in which the *Emerald*, *Satellite*, and *Toiler*, are defendants, one joint petition against the three, and that the *Toiler*, *Emerald*, and *Satellite* might as defendants, file one joint answer to the said petition, or that in the alternative the said causes should be heard in manner aforesaid on the pleadings, and preliminary acts already filed as the judge should direct. This consent was altered by the owners of the *Toiler*, *Emerald*, *and Satellite*, by the stipulation of separate pleadings on the part of the three vessels if so advised, and the alternative was refused.

Seeds, Q.C., LL.D. (with him *Corrigan*, LL.D.)—Twelve pleadings have already been filed, and there is no affidavit to resist this motion. The court has power under the 75th General Order to hear causes where no pleading has been filed save preliminary acts. In *The Demetrius* (1 Asp. Mar. Law Cas. 250; L. Rep. 3 A. & E. 523) Sir R. Phillimore refers with approbation to the case of *The William Hutt* (Lush. 25, at p. 27), as laying down the practice of the court with respect to the consolidation of actions where the decision of each action depends as here on precisely the same facts. In *The Melpomene* (1 Asp. Mar. Law Cas. 515; L. Rep. 4 A. & E. 129) a consolidation order was made at the instance of the plaintiff, and without the consent of the defendant, while in *The Bartley* (Swab. 198) the plaintiffs actually were mulcted in costs because they would not consolidate. There can be no question as to our right to consolidate the causes in which the *Emerald* and the *Satellite* are plaintiffs, and for the purpose of this motion we rely not on any particular section of the Act or rules, but on the broad principle by which the practice of the court is guided in respect of the consolidation of causes.

W. M. Johnston, Q.C. (with him *Martin Burke*), for the *Emerald*, *Satellite*, and *Toiler*.—If this were a motion merely to save expense it would not have been opposed by us; but it is for the purpose of binding us to the terms of a consent which we refused, inasmuch as we considered ourselves embarrassed thereby. [He then read the portion of the consent as altered.] We have altered this consent merely to enable, if necessary, both the *Emerald* and *Satellite*, to put in separate defences, and to enable the *Toiler*, if she has a separate case, to come and make it by separate pleadings. The court has jurisdiction to consolidate only under the 75th General Order, 1867, by which the solicitors on both sides must consent, which they have not done here; nor can the court under the 264th General Order, 1867, alter the rules. We submit that this latter order merely gives to the court a discretionary power with regard to the enlargement of the times fixed by the orders. Our opposition to this motion is only to prevent the defendants being shut out from any defence. The practice at common law with regard to consolidation is shown by the case of *The Corporation of Saltash* v. *Jackman* (1 D. & L. 851), which was an action for tolls. *The William Hutt* only decided that the court had no power to dissever an order made for the consolidation of three actions, and the cases which have been relied on are salvage and not material. Nor is *The Demetrius* in point. We have only asked by our alteration of the consent that the *Emerald* and *Satellite* should be at liberty to file separate defences. On our petitions we have put forward a statement that the vessels were in charge of "duly qualified" pilots, and we have been met with a counter allegation that the *Vildosala* was in charge of a "duly licensed" pilot and with a plea of compulsory pilotage; we want to be in a position to put forward a similar defence. What the case against the *Toiler* may be we know not, and that cause cannot in any case be consolidated.

Corrigan, LL.D. in reply.—The circumstances

connected with this collision are plain and simple matters of fact, and the question which will have to be investigated is whether the *Vildosala*, or the tug and tugs which must in this case be considered to be one vessel are to blame. There would be twenty-five pleadings required to make up the record; of these twelve have been already filed, and we ask the court to adopt a course which will obviate the necessity of thirteen more being placed on the record. We base our request on the practice of the court on the authority of Dr. Lushington and Sir R. Phillimore. It is objected that this consent as served by us embarrasses the *Toiler*, and precludes each of the three vessels from filing different defences. This is not so: the *Toiler* is not bound except by the preliminary act, and at the hearing she can raise any defence which the law knows of, consistent with her statement in that act, while we are bound by the statement of fact which we have made in our defences. *The Corporation of Saltash* v. *Jackman* does not apply in that case; ten ships did a similar act at different times, but here there is one single transaction only. We have followed the practice of the court in serving this consent, which is a simple and reasonable one, and because that consent has been refused have asked for costs.

Townsend, J.—This case has been admirably argued, and I think I can suggest an order which will meet Mr. Johnston's views and also those of the other side. The difficulty of dealing with this case arises not from any misconduct of the parties, but from the peculiar circumstances of the collision in which so many vessels are involved. From the affidavits which have been opened it appears that these are all causes of collision, and that they arose out of one and the same transaction. The *Vildosala* has been impleaded by the *Emerald* and the *Satellite*, and she has answered in both causes; she has also instituted actions against the same vessels, and these two principal cross causes must be consolidated. The *Vildosala* further says that the *Emerald*, *Satellite*, and *Toiler* are all in the wrong, and brings actions against them, and in the cause in which the *Toiler* has been impleaded by the *Vildosala* preliminary acts only have been filed. Inasmuch as the *Emerald*, *Satellite*, and *Toiler* are all represented by the same solicitor and counsel I assume that the case of the *Toiler* cannot be very different from that of the others. It is proposed on the part of the *Vildosala* that there should be no further pleadings. Two rules have been cited to me and have been relied on, viz., the 75th General Order, and the 264th General Order. [Here the learned Judge read both orders.] The first cannot apply unless there be a consent on both sides, which is not the case here, and I agree with Mr. Johnston's interpretation of the second, and consider that a power to modify times, or the like, only is given to the court. It is no doubt unfortunate that there have been so many pleadings, but I think we can avoid all others except one. I shall make an order that the answers of the *Vildosala* to the petition of the *Emerald* and *Satellite* be read as her petition in the causes against the *Emerald*, the *Satellite*, and the *Toiler*. I surmise that the *Toiler* has no new case to make, yet I do not think I have the right to shut the *Toiler*, the *Emerald*, and the *Satellite* out of any defence they may be advised to make. They may therefore file a joint answer to the answer, considered as a petition within one week, but if it should appear on the hearing that the filing of such defence was needless, that will be a question of costs. If there be any defence to raise, an opportunity will thus be given, and should the matter ultimately go to the Court of Appeal, the record will be in a condition to show on what grounds this court has proceeded. I will consolidate the causes in the manner which I have indicated, and thus meet what I consider the justice of the case. Costs of this motion to be costs in the consolidated cause.

Solicitors for the *Vildosala*, *J. T. Hamerton* and *Sons*.

Solicitor for the *Toiler*, *Emerald*, and *Satellite*, *James Davis*.

HIGH COURT OF JUSTICE IN IRELAND.

COURT OF APPEAL IN ADMIRALTY.

Reported by F. Blackburne Henn, Esq., Barrister-a-Law.

Jan. 26 *and* 28, 1880.

(Before the Lord Chancellor and Deasy and Fitzgibbon, L.JJ.)

Hamilton (apps.) *v.* Harland and Wolff (resps.); The Acacia.

Practice to ascertain priorities.

Sale of vessel by decree of the High Court of Admiralty restrained in order to ascertain the respective priorities of material men and mortgagees before appraisement and sale, such priorities to be ascertained by petition and answer in the High Court of Admiralty.

This was an application by motion on behalf of the Messrs. Hamilton, of Port Glasgow, the appellants in this cause, and intervenients in the High Court of Admiralty, in a suit for equipment and repairs, to stay the sale of the steamship *Acacia*, ordered to be sold by a decree of the High Court of Admiralty, dated the 14th Jan. 1880, pending the hearing of an appeal from the said decree, or to put a stay on the said decree so far as a sale of the said steamship *Acacia* is ordered by it, pending the hearing of the appeal in the matter.

The suit for equipment and repairs came before the High Court of Admiralty on the 13th Jan. 1880, and on the 14th of the same month the court pronounced its decree condemning the *Acacia* in respect of the claim of the plaintiffs, the Messrs. Harland and Wolff, and in costs, and also directing that a commission of appraisement and sale of the said vessel should issue forthwith. The Messrs. Hamilton, who had a mortgage upon the *Acacia* and who were plaintiffs in a mortgage suit against the said vessel, appeared as intervenients in the cause for equipment and repairs, and on the 21st Jan. 1880 gave notice of appeal from the said decree, and also from the order of the court dated the 3rd Dec. 1879, by which the learned judge refused an offer of conditional bail by the Messrs. Hamilton pending the hearing of their cause, and the ascertaining the respective priorities of their claim, and that of the Messrs. Harland and Wolff, a report of which motion appears *ante*, page 226.

The *Queen's Advocate* (Walter Boyd, Q.C.) with whom was *Kisbey* for the appellant.—The Messrs.

Hamilton are registered mortgagees, with a charge of 5800*l.* on this vessel, a sale of which has been ordered at the suit of the Messrs. Harland and Wolff, who have established their claim for the sum of 1070*l.* for repairs. We intervened in their suit for the purpose of protecting our interests, and serious questions will arise as to notice on the part of Messrs. Harland and Wolff of our mortgage before the execution of these repairs. We have appealed from the decree of the Court of Admiralty, directing a sale, and also from the order of the 3rd Dec. 1879. The vessel is now in Belfast in the custody of the marshal of the Court of Admiralty, and we want the sale to be stayed pending the hearing of our appeal. Our mortgage suit comes on for hearing to-day in the Court of Admiralty. He also referred to

The Scio, L. Rep. 1 A. & E. 353.

Seeds, Q.C., LL.D., with him *Corrigan*, LL.D. for the respondents.—Priorities cannot, according to the practice hitherto existing in the Court of Admiralty, be ascertained until the vessel has been sold, and the proceeds of the sale are in the court. Nor could they in the present case be ascertained until a decree was made in the mortgage suits. When the proceeds were brought into court, then, according to the practice, a motion should be made by each party claiming to have the amount of his decree paid out of the proceeds. Upon that motion the Court of Admiralty decided the priorities of the different claimants: (*The William F. Safford*, Lush. 69.) The grounds for refusing the motion for conditional bail are most fully stated in the report of that motion *ante*, page 226.

The Court directed that the motion should stand until after the hearing of the mortgage cause.

Jan. 28.—The *Queen's Advocate*.—We have obtained a decree against the vessel for the full amount of our mortgage, 5800*l.*

After hearing *Seeds*, Q.C.,

The Court made the following order: Let the sale of the *Acacia* as ordered by decree of the Admiralty Court be restrained and postponed until further order of said court, or of this court on the following terms: The intervenients admitting the validity as a charge upon the said steamship of the plaintiff's claim, established by decree of the 14th Jan. 1880, and undertaking within one week to present their petition to the High Court of Admiralty claiming, on such grounds as they may be advised, priority for their claim as mortgagees over the plaintiff's claim, plaintiff undertaking within one week after same shall be presented to answer said petition, both parties undertaking to speed the proceedings on such petition, so as to obtain, according to the course of such court, and without delay, the judgment of the said court as to the relative priority of their respective demands, such priority to be ascertained as against the said steamship, notwithstanding the same has not been sold, the intervenients further undertaking to abide by such order (if any) of the Court of Admiralty as to any loss, expenses, and costs occasioned by postponment of sale of said steamship, subject to right of appeal of either party against any order of the Court of Admiralty in the premises, stay further proceedings upon the intervenients' notice of appeal of 21st Jan. 1880 till further order of this court, and reserve costs of such appeal and of this motion for like further order.

Solicitors for the appellants, Hamilton, *Seeds* and *Thompson*.

Solicitors for the respondents, Harland and Wolff, *J. T. Hamerton* and *Son*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Wednesday, Feb. 25, 1880.

Before Jessel, M.R. James and Cotton, L.JJ.)

The Consett.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Costs—Reference — Collision — Both to blame—Owners of cargo—Owners of ship—Joint action.

Where an action is brought by owners of ship and owners of cargo laden on board it jointly against another ship for damages arising from collision, and both vessels are found to blame, and as a consequence no order is made as to the costs of the action, and each ship pays a moiety of the damage of the other, those plaintiffs who are owners of the cargo are entitled to the costs against the defendants of proving their claim in a reference before the Registrar and Merchants.

In this case an action for damages sustained in a collision was instituted by the owners of the *Jessore*, and also by the owners of the cargo laden on board of her, against the steamship *Consett*. The action was heard on the 25th Jan. 1878, when the judge found both vessels to blame for the collision, and therefore, according to the ordinary practice, made a decree "that the damage arising therefrom ought to be borne equally by the owners of the *Consett* and by the owners of the *Jessore*, and he condemned the owners of the *Consett* in a moiety of the plaintiffs' claim in respect of the said damages, and he also condemned the owners of the *Jessore* in a moiety of the defendant's counter-claim in respect of the said damages, and he referred the said damages to the registrar, assisted by merchants, to assess the amount thereof; but made no orders as to costs."

Affidavits in support of the various claims were filed in the registry, and on the 31st Oct. 1878 the registrar reported "that a moiety of the loss or damage sustained by the parties claiming amounts to the sum of 27,165*l.* 12*s.* 5*d.*, as stated in the schedule annexed," and from the schedule it appeared that the total claim made by the owners of cargo amounted to 30,191*l.* 2*s.*, of which 30,188*l.* 5*s.* 8*d.* was proved, and the moiety of which the owners of the *Consett* were liable to pay was 15,094*l.* 2*s.* 10*d.*

The defendants commenced a suit for limitation of liability, and on the 8th April obtained a decree

in it limiting their total liability, at 8*l.* per ton, to 13,259*l.* 7*s.* 4*d.* and interest, and directing a further reference of claims. The defendants, owners of the *Consett* (plaintiffs in the limitation suit), paid into court 13,843*l.* 10*s.* 2*d.*, being the amount decreed, with interest, and, on the 1st Aug. 1879, the registrar reported the portion of the sum due to the several plaintiffs. The report was silent as to payment of the costs of the reference.

On the 25th Nov. 1879 the judge of the Admiralty Division was moved in court by the owners of the cargo laden on board the *Jessore*, to allow them their costs of the reference and of their affidavits filed in support of their claim, a previous application for the costs of these affidavits, which were used again in the limitation suit, to be allowed in that suit, having failed.

Butt, Q.C. and *Myburgh* for plaintiffs, owners of cargo.—When both vessels are to blame, and an action has been brought by owners of cargo alone, though they can only recover half the damages from the ship sued, it is now settled that they, not being wrong-doers, are entitled to the costs:

The City of Manchester, 4 Asp. Mar. Law Cas. 106; L. Rep. 5 P. Div. 3; 40 L. T. Rep. N. S. 591.

If, in a case like this, where owners of cargo join their action with that by owners of ship, it is held that the owners of cargo are not entitled to costs, when both ships are to blame, it will lead to owners of cargo always instituting separate suits, and so tend to multiplicity of suits and increase of costs; besides, the defendants in this suit are themselves plaintiffs in the limitation of liability suit, and in those suits plaintiffs always have to pay the costs, and, by the use of these affidavits again in the limitation suit, the costs which the plaintiffs are liable to pay in that suit have been diminished. We ought not to be prejudiced by the fact that, by joining with the owners of ship in one action, the defendant is enabled to counter-claim against our co-defendants, for his counter-claim is not available against us.

Clarkson, for owners of the *Consett*.—There is a great difference between this case and that of *The City of Manchester* (*ubi sup.*) It is open to owners of cargo to bring a separate action, in which case they will recover their costs if the vessel they sue is alone to blame, or if both vessels are to blame; and will have to pay all costs if the vessel sued is not to blame at all; or, to join with the owners of the ship, and so identify themselves with their interests, diminishing the costs they will have to pay, if the vessel sued is not to blame, by sharing them with their co-plaintiff, the shipowner, and taking their share of the burden if both vessels are to blame. Besides, this matter is already *res judicata*; the decree in the cause distinctly declines to make any order as to costs, and this reference is only a proceeding in the cause, and there is no precedent for the payment of costs of a reference where both are to blame, except for exorbitant demands.

Butt, Q.C. in reply.—The decree in the cause does not apply to costs of the reference. Those costs are in the discretion of the registrar, subject to review by the court. Here the registrar has not exercised his discretion at all, and we ask to have the report amended by giving us the costs, not of the reference as a whole—for that affects the two ships as well as ourselves—but the costs we incurred at the reference by filing our affidavits of claim.

Sir Robert Phillimore.—I am of opinion that the court has not by its decision in the original action adjudicated on the question as to whether the owners of the cargo on board the *Jessore* are entitled to the costs incurred by them in proving their claim at the reference before the registrar. According to the practice of the court as now settled, the owners of the cargo on board the *Jessore* would, if they had brought a separate action, have been entitled to all their costs against the owners of the *Consett*, and amongst them to the costs of these affidavits. The fact that they have joined in the same action as the owners of the ships has not, in my opinion, had the effect of increasing, but rather of diminishing, the amount of costs the owners of the *Consett* have to pay. I am therefore of opinion that the owners of the cargo laden on board the *Jessore* are entitled to their costs at the reference, and the costs of and relating to the affidavits which were brought in and used in support of their claims at the reference.

The following decree was drawn up:

The judge having heard counsel on both sides condemned the defendants in the costs incurred by the owners of the cargo of the vessel *Jessore* (some of the plaintiffs) of and relating to the affidavits filed in support of the claim, and in the costs of the reference, and of this motion; but, on application by defendants' counsel, gave defendants leave to appeal from this order, and stayed execution of same pending the appeal.

From this decree the defendants appealed, and the appeal came on for hearing on the 25th Feb., before Jessel, M.R., James and Cotton, L.JJ.

Webster, Q.C. and *Clarkson* for appellants, owners of the *Consett*.

Butt, Q.C. and *Myburgh* for respondents, owners of cargo on board the *Jessore*.

The Court, without calling on the respondents, dismissed the appeal with costs, on the ground that the reference was a separate proceeding from the original action, and that the order as to costs made by the judge of the court below therein was a matter of discretion with which the Court of Appeal would not interfere, and which appeared to have been exercised on a proper and rational principle.

Solicitors for appellants, owners of the *Consett*, *Thomas Cooper* and *Co.*

Solicitors for respondents, owners of cargo on board the *Jessore*, *Gregory*, *Rowcliffes*, and *Co.*

Wednesday, Feb. 25.

(Before Jessel, M.R., James and Cotton, L.JJ.)

The Sir Charles Napier.

APPEALS FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Pleading — Parties — Claim — Counter-claim — Set-off — Representative capacity — Demurrer—Underwriters.

To a claim by a master for his wages, the defendant set up a counter-claim and set-off for damages against the plaintiff for negligence leading to the loss of the ship. To this the plaintiff replied that the ship was insured, and that the underwriters were liable to pay the amount of the loss to the plaintiff, and that consequently the defendant could not maintain any set-off or counter-claim against the plaintiff. To this reply the defendant demurred.

Held, that the demurrer must be sustained, because the plaintiff had not pleaded that the counter-claim was brought without authority of underwriter, or that the money had been received, but leave given to amend the pleadings to raise these issues in terms.

Quære, even if these issues were raised properly, would they form any defence to the counter-claim. (*a*)

This was an action brought by George Trench, lately the master of the British ship *Sir Charles Napier*, against John H. Howard, who had been, with others, mortgagee of the said vessel, for his wages and disbursements. The statement of claim set out various sales of the ship subsequent to the engagement of the plaintiff, and which took place without his knowledge, and a final sale on 19th Sept. 1878 to the defendant, previous to the return of the plaintiff to England on the 5th May 1879, and that the original owner of the ship had, previous to the return of the plaintiff, filed a petition for liquidation, and that there were no assets of his estate. The *Sir Charles Napier* was wrecked on the Island of Ascension on the 18th March 1879.

The statement of claim further alleged that the plaintiff had bought the ship subject to claims for payment of wages to the crew, &c., and concluded with the following paragraph:

18. The defendant insured the said ship, and has received, and is entitled to receive, the insurance money.

In answer to this claim the defendant delivered a "statement of defence, demurrer, and set-off and counter-claim," of which the important paragraphs were as follows:

14. The defendant demurs to paragraph 18 of the statement of claim, upon the ground that the facts therein alleged do not show any ground of action or relief against the defendant, and on other grounds sufficient in law to support such demurrer.

15. The defendant denies the truth of the said 18th paragraph of the statement of claim.

By way of set-off and counter-claim, the defendant alleges as follows.

18. Whilst the defendant was sole owner of the *Sir Charles Napier*, and the plaintiff was his master, and in command thereof, the plaintiff so neglected his duty as master, and conducted himself so negligently and inefficiently as his master, that by and through his negligence and inefficiency the said ship was wrecked off the Island of Ascension and totally lost on or about the 18th day of March 1879, and the defendant says that a court of inquiry into the said loss of the said ship, and of the plaintiff's conduct with respect thereto as her master, was duly held at Ascension pursuant to the provisions of the Merchant Shipping Act 1854, and the several subsequent Acts in amendment thereof, and that the said court, after inquiry into the said loss and the conduct of the plaintiff with respect thereto and his management of the said ship as her master, and hearing the plaintiff, held and pronounced that the said loss of the said ship was caused by the negligence of the plaintiff as her master, and suspended his certificate as master for a year.

The plaintiff set down the demurrer to the 18th paragraph of the statement of claim for argument, and at the same time moved to strike out the latter portion of paragraph 18 of the counter-claim, so far as it contained any reference to the proceedings of a court at Ascension, as irrelevant and embarrassing.

Nov. 11, 1879.—*Hilbery*, for the plaintiff, took the preliminary objection that the defendant could not plead and demur together to the same matter without leave (Order XXVIII., r. 5); and having done so his demurrer must be struck out. The objection is not waived by the fact that I have set down the demurrer for argument:

Hagg v. *Darley*, 38 L. T. Rep. N. S. 312; 47 L. J. 67, Ch. Div.

Had I not set it down for argument it would be allowed against me (Order XXVIII., r. 6), and it cannot be alleged that the impugned pleading is irrelevant, as, if it is demurrable, it must be because it alleged a cause of action. I therefore am entitled to my costs in any event.

Clarkson, contra.

Sir J. Phillimore.—I shall allow the demurrer with costs, paragraph 18 of the statement of claim to be struck out; but also I shall order the statement of defence and counter-claim to be amended by striking out the latter portion of paragraph 18. Costs will be costs in the cause.

The plaintiffs, on the 12th Nov., delivered a reply, the third paragraph of which was amended by leave of the court on the 22nd Nov. 1879. The paragraph as amended, the amendments being shown in italics, was as follows:

3. The plaintiff further says, in answer to the defendant's counter-claim, that the said vessel was fully insured *by or on behalf of her owners, of whom the defendant was one*, by certain policies of insurance against a total loss, and that the said *Sir Charles Napier, being insured as aforesaid*, became, on the occasion mentioned in the counter-claim, a total loss to her owners. The plaintiff alleges that the underwriters of the said policies of insurance having (*without any deduction for the defendant's claim against themselves, in respect of the moneys and damages claimed in this action by the defendant against the plaintiff, and without being informed thereof*) paid or *agreed and* become liable to pay *to the owners of the said vessel, of whom* the defendant *was one*, or to some person lawfully authorised to receive the said money on *their and* his behalf, the whole amount of money payable under the said policies of insurance to *the owners of the said ship, of whom* the defendant *was one*, in the event of the total loss of the said ship, the defendant cannot, *without the knowledge and authority of the said*

(*a*) In his judgment, the Master of the Rolls seems to intimate that, if the plaintiff had stated in his reply that the underwriters had paid the amount of the loss, and that the defendant was in the position of trustee to them, and the counter-claim was made without their authority, the reply would have been a good answer to the counter-claim. This point was not seriously argued on the appeal, as the question there was the effect of the reply as it then stood; but the authority of the Master of the Rolls stands so high, that it is as well to point out that his opinion was expressed without argument against this view. If he is right, every plaintiff in a collision acting in the Admiralty Division may reply to a counter-claim in the same way, and if he could succeed in proving the facts stated, the reply would be a bar to the counter-claim. The difficulty, if there is any, arises from the fact that a shipowner who has been paid for a loss by his insurers becomes trustee for them in respect of any compensation he may recover from a person occasioning the loss; but does he become such trustee until he has actually received the money? If not, it cannot be necessary to obtain their authority to proceed against the wrongdoer. Again, it may be asked how can the fact that the defendant has made a contract with underwriters, by which he is indemnified from loss in certain events, affect his rights in respect of that loss against the wrongdoer? The insurers may be entitled to avail themselves of any benefit accruing from those rights, but can the wrongdoer set up the underwriter's possible claims to defeat the claim against himself? In cases of personal injury, it is a well-established rule that the wrongdoer cannot take advantage of anything which has been recovered from an accident insurance company. Does the fact that in marine insurance the assured becomes trustee for his insurers of any sums recovered by him distinguish his position from that of a person insured with an accident company?—Ed.

underwriters, further maintain *any set-off or counter-claim* against the plaintiff in respect of the loss of the said ship.

To this paragraph the defendants demurred.

On the 16th Dec. the demurrer came on for argument.

Clarkson in support of the demurrer.—This question has really been decided by the court when it allowed my demurrer to the statement of claim. The matter which was struck out of the statement of claim as irrelevant is pleaded again as a substantive reply to my counter-claim for damages. Whether the defendant has been paid or is entitled to recover compensation from the underwriters for the loss of the ship, cannot affect his right of action against the plaintiff. Underwriters cannot sue independently of the person insured:

Simpson v. *Thomson*, 3 Asp. Mar. Law Cas. 567; L. Rep. 3 App. Cas. 279; 38 L. T. Rep. N.S. 1.

If I recover money in this action from the plaintiff, and have already been paid by the underwriters, I should have to pay over the money to them, but the right of action is mine personally, and I am entitled to bring it by way of set-off or counter-claim against the plaintiff's claim for wages. If the plaintiff's contention is correct, in nearly every action of damage brought in this court the underwriters on one or both ships would have to be made parties:

Hilbery.—There is no doubt a right of action against the plaintiff if he lost the ship by his negligence, but, so far as that right of action is in the defendant, it is in him as trustee for the underwriters, and not in his own behalf, and he cannot set off a claim as trustee against a personal claim against himself. It would be paying his debts with the money of the underwriters. Whatever has been the former practice of this court, it is now governed by that of the Court of Chancery before the passing of the Judicature Acts: (Supreme Court of Judicature Act 1873, s. 24 (1); Order XVI., rr. 7, 11.) If the defendant can set up a counter-claim as trustee for third parties, the court will have to pronounce two separate judgments on claim and counter-claim, and not the one final judgment on both required by Order XIX., r. 3, Order XXII., r. 10. That the defendant would not have been entitled to relief in respect of such a counter-claim as this under the circumstances against a personal claim against himself in a court of equity is shown by a long series of cases:

Bristowe v. *Needham*, 8 Scott N. R. 366; 7 M. & G. 648;

London, Bombay, and Mediterranean Bank v. *Narraway*, L. Rep. 15 Eq. 93; 27 L. T. Rep. N. S. 572;

Clark v. *Cart*, 1 Craig & Phil. 154;

Watson v. *Mid Wales Railway Company*, L. Rep. 2 C. P. 593; 17 L. T. Rep. N. S. 94;

and that this practice now prevails in the common law divisions is shown by

Macdonald v. *Carington*, L. Rep. 4 C. P. Div. 28; 39 L. T. Rep. N. S. 426.

With regard to the defendant's claim, he is precisely in the same position with regard to any money he might recover as if he were the executor or specially appointed trustee of the underwriters:

North of England, &c., Insurance Association v. *Armstrong and others*, L. Rep. 5 Q. B. 244; 21 L. T. Rep. N. S. 822; 3 Mar. Law Cas. O. S. 330.

Clarkson in reply.

Sir ROBERT PHILLIMORE.—I cannot see, notwithstanding the argument which has been addressed to me, that the cases cited in any way support the plaintiff's contention. It appears to me that there is running through the whole argument some confusion between the principles governing a counter-claim and those applicable to a set-off. The claim of the defendants here is not brought in a representative capacity, though, if he recovers upon it, and has already been paid by the underwriters, he may hold anything that he recovers as a trustee for them. The demurrer to paragraph 3 must be sustained, and that paragraph struck out of the reply with costs.

From this decision the plaintiff appealed.

Feb. 25.—*Hilbery* for the appellant—The question is, can a trustee, as such, counter-claim in respect of the trust property against a plaintiff who sues him personally for wages? Defendant says, first, that wages are not due to the plaintiff, and secondly, that plaintiff was master of this ship, and lost her by his negligence. To the second defence the plaintiff replies that the ship was insured and became a total loss, and that the defendant has received or is entitled to receive all the insurance, and is therefore a trustee for the underwriter in respect of any money he could receive for plaintiff supposing the ship to have been lost through the plaintiff's negligence. [JESSEL, M.R.—Ought not the application to be made by you under Order XIX., r. 3, to exclude the counter-claim or set-off?] A plaintiff or a person setting up a counter-claim has no right to demur to any statement of fact, *i.e.*, that he is a trustee. The plaintiff is entitled to a judgment for his wages *simpliciter*, and defendant, assuming that his ship was lost by plaintiff's negligence, is only entitled to judgment, not for himself but for the underwriters, his *cestuis que trust*, and that is not the subject of a set-off or counter-claim, but of an independent action By the rules of pleading every pleading must contain a statement of all material facts, and no fact can be proved at the trial unless it has been pleaded; therefore we were not only justified in pleading the fact of the trusteeship, but we were obliged to do so.

Clarkson for respondent.—The defendant is not in the position of trustee; his contract of indemnity with underwriters is quite distinct from his right of action against a wrongdoer. It is true that the underwriters may by taking proper steps make him a trustee for them of money which he receives. The reply does not allege that the money has been paid to defendant by underwriters, or that the action is brought without their knowledge or against their interest. Hence, even if the plaintiff's contention is right, it is not duly raised by his pleadings.

Hilbery in reply.—The question on the pleadings is now raised for the first time; if they are to be taken against me, and because I have averred in the alternative that the money has been paid or is to be paid, that it has not been paid, and that therefore the relation of trustee and *cestuis que trust* has not yet arisen between the defendant and the underwriters. I should be allowed to amend, the objection not having been taken below. But on a total loss taking place, what remains of the property becomes the property of the underwriters, and if any right of action remains in the

original shipowner in respect of that property, it can only be as trustee for the actual possessors of it.

Jessel, M.R.—This is an appeal from a decision of Sir R. Phillimore allowing a demurrer to a portion of the reply. I am for my own part loth to allow demurrers of this description which do not go to the merits of the action, and only raise subsidiary questions of little or no importance. The suit being an action for wages by the master of the *Sir Charles Napier*, the defendant raises a defence and counter-claim that the vessel was lost by the negligence of the plaintiff, and that he is entitled to damages equal to the value of the ship for such negligence. To this set-off or counter-claim the plaintiff replies that the defendant was insured, and that therefore, as he recovers his loss from the underwriters, it is no defence to the action for wages. He says that the fact of insurance is material; and that, moreover, the claim cannot be entertained in this action, as the plaintiff is entitled to one judgment personally against the defendant, and the defendant, supposing him to win on his counter-claim, is not entitled to judgment for himself, but on behalf of his *cestuis que trust*, and that, therefore, it would be necessary to give two judgments, and not one only, in accordance with Order XIX., r. 3, Order XXII., r. 10. He says that defendant ought not to be allowed to protect himself by setting up a claim as trustee against a purely personal claim against him. The objection, however, to this is, that though the fact that the defendant was insured is pleaded, it is not pleaded that he is or would be a trustee for underwriters in respect to any money he might recover from the plaintiff. No doubt the defendant has a right of action against the plaintiff whom he alleges to have lost his ship through negligence, and it does not appear that he has lost that right. The allegation in the reply is that he has been paid or will be paid, and that interpretation of the pleadings must be taken which is least advantageous to the pleader; it therefore cannot be said that he has lost his personal right of action, as it is not shown that the relationship of trustee and *cestuis que trust* has arisen between the defendant and his underwriters, neither is it pleaded that this action is brought, or rather this counter-claim or set-off set up, without the knowledge and authority of the underwriters. It must also be borne in mind that a set-off and counter-claim are not the same thing; a matter may be an answer to one but not to the other. As therefore the pleadings do not support the contention of the plaintiff, it is not necessary to decide what would be the result if they did, and the judgment of the court below allowing this demurrer must therefore be affirmed with costs. As to amending the pleadings I think, if the plaintiff can show that the defendant has actually received the money, and considers the fact to be material, he should be allowed to do so, but such amendment cannot be allowed without some evidence. The plaintiff may bring in an affidavit before Saturday next, and if satisfactory the amendment will be allowed.

James and Cotton, L.JJ. concurred.

The pleadings were not amended in pursuance of the above permission.

Solicitors for plaintiff, *F. W.* and *H. Hilbery*.
Solicitor for defendant, *W. W. Wynne*.

Dec. 11, 12, 20, 1879; *and Feb.* 27, 1880.

(Before James, Baggallay, and Brett, L.JJ.)

The Parlement Belge.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Jurisdiction—International law—Ex-territoriality—Foreign Government vessel—Mail packet—Collision—Arrest—Exemption from.

An unarmed vessel belonging to a foreign sovereign State, and employed in what is considered by that State to be a national service, is entitled to the privilege of a vessel of war as to freedom from arrest in a suit in rem.

Such immunity is not forfeited by the partial employment of the vessel in carrying merchandise and passengers where her substantial employment is of a national character; e.g. the carriage of mails.

Semble, any property of a foreign sovereign or State used for public purposes is exempt from the jurisdiction of any tribunal in this country.

A suit in rem, though primarily a proceeding against the ship or res, is indirectly a process compelling the appearance of the owner to defend his property, and therefore is not applicable where the ship or res is the property of a foreign sovereign or sovereign State against whom an action will not lie by reason of international law or the comity of nations.

The judgment of the court below, that a vessel employed in such a way was not exempt from civil process in a suit in rem, reversed on the ground that the immunity from process was incident to her public character and ownership.

The question decided in the court below, whether the Crown has power to grant by treaty to foreign vessels the immunities of public ships without the consent of Parliament, not considered (a)

This was an appeal from the decision of the Probate, Divorce, and Admiralty Division (Admiralty), allowing judgment by default against the steam vessel *Parlement Belge*, and a warrant to issue for the arrest of that vessel.

The *Parlement Belge* was a vessel engaged in carrying the mails between Dover and Ostend. The peculiar circumstances of the case which led to the appearance under protest of the Attorney-General on behalf of the Crown are set out in the report in the case in the court below (*ante* p. 83; 40 L. T. Rep. N. S. 222; L. Rep. 4 Prob. Div. 129).

The appeal was heard on the 11th, 12th, and 20th Dec. 1879.

The *Solicitor-General* (Sir H. Giffard), *Admiralty Advocate* (Dr. Deane), with the *Attorney-General* (Sir J. Holker) and *A. L. Smith*, for the Crown, appellants.

Webster, Q.C. and Dr. *W. G. F. Phillimore* for respondent.

The *Solicitor-General*.—There is no traverse of the facts stated in the information of the Attorney-General (*ante* p. 84), and therefore for the purposes of this argument they must be taken as true. We admit moreover that the vessel has been employed in the carriage of parcels, but not that she has been used as an ordinary cargo vessel. The carriage of letters is in itself a carriage of parcels of a particular description. [James, L.J.—The carriage of

(a) See foot-note to report of case in the court below, *ante*, p. 83.

bullion by a regular vessel of war does not divest her of her privileged character.] The broad question is, whether a vessel employed under the conditions in which this vessel is employed is within the jurisdiction of the civil courts of law of the country; our contention is that she is privileged from the jurisdiction of those courts, and further that, even if acting under the conditions of a treaty she has done something which, under other circumstances, might vitiate that privilege, that is not a matter which a subject of this realm can raise. [Brett, L.J.—Is it contended that any person except the Belgian Government derives a profit from the trading of this ship? *Phillimore.* — The Continental Daily Parcels Express (see *ante* p. 86). Brett, L.J.—They are only shippers, not interested in the profits made by the ship.] The only evidence of trading is that contained in the circular or advertisement of the Continental Daily Parcels Express. Our first point is, that the *Parlement Belge* was the property of the Belgian Government, and as such exempt from the jurisdiction of the courts of this country. A public vessel, that is a vessel the property of the State, is free from the civil jurisdiction of other states: (*The Exchange*, 7 Cranch, (Amer.) 141.) That in that case the vessel was an armed ship makes no difference; the judgment is based on the fact of her being a public ship. The exemption is that of the Sovereign's property, not an incident of the particular purpose for which the property is employed; this is shown by the fact that it extends to all sorts of property, and is not restricted to ships at all. In *Vavasseur* v. *Krupp* (L. Rep. 9 Ch. Div. 351; 39 L. T. Rep. N. S. 427) it was held that the courts had no jurisdiction to prevent a foreign sovereign from removing his property in this country, and this although the property, had it belonged to any person other than a sovereign, might have been liable, not only to detention, but also to destruction, in consequence of a breach of patent rights granted by the Crown. There is no precedent for the arrest of a foreign public ship. *The Prins Frederic* (2 Dod. 451) is no authority on the subject, as the case was never decided. *Briggs* v. *The Lightboats* (11 Allen's Mass. (Amer.) Rep. 186) shows that the exemption depends on the public, and not on the military character of the property or ship. But even if the vessel would under ordinary circumstances by reason of her employment be liable to the ordinary civil process, she is exempted from that civil process by the express provisions of the convention (*ante* p. 84). It is contended by the respondents that the treaty-making power of the Crown is expressly limited to making treaties of peace and war, but in fact the Crown by its ministers is the agent of the country in foreign affairs. [Brett, L.J.—Do you contend that the Government might by treaty with a foreign government exempt hired merchant vessels from the jurisdiction of the courts?] The 6th article of the treaty would exempt such vessels hired for this particular purpose of carrying the mails from arrest. Every state must be understood on the principle that certain persons or things are outside its operation; that is, those persons or things which are not subject to it, at all events without express words, by the common law and by international law as a part of the common law:

Triquet and others v. *Bath*, 3 Burr. 1478.

The Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73) declares the authority of Her Majesty over all foreign ships within a certain distance of the coast, but it could not be contended that by this Act the courts of this country had acquired jurisdiction over foreign ships of war; it was not necessary to specially exempt those vessels from the operation of the Act, because they are exempt from the operation of all municipal law by international law. All statutes must be interpreted *salvo jure Regis.* [Brett, L.J.—No words, however large in their signification, can give a jurisdiction which did not previously exist, unless they purport expressly to give it; if they do that, the courts must obey the statute.] It is the prerogative of Her Majesty to invest any particular person or thing with a diplomatic and therefore a privileged character. On principle every person in the realm is bound to obey the law or take the punishment, but if he is recognised as an ambassador his liability ceases. If he is recognised as an ambassador, *i.e.*, received as such by Her Majesty, that is sufficient to give him the privilege; the courts cannot inquire into the validity of his credentials or employment. [Bagallay, L.J.—Does your contention go so far as to say that the exemption from civil process would extend to all cases connected with the ship, *e.g.*, a case of smuggling by one of the crew?] Any breach of the municipal law would have to be corrected by diplomatic action between the States, and so also all breaches of the carrying powers given by the treaty: "Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals; and they are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. If a treaty should, in fact, be violated by one of the contracting parties, either by proceedings incompatible with the particular nature of the treaty, or by an intentional breach of any of its articles, it rests alone with the injured party to pronounce it broken. The treaty in such a case is not absolutely void, but voidable, at the election of the injured party. If he chooses not to come to a rupture, that treaty remains obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction:" (Kent's Com. on Amer. Law, vol. 1, p. 174.) [Brett, L.J.—But that only refers to treaties on subjects which are a proper matter for treaties; if the Crown had no power to make this treaty the principle does not apply. If the Government of Belgium should consider themselves aggrieved by this action it may be that the Government of this country must make it good to them by reason of the obligation of the treaty, though the plaintiff is not prevented from bringing his action.] It is only the nation which can avail itself of a breach of the treaty or an informality or irregularity in it; that course is not open to the individual. If an ambassador or one of his servants were to smuggle contraband articles in the ambassador's carriage, it may be that the goods smuggled might be liable to seizure, but the carriage itself would not, though in ordinary cases

the carriage of wrongful goods leads to the forfeiture of the vehicle in which they are carried: (the Customs Consolidation Act 1853, 16 & 17 Vict. c. 107, s. 222); and it is shown by *The Exchange* (7 Cranch. Amer., 116) that the general permission granted to public vessels to visit the ports of another country is sufficient to invest them with the privilege of exemption from civil process whilst there; *a fortiori*, therefore, a special invitation to a vessel to come under that privilege invests it with the privilege whilst in the ports of that country which has invited it. [James, L.J.—But the permission given to ordinary public vessels to visit the ports of another country is the invitation of the nation, not merely of one of the estates of the realm.] But here the special invitation is given by that estate of the realm which is the only one in which is vested, so far as foreigners are concerned, the grant of such a privilege. It is not necessary for Her Majesty to invest a vessel with a particular character, but only to say that vessels employed in such a service are so invested. This vessel is from the conditions of its ownership exempt without the treaty, but, as a public vessel engaging in ordinary commerce might be held to have waived this exemption, the treaty says that this vessel shall not waive its exemption by reason of carrying on such traffic as is contemplated by the treaty. There has never in history been a successful attempt to arrest a public ship in time of peace for a breach of municipal law. (Brett, L.J.—The object of an arrest of a ship in a suit *in rem* is to compel an appearance. The owner, the King of the Belgians, could not be compelled to appear in any civil suit.] The case of *The Charkieh* (1 Asp. Mar. Law Cas. 581; L. Rep. 4 A. & E. 59; 28 L. T. Rep. N. S. 513), on which the learned judge of the court below seems to have based his judgment, does not apply. That was the case of a vessel employed to all intents and purposes as an ordinary merchant vessel, and not owned by a sovereign prince, nor the property of a sovereign state, nor employed in the public service, though in the judgment below the fact of her not being a ship of war in the ordinary use of the term is held to bar her from the claim of privilege. The learned judge of the court below admits (*ante* pp. 91, 92) that the privilege is not limited to ships of war, but is extended to public ships when used for exploring purposes, though unarmed, and to vessels of pleasure or yachts belonging to a sovereign prince. What definition can be given of such vessels which would not include this ship? The dictum extracted from the judgment of Lord Campbell in *The Magdalena Steam Navigation Company* v. *Martin* (2 Ellt. & Ell. 94, 114) does not apply here, when the privilege claimed is that of the State property, and not of an individual which may or may not extend to his property; and the judgment of Story, J. in *The Santissima Trinidad* (7 Wheaton (Amer.) 283) applies by implication to all public ships, though for the purpose of that case it was not necessary to state the principle of exemption for other than public ships of war. The only reason why the treaties relied on by the respondents as having been referred to Parliament before becoming operative were so referred, was either because they enacted penalties in certain cases, which of course could not be inflicted either on a subject or a foreigner without the consent of Parliament, or because, as in the Treaty of Berne, they concerned the revenue.

Dr. *Deane*, Q.C. (Admiralty Advocate) on the same side.—The privilege is that of a public ship as distinct from a private ship, and not of a public ship of war as distinct from a public ship not of war. The question of privilege or no privilege is decided by the condition of her officers, whether they are commissioned or not; that is, whether the ship is a commissioned vessel (Phill. Inter. Law, vol. 1, p. 404, 2nd ed. s. 350). The same principle is acted on in our Courts of Admiralty, where, in consequence of the immunity of the Crown from suit, in case of collision with a Queen's ship or public vessel, the action is brought against the captain; and this is so not only in the case of ships of war, but also in that of troop ships and unarmed store ships, as in the recent case of *H. M. S. Wye* (not reported). When the expression armed vessels of the Government is used, it in reality only means fitted out by Government in the sense of the French word *armement*, which is equivalent to our word "equipment," or *armateur*, which is the ordinary expression for a shipowner. In *Briggs and another* v. *Lightboats* (11 Allen's Mass. Amer. Reports, 157) this question was decided in this sense, for (p. 165) the learned judge says: "It is said for the petitioners that these lightboats were not upon their stations, and that they were not intended for military service. But after they had once come into the possession of the United States for public uses, whether remaining at the builders, or at the station of their final anchorage, or on the way from one to the other, they were subject to the exclusive control of the Executive Government of the United States, and could not be interfered with by State process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty, and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted;" and so also in the more recent case of the United States ship *Constitution* (*ante* p. 79; L. Rep. 4 P. Div. 39; 40 L. T. Rep. N. S. 219), that vessel was held to be within the privilege of exemption, though not at the time employed as a ship of war, but in the peaceful, and indeed commercial, occupation of carrying back to the United States samples which had been exhibited at the Paris exhibition, and which his Lordship in his judgment speaks of as cargo, but for the arrest of which he refused to allow a warrant to issue; therefore it is obvious that the mere carriage of cargo, and non-efficiency for warlike purposes, are not in themselves sufficient to deprive a public vessel of the privilege. In one sense, indeed, every vessel of the Government is armed, as the officers have a right to carry arms forbidden to ordinary civilians, and doubtless the crew have their rifles and cutlasses, &c., and the arming may consist of no more than this. In the case of the boats and steam launches of a regular warship could it be maintained that those boats, when on service detached from the man-of-war, would not be entitled to the privilege? The object aimed at by an arrest is, primarily, to enforce an appearance, which cannot be done here, the owner, the King of the Belgians, not

being under any obligation to appear; and secondarily, failing an appearance, to obtain a sale of the ship—that is, in this case, to sell the property of a foreign government, which would be a breach of international law.

Webster, Q.C. for respondents.—There is no authority for the exemption of vessels engaged in trade from civil process, no matter whom they may belong to. The basis of *The Exchange* (7 Cranch, 116) is that that vessel was a portion of the public armed force of the nation to which she belonged. If she had been engaged in trade she could not have claimed the exemption. The court, indeed, suggests that possibly a private ship not trading may claim an exemption, but this point is not determined, and it only shows that the fact of trading forfeited the exemption. The whole of the case, both the decision itself and the reasoning on which it is founded, apply only to vessels of war in the ordinary acceptation of the term, and the principle is affirmed that in the case of a sovereign trading he would be subject to the ordinary municipal law of the country, so far as the trade was concerned: (*The Swift*, 1 Dod. 320, 339.) *The Santissima Trinidad* (7 Wheaton 283) is a direct authority for the proposition that the property of a foreign government may be arrested. [Brett, L.J.—That is a question of the law of prize.] Yes, in a sense, but prize belongs to the Government of the captor, and it is shown by that case to be liable to the municipal law of another country. In the judgment of the court below in that case (*The Santissima Trinidad*, 1 Brockenbrough Amer. pp. 479, 497), Marshall, C.J. says: "Foreign courts consider the property," that is, in prizes captured either by vessels of war or privateers, "as the property of the Sovereign, and the possession of the captor as the possession of the Sovereign." [James, L.J.—But that case only says that, if the property of the Sovereign is alleged to have been acquired in a way contrary to the municipal law of the place where it has been acquired, the courts can investigate the question whether the acquisition has or has not been lawful, that is, whether the foreign Sovereign has any title to the property at all.] The true difference is, that where any wrong or breach of contract imposes a maritime lien on the ship, which lien can be enforced by a suit *in rem* against the property, the arguments against personally suing a sovereign or sovereign state do not apply; this is shown by the decision of the American courts in the case of *The United States* v. *Wilder* (3 Sumner, Amer. 308, 314), which declared that the property of the United States on board a private ship was not exempt from the maritime lien which the laws of the United States allow shipowners to have over goods to enforce general average contributions. Yet the United States could not have been sued by a subject personally; that shows, for the distinction is drawn in that case, that the only property of the Government which is exempt from proceedings *in rem* to enforce a maritime lien is that property which for reasons already pointed out it would be contrary to international law and the comity of nations to take any proceedings against, *i.e.*, the public armed vessels of the State. The case of *Briggs* v. *The Lightboats* (11 Allen, Mass. Amer. 157) is not really in point; the question there was not of proceedings to enforce a maritime lien, but to enforce a lien given by a statute, what may be called a territorial lien of the nature of, but somewhat more extensive than, a possessory lien; the rights under it were given by a statute which did not bind the Sovereign. Maritime lien, on the other hand, is a lien recognised by all states as binding on the property in whosesoever hands it may be. [James, L.J.—The expression "maritime lien" is not a strictly accurate one; "lien" means strictly only a charge on a thing whilst in the hands of the person making the demand against the owner of the thing.] What is called a maritime lien binds the charge on the thing in whosesoever hands it is, and only cannot be enforced where the thing is the public armed vessel. [Baggallay, L.J.—Suppose damage is done by a ship of war which is subsequently sold by the Government to a private individual, do you say that a lien would attach to her in the hands of her new owner for the damage done whilst a vessel of war?] The exemption is only that of vessels of war, and therefore only exists so long as the vessels are vessels of war:

> Wheaton International Law, by Boyd, s. 101, p. 141.
> Halleck International Law, by Baker, ch. 7, s. 25, p. 176;
> Phillimore International Law, 2nd edit., vol. 1., ss. 343-350, pp. 393-405;

and does not extend to persons other than the *personnel* of such ships even on board of those ships:

> Opinion of Sir W. Scott (Lord Stowell), 18th Nov. 1820; Report of Royal Commission on Fugitive Slaves, 1876, p. 77.

How then can it extend to persons other than the crews of a ship of war or property other than a ship of war? Besides, even if the vessel were exempt as a vessel of war is exempt, or as it is sought to make other vessels exempt under this convention, the *Parlement Belge* has forfeited such exemption whether claimed as a public vessel engaged in a public service, or under the convention, by the trading in which it has been proved she has engaged. It is the condition on which a man of war claims exemption that she does not trade, and it is the express condition in this convention which purports to extend the exemption to vessels complying with the condition. [James, L.J.—The alleged carrying of merchandise has not in any way caused the damage of which you complain.] That is immaterial. *Primâ facie* I am entitled to recover for the damage I have sustained, and the vessel claiming an exemption from civil process is bound to prove that she has acted in accordance with the rules on which that exemption is granted.

Dr. *W. G. F. Phillimore*.—This proceeding being by a suit *in rem* against the ship is not similar to a personal action against the owner of the ship. No citation is served on any person, but any person, not the owner alone, who considers he has an interest, may appear. That is really the way in which the Attorney-General appears; it is not for the King of the Belgians or the Belgian Government, but for the Crown of the country who consider they have an interest in the suit. An Admiralty action *in rem* is a legal proceeding for the consummation of an inchoate maritime lien:

> *The Bold Buccleugh*, 7 Moo. P. C. Cas. 273.

This therefore is a suit against the ship and not against the foreign Sovereign, and does not touch his dignity. [Brett, L.J.—A maritime

lien gives no right to take possession of the property, it only gives a Court of Admiralty jurisdiction to hold it till the rights of all parties in it are settled. I doubt much whether a maritime lien would attach to a vessel after leaving the Government service for damage done by her whilst in the service.] There is direct authority that a vessel chartered by a foreign government for warlike purposes is liable to arrest after the termination of her charter for damage done whilst under charter:

The Ticonderoga, Swab. 215.

Before the case of *The Exchange* (*ubi sup.*) was decided there were grave doubts amongst jurists as to the exemption even of armed ships, and *The Swift* (*ubi sup.*) shows that unarmed ships would in any case not be exempt from the law. [Brett, L.J.—In the case of *The Resolute* (33 L. T. Rep. O. S. 80; 4 Ir. Jur. N. S. 123), a Government transport which had been arrested in a suit for damage was released.] Yes; but she was a commissioned vessel employed in the military service of the country. In the case of *The Prins Frederic* (*ubi sup.*) the warrant was actually executed, and the subsequent proceedings show that Lord Stowell did not consider that there had been anything necessarily wrong in the process. The exemption from municipal law is really only for those ships and persons who are under martial law. A captain of a vessel so situated may both be punished himself and may punish his crew for an infraction of the sailing regulations, but that is not the case here. Can it be supposed for a moment that all the passengers who go on board the *Parlement Belge* for the passage from Dover to Ostend are under the martial law of Belgium in the way in which a man on board an English ship of war is under the Naval Discipline Act? Besides, a ship of war is frequently sent on missions of the utmost importance to the State to which she belongs, and her detention might lead to the gravest complications. This distinction is the correct one, in the opinion of M. Ortolan, himself both a naval officer and an international jurist, and is shown by his approval of the answer of the Russian Government to a question propounded to it by that of Spain touching the character of a Danish vessel:

Ortolan, liv. 2, chap. 10, 2nd edit., pp. 211, 217.

This ship and her officers are in no sense *agens de la force publique*. The reason of the exemption is the nature of the service, and here the only public service is the carriage of mails, and that is not a species of public service that creates any exemption. Mail steamers, both British and foreign, are arrested continually. In a recent case where the Dutch mail boat from Sheerness to Flushing (*The Stadt Flushing*, not reported) was arrested, she attempted to defend herself from the charge of going too fast in foggy weather by alleging a contract between her owners and the Government requiring the mails to be carried at a certain speed under penalties; but it was held to be no defence to the action. On what principle can it be said that the Calais steamer belonging to the South-Eastern Railway Company is liable to seizure for damage done, and that the Ostend steamer employed in precisely the same service is not? The only property of a sovereign or a state that is exempt from civil process is that property which is connected with the dignity or personal comfort of the Sovereign or with the military power of the State. [James, L.J.—In some respects he is under a personal disability; for example, he could not acquire real estate in this country in his sovereign capacity.] Since the passing of the Alien Act he probably could, and if so, it would be liable to the law of this country, but his ordinary movable property would in any case be liable to the municipal law, as *e.g.*, if any person on his behalf stored explosives belonging to him in a manner contrary to the Explosives Act, they would be liable to seizure and forfeiture, and a railway company might sell his property if left on their hands. That under certain circumstances a suit can be brought affecting the property of a foreign government in this country is shown by the case of *Lariviere* v. *Morgan* (L. Rep. 7 Ch. App. 550; 24 L. T. Rep. N. S. 339, 859), which was a bill against the Government of France. [James, L.J.—In that case the money about the payment of which the bill was filed was in the hands of a stakeholder.] The alleged stakeholder, however, denied that it was held by him in trust for the vendors, and they ultimately won. The law as to appearance by foreign states is laid down in the judgment of Lord Hatherley; he says: "The main argument in the case has, however, been that the French Government, though it has an undoubted interest in the fund, is not before the court. . . . . The question now raised is, whether, in the absence of the French Government, it is possible to ascertain the right to the particular fund, the French Government declining to appear—a very proper course for them to take if they think fit. Is there then to be a total failure of justice because the French Government declines to assert any right to the fund? . . . . In any such case we must ascertain as we best can, in the absence of other parties, what are the rights of the parties who do appear. . . . There may be many cases in which a foreign government has some interest, but the other parties interested must not suffer because it is impossible to compel the attendance of one of those who might claim the fund." And though this decision was not upheld by the House of Lords, yet so far as this portion of it is concerned the House of Lords agreed, for Lord Cairns is reported to say: "No doubt, under such circumstances, the court having a trust fund under its control might well proceed to administer that fund, even although a foreign government might be interested in it, and might not be before the court or subject to the jurisdiction of the court." It appears indeed that, although a foreign sovereign cannot be compelled to appear, he may in some cases be added as a defendant:

Gladstone v. *Musurus Bey*, 1 H. & M. 495.

The decision in *Vavasseur* v. *Krupp* (L. Rep. 9 Ch. Div. 351; 39 L. T. Rep. N. S. 427) depends on various considerations other than the property being in the Mikado of Japan. There was no user in this country, and also the goods were munitions of war, and were here as part of the armament of vessels of war, and it is on that fact—their military character—as affecting the dignity of a foreign state that the judgment is based. [James, L.J.—The case of *Betts* v. *Neilson* (12 L. T. Rep. N. S. 719) shows that a patent right may be violated as well by a passive as an active user in this country, and in *Vavasseur* v. *Krupp* (*ubi sup.*), notwithstanding

an injunction of the court the Mikado was allowed to remove the goods in consequence of his status]. A suit may be instituted against the representative of a foreign country so long as it does not touch or interfere with his personal liberty or comfort, and in cases governed by the civil law, and where jurisdiction is provided by a suit *in rem* in the first instance, such suit may proceed:

Taylor v. *Best*, 14 C. B. 487.

The Court of Admiralty is a court proceeding by the civil law, and therefore a suit *in rem* may proceed. [Brett, L.J.—The privileges of an ambassador are limited, *non sequitur* that the privileges of a sovereign are so in respect of his property.] They are the same in kind, and in *Taylor* v. *Best* (*ubi sup.*) the case was argued on the principle of the privilege of sovereigns, and this is the correct principle: (Bynkershoek de Foro Legatorum, ch. vii., viii.) The propriety of proceeding by a suit *in rem* where possible is shown by Lord Campbell in the *Magdalena Steam Navigation Company* v. *Martin* (2 El. & El. 94), where he says: "In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited, but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, whilst he continues ambassador, be taken in execution on the judgment." [Brett, L.J.—The only maritime law in this country authorising an arrest of property is that recognised by the common and statute law.] Yes, but the protest of arrest of a ship in an Admiralty action is so recognised. The case of *Santissima Trinidada* (1 Brockenbrough, Amer. 478 on appeal, 7 Wheaton, Amer. 283) decides two questions: first that it is the duty of a court of law to decide the status of a foreign vessel claiming exemption from municipal law as a vessel of war; and secondly, that at all events pending the decision of the first question the property of a foreign sovereign may be seized. The learned judge who decided this case in the court below based his judgment in both these questions on the authority of previous cases, and specially on that of *The Exchange* (*ubi sup.*). [Brett, L.J.—If the seizure is an unlawful seizure, the property in the goods seized does not pass, and therefore never becomes the property of the Sovereign.] It is sheltered by the national flag. The case of *Briggs* v. *The Lightboats* (*ubi sup.*) is no authority for this case. The suit itself was not an Admiralty suit; that is, it was not according to the definition of our law a suit *in rem*. It was a suit brought to enforce a right of lien given by statute in a particular state, and it was moreover an attempt by a subordinate state to enforce a lien given by a statute of that subordinate state alone against the property of the paramount state, that is, to exercise a jurisdiction which was beyond its authority by reason of the peculiar constitution of the United States:

United States v. *Judge Peters*, 5 Cranch. Sup. Court (Amer.) Rep. 115.

The fact of the property, the subject of a suit *in rem*, being the property of the Sovereign, is no defence to such an action:

United States v. *Wilder*, 3 Sumner, Amer. 308.

[Brett, L.J.—In that case the United States by bringing the action had voluntarily come before the court.] Yes, but the question decided by that case is not as to the right of the subject to sue the State, but as to the liability of the property of the State to be proceeded against *in rem*. Story, J. says (p. 312): "It is said that, in cases where the United States are a party, no remedy by suit lies against them for the contributions, and hence the conclusion is deduced that there can be no remedy *in rem*. Now I confess that I should reason altogether for the same premises to the opposite conclusion. The very circumstance, that no suit would lie against the United States in its sovereign capacity, would seem to furnish the strongest ground why the remedy *in rem* should be held to exist." Besides, though as a matter of constitutional law in this country a subject cannot sue the Crown, it does not follow that by the comity of nations he should not be able to sue the sovereign of a foreign country. That there are differences between the status of the Crown and of foreign sovereigns recognised by our courts is clear; *e.g.*, the Crown cannot be compelled to make discovery of documents:

Thomas v. *The Queen*, L. Rep. 10 Q.B. 44;
Tomlin v. *Attorney-General*, 40 L. T. Rep. N. S. 542.

Whereas a foreign Government is compelled:

Prioleau v. *United States*, 14 L. T. Rep. N. S. 700 L. Rep. 2 Eq. 359;

and even our own Crown is liable in suits *in rem*, for all property derelict at sea vests in the Crown as droits of Admiralty (*The Augusta*, 1 Hagg. 18), and yet such property is subject to suits *in rem* for salvage in the every-day practice of the court: and that there are vessels belonging to the Government or to a department of the Government which yet are not entitled to the privileges of men-of-war is evident:

The Helen, 3 C. Rob. 224;
The Cybele, 3 Asp. Mar. Law Cas. 478, 532; 37 L. T. Rep. N. S. 165, 773; L. Rep. 3 P. Div. 8.

The writers on international law agree in pointing out that the ex-territorialty attaches only to a vessel of war:

Bluntschli, Droit International, sect. 321, p. 184;
Calvo, Droit International, edit. 2, liv. 6, sect. 259, p. 377;
Phillimore Inter. Law, 2nd ed., vol. 1, pp. 398, 399, sects. 343, 344;
Bynkerschoek, De Foro Legatorum, ch. 4.

So far as our own public vessels are concerned, the flag carried is notice of their condition; ships of war carrying a white ensign and pendant, other public vessels a blue ensign, and merchant ships a red ensign; and in most foreign countries the distinction between men-of-war, that is vessels commissioned for military purposes, and other ships is marked in the same way. There is nothing to show that the ensign carried by the *Parlement Belge* was anything different from the ordinary Belgian merchant ensign; and even if this vessel, could claim exemption either on the ground of being public property or of being a vessel of war she has forfeited that exemption by trading:

The Charkieh, 1 Asp. Mar. Law Cas. 581; ep 4 Ad. & Ecc. 59; 28 L. T. Rep. N. S. 513.

James, L.J.—As at present advised, we are of opinion that, if the vessel is not exempt from jurisdiction on the ground of being public property or a vessel of war, the convention to which reference has been made would not give her such an exemption. If, however, we should arrive at the

conclusion that anything turns on the making of the convention or its provisions, we will give an opportunity for further argument on the subject.

Giffard (S.G.) in reply.—Bynkershoek's opinion was, that all vessels, even undoubted ships of war, might be seized, but all jurists have disclaimed this opinion: (Wheaton Inter. Law, by Lawrence, p. 199.) That the exemption of certain foreign ships depends on their public and not on their military character, is the opinion of the American courts in the interpretation put upon the case of *The Santissima Trinidad* (*ubi. sup.*) in *Briggs and another* v. *The Lightboats* (11 Allen Mass. Rep. Amer. at p. 186). In France, moreover, the law is that "no suit or proceeding can be brought against property of any kind belonging to a foreign government. It has been decided that no private person can lay an attachment (*pouver une saisie arrêt* in France upon the funds of a foreign government, and that the courts are incompetent to decide upon the validity of such attachment (*saisie arrêt*"): (Fœnix as quoted by Wheaton, Lawrence, edit. 2, p. 199, note 69.) There is no real difference between the liability to a suit *in rem* and a suit *in personam*. A suit cannot, in fact, be brought against a thing, but as a matter of proceeding the plaintiff is permitted in certain cases to get the court to take custody of goods belonging to the defendant to enforce the appearance of the defendant; but if the defendant is not liable to appear, the process to compel him to appear is not available. The principle on which *The Bold Buccleugh* (7 Moore P.C. Cas. 267) was decided is not applicable here, for it only decided that a plaintiff, by having elected to sue one set of owners personally in Scotland, was not thereby prevented from suing another, who by purchasing the vessel had become liable for damage previously done by her, in England. In *The Exchange* (*ubi sup.*) the attempt was made, as in this case, to make a foreign public ship liable *in rem*, but the attempt failed. A foreign sovereign cannot in any case be compelled to appear:

Wadsworth v. *Queen of Spain*; *De Haber* v. *Queen of Portugal*, 17 Q. B. Div. 171.

In those cases the attempt was made by means of the peculiar process of foreign attachment, and here by the peculiar process of nailing a writ to the ship's mast; indeed, in this case the violation of the Sovereign's ex-territoriality would be direct, for the service of the writ on the ship is one method of serving it on the individual, just as in cases of ejectment it may be served by fixing it to the door of a vacant tenement.

James, L.J.—Before the Admiralty Court Acts (3 & 4 Vict. c. 65; 24 Vict. c. 10) were passed the Admiralty Court would have had no jurisdiction in this case. The collision happening within the body of a county, the only legal process open to the plaintiffs would have been a suit at common law, in which suit he could not, by any means, have compelled the appearance of a foreign sovereign. Have the Admiralty Court Acts so affected the rights of a foreign sovereign as to make him liable in a suit in which before that act he would not have been liable?

Cur. adv. vult.

Feb. 27.—The judgment of the court was now delivered by

Brett, L.J.—In this case proceedings *in rem* on behalf of the owners of the *Daring* were instituted in the Admiralty Division, in accordance with the forms prescribed by the Judicature Act, against the *Parlement Belge* to recover redress in respect of a collision. A writ was served in the usual and prescribed manner on board the *Parlement Belge*. No appearance was entered, but the Attorney-General, in answer to a motion to direct judgment with costs to be entered for the plaintiffs and that a warrant should issue for the arrest of the *Parlement Belge*, filed an information and protest asserting that the court had no jurisdiction to entertain the suit. Upon the hearing of the motion and protest, the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. The Attorney-General appealed.

The protest alleged that the *Parlement Belge* was a mail packet running between Ostend and Dover, and one of the packets mentioned in Article 6 of the Convention of the 17th Feb. 1876, made between the Sovereigns of Great Britain and Belgium, that she was and is the property of His Majesty the King of the Belgians, and in his possession, control, and employ, as reigning sovereign of the State, and was and is a public vessel of the Sovereign and State, carrying His Majesty's royal pennon, and was navigated and employed by and in the possession of such Government, and was officered by officers of the royal Belgian navy holding commissions, &c. In answer it was averred, on affidavits which were not denied, that the packet boat besides carrying letters carried merchandise and passengers and their luggage for hire.

Three main questions have been argued before us: (1) Whether, irrespective of the express exemption contained in Article 6 of the Convention (the Convention is set out in the report of the case in the court below, see *ante p.* 84,) the court had jurisdiction to seize the vessel in a suit *in rem*; (2) Whether, if the court would otherwise have such jurisdiction, it was ousted by Article 6 of the Convention; (3) Whether any exemption from the jurisdiction of the court which the vessel might otherwise have had was lost by reason of her trading in the carriage of goods and persons. In the course of the argument, we desired that it might, in the first instance, be confined to the first and third questions, reserving any further argument on the second question to be heard subsequently, if necessary. We have come to the conclusion that no such argument is necessary. We, therefore, can give no opinion on the second question. We neither affirm nor deny the propriety of the judgment of the learned judge of the Admiralty Division on that question.

The proposition raised by the first question seems to be as follows:—Has the Admiralty Division jurisdiction in respect of a collision to proceed *in rem* against, and in the case of non-appearance or omission to find bail to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ, as sovereign by means of his commissioned officers, and is a public vessel of his state in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war, or employed as a part of the military force of the country? On the one side it is urged that the

only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the Government as part of the military force of the State. On the other side it is contended that all movable property which is the public property of the Sovereign and nation used for public purposes is exempt from adverse interference by any Court of Judicature. It is admitted that neither the Sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any court of this country. It is admitted that no armed ship of war of the Sovereign of Great Britain, or of a foreign sovereign, can be seized by any process whatever, exercised for any purpose, of any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity, and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit personally impleaded against the Sovereign, but in a suit *in rem* against the vessel itself.

This contention raises two questions:—(1) Supposing that an action *in rem* is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the court? (2) Is it true to say that an action *in rem* is only and solely a legal procedure against the property, or is it not rather a procedure, indirectly if not directly, impleading the owner of the property to answer to the judgment of the court to the extent of his interest in the property? The first question really raises this—whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be so, or, in other words, whether it is so by the law of nations, The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any court of some property of every sovereign is admitted to be a part of the law of nations, The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a state which is destined to the use of the State depends on whether the principle on which the agreement has been implied is as applicable to all that other public property of a sovereign or state as to the public property which is admitted to be exempt. If the principle is equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

The first question therefore is, what is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised?

"Our king," says Blackstone (bk. 1, c. 7), "owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King even in civil matters, because no court can have jurisdiction over him; for all jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress, and the sentence of a court should be contemptible unless the court had power to command the execution of it. . . . . But who shall command the King?" In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. "The world," says Wheaton, adopting the words of the judgment in the case of *The Exchange* (7 Cranch. Amer. Rep. 116), "being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the Sovereign from arrest or detention within a foreign territory. Why has the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation." By dignity is obviously here meant his independence of any superior authority. So Vattel (liv. 14, c, 7, s. 108), speaking of sovereigns says: "S'il est venu en voyageur, sa dignitié seule, et ce qui est du á la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute jurisdiction." In the case of *The Duke of Brunswick* v. *The King of Hanover* (6 Beav. 1) the suit was against the King. There was a demurrer to the jurisdiction. Lord Langdale, in an elaborate judgment, allowed the demurrer. He rejected the alleged doctrine of a fictitious ex-territoriality. He admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign, but he nevertheless adopted an analogy between the cases of the ambassadors and the Sovereign, and allowed the demurrer, on the ground that the sovereign character is superior to all jurisdiction. "After giving to the subject," he says, "the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of a sovereign, but that there are reasons for the immunities of sovereign princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors, that suits against sovereign princes of foreign countries must in all ordinary cases in which orders or declaration of right may be made end in requests for justice which might be made without any suit at all, that even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities though necessary to the independence of princes and nations. I think that, on the whole, it ought

to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts here." From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every court has been decided is that the exercise of such jurisdiction would be incompatible with his real dignity—that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.

The reason of the exemption of ships of war and some other ships must be next considered, and the first case to be carefully considered is, and always will be, *The Exchange* (7 Cranch. 116). It is undoubted that the decision applies, in fact, only to the case of a ship of war. Yet, in considering what was the principle on which the judgment was founded, there are some important circumstances to which attention must be directed. The plaintiffs filed their libel against the schooner *Exchange* found in an American port, and prayed for the usual process to attach the vessel, and that she might be restored to her owners. Upon this libel the usual process in a cause of restitution was issued and executed; that is to say, the vessel was detained. There was no appearance in the suit. Then the usual proclamations issued for all persons to appear and show cause why the vessel should not be restored to the owners. No person appeared. Then the Attorney-General of the United States appeared and filed a suggestion. In this it must be noticed that the vessel is not described as "an armed ship of war," but as "a certain public vessel belonging to His Imperial Majesty, and actually employed in his service." It certainly is to be remarked that those who conducted this case with unusual ability deliberately, in stating the cause of objection, rested the claim of exemption, not on the fact of the vessel being an armed ship of war, but on the fact of her being one of a larger class, namely, "a public vessel" belonging to a sovereign, and employed in the public service. It is upon the suggestion so pleaded that the court gives judgment. It is right, however, to say that the fact of the vessel being an armed ship of war was before the court, and that the judgment frequently uses that phrase, though by no means invariably. It is impossible within reasonable bounds to set out the elaborate judgment of Marshall, C.J. and the court. The reasoning seems to be as follows: The ship is within the territorial jurisdiction of the United States—*primâ facie* the court of the United States has jurisdiction. But all nations have agreed to certain limitations of their absolute territorial jurisdiction—as, for instance, they have abjured all personal jurisdiction over a foreign sovereign within their terriority, and this on account of his dignity; and all personal jurisdiction over foreign ministers, and, says the judgment, this is on the same principle; and all jurisdiction over a foreign army passing through the territory. Is the same immunity to be held to apply to ships of war? The judgment answers, Yes, and upon the same principle; *i.e.*, that to hold otherwise would be inconsistent with the dignity—that is to say, the recognised independence—of the foreign sovereign. After dealing with the case of private foreigners and merchant vessels in a foreign country the judgment continues: "But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied licence, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the Sovereign within whose territory she claims the rites of hospitality." *The Prins Frederic* (2 Dod. 451) seems to us to be worthy of great attention. An armed ship of war belonging to the King of the Netherlands was arrested on a claim for salvage. The case was elaborately argued upon the question of jurisdiction. An argument of the closest and most forcible reasoning, to which we see no answer, was presented by Dr. Arnould, the Admiralty Advocate (*see* p. 466). "There is a class of things," he says, "which are not subject to the ordinary rules applying to property, which are not liable to the claims or demands of private persons, which are described by civilians . . . . as *extra commercium* . . . . and in a general enumeration are," by them, "denominated *Sacra, Religiosa, Publica, Publicis usis destinata* . . . . . These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them the arrest, the judicial possession, and judicial sale incident to such proceedings would divert them from those public uses to which they are destined. . . . . Ships of war belonging to the State are included in this class of things by their nature, and of necessity arising from their nature. . . . . The same inconveniences. . . . which. . . . would arise" from such proceedings in the courts of their own country "would equally arise if such vessel could be arrested and detained in a foreign port. . . . . There is another point of view. . . . . It is the interest and duty of every sovereign independent state to maintain unimpeached its honour and dignity." The point and force of this argument is, that the public property of every state, being destined to public uses, cannot within reason be submitted to the jurisdiction of the courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of states, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. The dignity and independence of each state requires this reciprocity. It was this reasoning

which induced Sir William Scott to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reasoning could not be controverted. The case has always been considered as conveying his opinion to have been to that effect: see per Lord Campbell in *De Haber* v. *The Queen of Portugal* (17 Q B. 121), who says that the difficulties suggested by the argument were, in the opinion of Sir William Scott, insuperable. But if so, he assented to an argument which embraced in one class "all public property" of the State, and treated "armed ships of war" as a member of that class. In the case of *The Athol* (1 W. Rob. 374), Dr. Lushington certainly extended the immunity from jurisdiction to a troopship, which was not an armed ship of war, though she was employed in a sense as part of the military force of the country. The reason of his judgment was in terms that in cases of tort or damage committed by vessels of the Crown the legal responsibility attaches to the actual wrongdoer only. That is in effect to say that the vessels of the Crown cannot be touched. We come next to the important case of *Briggs* v. *The Light Boats* (11 Allen, 157). By the Massachusetts Statute, it was enacted that "any person to whom money is due for labour and materials furnished in the construction of a vessel shall have a lien upon her, which lien may be enforced by petition to the Superior Court praying for a sale of the vessel." The petition may be entered or filed, a process of attachment issues against the vessel, and notice is to be given to the owner thereof to appear and answer to the petition. This enactment gave a statutory lien on the vessel, to be enforced by process of a court. It is a more extensive lien than the common law possessory lien in respect of work done on the vessel, as it is not lost by loss of possession. It is to be enforced by the same process as a maritime lien. It is therefore in effect an enactment which applies the incidents of a maritime lien to a new subject-matter, viz., a claim for work and labour in the construction of a vessel. It follows that upon the point raised in that case the reasoning must be as applicable to every maritime lien and the means of enforcing it, as to that similar statutory lien. Now in that case the plaintiffs filed a petition and prayed an attachment and sale of the vessel. The court thereupon issued a process of attachment. and ordered notice to be given to the United States by service on their attorney. The vessel was attached, and notice given accordingly. The United States appeared specially and pleaded to the jurisdiction that at the time of the filing of the petition the vessels were the public property of the United States and in their possession, and held and owned by them for public uses, and as instruments employed by them for the execution of their sovereign and constitutional powers, and, therefore, not subject to the process or jurisdiction of the court. The question, therefore, was whether the court had jurisdiction to take possession of the vessels in order to sue them if necessary, and to give notice to the Government that if they had any objection to such sale they must appear. Every step in that case was the same as was every step in the case of *The Exchange* (*ubi sup.*), and as is every step in the present case. The objection to the jurisdiction as pleaded was in substance the same as that pleaded in the case of *The Exchange* (*ubi sup.*) and in the present case. The vessels, however, were not ships of war, or vessels employed in the military service of the State. They were like the *Parlement Belge*—vessels which were the public property of the State and in their possession, and held and owned by them for uses treated by them as public. It is obvious that all the arguments which have been used in the present case on behalf of the plaintiffs might have been, and almost certainly were, used in that case. But the court gave judgment declining the jurisdiction. "It is said for the petitioners," says the judgment (page 165,) "that these lightboats were not intended for service. But after they had once come into the possession of the United States for public uses, they were subject to the exclusive control of the Executive Government of the United States, and could not be interfered with by state process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty. These reasons have satisfied us that there is no principle upon which the courts of this Commonwealth can entertain jurisdiction of these petitions." The judgment then reviews many cases. Among others *The Marquis of Huntley* (3 Hagg. 247), in which Sir John Nicholl treated "Government stores" in charge of a lieutenant, but on board a ship which was only chartered by Government, as beyond his jurisdiction, though the ship and freight were within it; *The Schooner Merchant*, in Florida, in which it was held that the mails could not be arrested or detained for salvage; *The Thomas A. Scott*, in which a transport ship, owned by the United States, but not commissioned, was held to be beyond jurisdiction. The judgment ends thus: "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character." The reasoning of that careful judgment is the reasoning of the Admiralty Advocate in the case of *The Prins Frederic*. The ground of that judgment is that the public property of Government in use for public purposes is beyond the jurisdiction of the courts either of its own or any other state, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or ships of war, and exempts it from the jurisdiction of all courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State. The judgment of Lord Campbell in *De Haber* v. *Queen of Portugal* (17 Q.B. 171) seems to the same effect. though the decision may fairly be said to apply only to a suit directly brought against the Sovereign. But he relies on the statute of Anne with regard to the ambassadors, and says, "Can we doubt that in the opinion of that great judge, Lord Holt, the Sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the minister who represents him?" and he cites the statute thus: "It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be

arrested, *or his goods distrained or seized*, shall be utterly null and void. The italics are as written by Lord Campbell, and further citing *The Prins Frederic* (*ubi sup.*) he says: "Objection being made that the Court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that being in possession of and having a lien upon a ship which they had saved the proceeding might be considered *in rem*, but Lord Stowell saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representations to be made to the Dutch Government, who very honourably consented to his disposing of the matter as an arbitrator." The decision, therefore, is, that the immuuity of the Sovereign is at least as great as the immunity of an ambassador, but the statute declares that the law is and always has been not only that an ambassador is free from personal suit or process, but that his goods are free from such process as distress or seizure, the latter meaning seizure by process of law, it follows that the goods of every sovereign are free from any seizure by process of law. The latest case on the point seems to be the case of *Vavasseur* v. *Krupp* (9 Ch. Div. 351; 39 L. T. Rep. N. S. 426) before this court. The question was whether the English court had jurisdiction to order "shells" belonging to the Mikado of Japan to be destroyed supposing they were an infringement of the plaintiff's patent. All the judges held that there was no such jurisdiction. "I suppose," says James, L.J., "that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringment of somebody's patent. He says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case." Brett, L.J. said: "The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country." I shall assume for this purpose that there was an infringement of the patent, yet the Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country.', And Cotton, L.J. says: "This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the State of which he is sovereign, as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented as all foreign countries having a sovereign are represented by the individual who is the sovereign."

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every Sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

It is said, however, that there are authorities inconsistent with the view that this is a part of international law. The case of *The Santissima Trinidad* (7 Wheaton (Amer.), 283) is relied on. But, as was pointed out in the judgment in *Briggs* v. *The Lightboats*, the former case is one depending upon a well known doctrine of the law of prize, viz., that property captured in breach of the laws of neutrality is held by the courts of the neutral State not to be lawful prize. In *The United States* v. *Wilder* (3 Sumner (Amer.), 308) it would be uncandid to say that there are not expressions of Story, J. which are in favour of the contention that the immunity from jurisdiction is confined to ships and materials of war. But in that case the right which was adverse to the United States Government was a possessory lien for general average. The remedy of the shipowner was in his own hands. He required no assistance from any process of any court, as would also be the case in a lien for freight. As a decision, therefore, the case is not in point, because the United States were plaintiffs voluntarily seeking the assistance of the Massachusetts tribunal. But it seems to us sufficient to say that we do not think the observations of Story, J. countervail effectually the arguments and decisions in the other cases which have been cited. There is then the opinion of the learned judge of the Admiralty Division, expressed in the case of *The Charkieh* (1 Asp. Mar. Law Cas. 581; L. Rep. 4 Adm. & Ecc. 59; 28 L. T. Rep. N. S. 513.) The decision is, of course, not in point, because the case was decided on the ground that the Khedive was not an independent sovereign. But there is a careful consideration in the judgment of the question whether the ship would have been liable to the jurisdiction of the court in proceedings *in rem* in respect of a collision if the Khedive had been a sovereign prince. The conclusion is that she would have been. Such an opinion deserves respectful attention. We are not quite sure whether we correctly appreciate the grounds of the opinion. The learned judge agrees that an ambassador is personally exempt from the service of all process in a civil cause, and from any action which renders such service necessary; and that "the law as to the privileges of an ambassador applies with equal force to the Sovereign: but," he continues, "it remains to be considered whether there may not be a proceeding *in rem* against property of the Sovereign or ambassador which is free from the objections fatal to the other modes of procedure. He then says "that he would be prepared to hold that proceedings *in rem* in some cases may be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit." This is an intimation of an opinion not yet conclusively formed that proceedings *in rem* are a legal procedure solely against property, and not directly or indirectly against the owner of the property. But

then he says that a proceeding *in rem* cannot be instituted against the property of a sovereign or an ambassador if the *res* can in any fair sense be said to be connected with the *jus coronæ* of the Sovereign or the discharge of the functions of the ambassador. From this one would infer that no personal process can issue against a sovereign or an ambassador; that no process *in rem* can issue against any property which can in any fair sense be said to be connected with the *jus coronæ*, but such process might issue against other property of a sovereign or an ambassador. But then he says that "it is by no means clear that a ship of war to which salvage services have been rendered may not *jure gentium* be liable to be proceeded against in a Court of Admiralty for the remuneration of such services." Yet such proceedings are undoubtedly by means of process *in rem*, and it can hardly be denied that a ship of war is property connected with the *jus coronæ*. "I am disposed to hold," he says, "that in case of salvage or collision the *obligato* attaches *jure gentium* upon the ship whatever be her character, public or private." If this includes a ship of war it seems to us difficult to understand how it is not inconsistent with the principle of the judgments in the cases of *The Exchange* and *Briggs* v. *The Lightboats*. If it does not include a ship of war, the distinction between other processes and the process *in rem* is not always an answer to the claim of immunity. But then the learned judge expresses an opinion that in the case before him there was a nearer goal at hand, because it was idle to contend that the ships were not trading vessels to all intents and purposes, though, when engaged in their regular employment, they carried mail bags. This seems to intimate that the ships then in question were not public ships at all. We cannot think that this judgment discloses any final opinion of the learned judge, either as to the limits of the nature of the property which is exempt, or as to the whole nature of the action *in rem* with regard to the question under discussion.

Having carefully considered the case of *The Charkieh* (*ubi sup.*) we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, namely, that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

This proposition would determine the first question in the present case in favour of the protest, even if an action *in rem* were held to be a proceeding solely against property, and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is, undoubtedly, not necessary, in order to enable the court to proceed further, that the owner should be personally served with any process. In the majority of cases brought under the cognizance of an Admiralty Court no such personal service could be effected. Another course was therefore taken from the earliest times. The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him. Besides which, by the regular course of the Admiralty, the owner was cited or had notice to appear to show cause why his property should not be liable to answer to the complainant. The owner has a right to appear and show cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But, unless it were considered that, either by means of the publicity of the manner of arresting the property, or by means of the publicity of the notice or citation, the owner had an opportunity of protecting his property, from a final decree by the court, the judgment *in rem* of a court would be manifestly contrary to natural justice. In a claim made in respect of collision, the property is not treated as the delinquent *per se*. Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation, if those in charge of her were not the servants of her then owner, as for example if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed, not merely on the property, but also on the owner through the property. If so, the owner is, at least, indirectly impleaded to answer to—that is to say, to be effected by—the judgment of the court. It is no answer to say that if the property be sold after the maritime lien has accrued the property may be seized and sold as against the new owner. This is a severe law, arising probably from the difficulty of otherwise enforcing any remedy in favour of an injured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit and the same opportunity and right of appearance as the former owner would have had. He is impleaded in the same way as the former owner would have been. Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading. The case of *The Bold Buccleuch* (7 Moo. P. C. C. 267) does not decide to the contrary of this. It decides that an action *in rem* is a different action from one *in personam*, and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign

in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign cannot be personally impleaded in any court.

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for such purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both those propositions raise the question of how the ship must be considered to have been employed. As to the first, the ship has been by the Sovereign of Belgium, by the usual means, declared to be in his possession as sovereign and to be a public vessel of the State. It seems very difficult to say that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange* (*ubi sup*). Whether the ship is a public ship used for national purposes seems to come within the same rule. But, if such an inquiry could properly be instituted, it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not, in fact, brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the State which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the State which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity.

For all these reasons we are unable to agree with the judgment of the learned judge, and have come to the conclusion that the judgment must be reversed, with a declaration that the Admiralty Division had no jurisdiction over the *Parlement Belge*.

James and Cotton, L.JJ. concurred.

James, L.J. adding: The appeal sustained with costs. There being no jurisdiction to entertain the suit, the whole proceedings will fall to the ground.

Solicitors for the Treasury, appellants, *Hare* and *Co.*; for plaintiffs, respondents, *Lowless* and *Co.*

Monday, Dec. 8, 1879.

(Before James, Baggallay, and Brett, L.JJ.)

The Robert Dixon. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Salvage—Towage—Negligence—Damage—Tug and tow.

Where in the performance of towage services the tow gets into a position of danger, the tug is not entitled to salvage reward for extricating her from it, unless she can show (1) *That there was no negligence on the part of the tug causing the tow to get into the position of danger, and* (2) *That her being in the position of danger was the result of an unforseen and inevitable accident.*

Semble, the person in charge of the tow may give express orders as to the course and the tug is bound to obey them, but in the absence of such orders the tug has the general direction of the course, and is bound to tow the vessel in a safe and prudent course.

This was an appeal from the judgment of Sir Robert Phillimore, by which he found that the tug *Commodore* was not entitled to salvage remuneration for services rendered to the *Robert Dixon*, and that the *Robert Dixon* was entitled to recover damages from the *Commodore* for loss sustained by her through the negligence of the *Commodore*.

The facts of the case are fully set out in the report of the cause in the court below (*ante*, p. 95; 40 L. T. Rep. N. S. 333).

Dec. 8, 1879.—The appeal came on for hearing.

Webster, Q.C. and *Potter* for the appellants, owners of the *Commodore*.

Milward, Q.C. and *G. Bruce*, for the respondents, were not called on.

James, L.J.—It appears to us and to the assessors who have assisted us that, though we might not have come to the same conclusion as to one part of the case as the judge of the court below, there is no sufficient cause shown to us to overrule the decision, and that, if the whole of the evidence came before us as a new matter, it would justify the finding, and would not warrant any other conclusion. The learned judge in the court below does not express any opinion on the point on which there is a conflict of evidence, namely, as to whether there were any positive orders and directions given from the *Robert Dixon* to the *Commodore*, which orders were disobeyed. And it is not necessary for us to express an opinion on that point, for, if no orders were given except the general ones when the pilot left the *Robert Dixon*, then the *Commodore* was towing according to the skill and judgment of her master, and there was no order which could relieve the master of the *Commodore* from the responsibility of taking the ship a

reasonably safe and prudent course, having regard to the condition of the vessel and the state of the weather. It appears to us that to take the ship inside of the in-shore pilot boat was not, under the circumstances, such a reasonably prudent course. That pilot boat was lying on the inside of the ordinary course of passing vessels so as to be out of their way, and therefore it would not be right or prudent for the tug to pass in-shore of her. That being so, the judgment of the court below appears to us to be warranted by the facts. And on the other evidence in the case it is obvious that the *Commodore* did as a matter of fact—though not wilfully, to create a salvage service—bring the *Robert Dixon* into a position of extreme peril. It would be strange if, under these circumstances, whether the course which led into danger was pursued from want of prudence or from an error in judgment, the tug could convert her towage into a salvage service. Therefore I am of opinion that she is not entitled to claim as a salvor.

As to the counter-claim for the loss of the anchors and chains belonging to the *Robert Dixon*, that loss was a consequence of the position in which the *Robert Dixon* was placed, and therefore of the negligence on the part of the *Commodore*, and therefore must follow the same rule, and the *Commodore* must bear the loss. It might not be so if it were proved that the loss was caused by want of proper care on board the ship—as, for example, if the anchors could have been weighed by a sober crew, but the drunkenness of the men had prevented it being done; but the evidence on that point is of a very shadowy and unsatisfactory nature, and it is a matter the onus of proving which is on the *Commodore*, who alleges it, and I cannot consider that it has been proved.

Baggallay, L. J.—I am of the same opinion.

This is an action for salvage brought by the owners of the steam-tug *Commodore*, who at the time the alleged services were rendered was under a contract to tow the *Robert Dixon* from Liverpool to the Skerries. The suggestion on the part of the *Commodore* is, that in course of the towage the *Robert Dixon* met with a misfortune which was not contemplated by the contract, and which led her into a position of great peril, from which the *Commodore* was used to rescue her, and get her again in her proper course. The difference between towage and salvage, and where one may be considered to merge into the other, is very clearly laid down in the case cited in the judgment in the court below (*The Minnehaha*, Lush. 335; 4 L. T. Rep. N. S. 810; 1 Mar. Law Cas. O. S. 111). It is there stated: "If the danger from which the ship has been rescued is attributable to the fault of the tug; if the tug, whether by wilful misconduct or by negligence, or by want of that reasonable skill or equipment which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She can never be permitted to profit by her own wrong or default." That principle is one universally recognised, and therefore the only question here is, whether the danger from which the *Robert Dixon* was rescued was one into which she had been brought by the fault of the *Commodore*. I do not say from the wilful misconduct—that is not charged—but from the bad navigation or management of the tug. Now, upon the evidence, I can arrive at no other conclusion than that it was caused by the negligence of the tug and the want of the necessary amount of skill. I am satisfied that the course of the vessel after leaving the Mersey was not a safe course, and that the vessels continued in it too long.

Brett, L.J.—I am of the same opinion.

The plaintiffs were under a towage contract to tow the *Robert Dixon* to the Skerries, and they bring an action in which they assert that the towage service was altered into one which gives a right to salvage reward. It lies upon the plaintiffs to show that the change in the condition of the ship was caused without any want of care or skill on their part, but arose from some cause or accident over which they had no control. I am of opinion that the burden of proof of both the negative and affirmative propositions lies on the plaintiffs. They must show that there was no want of reasonable care and skill on their part which caused or contributed to the danger, and also that the danger arose from some cause beyond their control. In that proof the plaintiffs, in my opinion; fail, and they fail mainly on their own evidence, and it is not necessary therefore to rely on the evidence given on behalf of the defendants. It appears from the evidence given on behalf of the plaintiffs that when the licensed pilot left the *Robert Dixon* she was in charge of her own captain, assisted by a Channel pilot, who was not a licensed pilot employed by compulsion of law, and therefore that she was in fact and in law in charge of her own captain throughout. I think it is proved by the plaintiffs' witnesses that a general direction as to the course was given by the Channel pilot, that is in contemplation of law by the captain, under whose orders the Channel pilot acted, and I am inclined to hold that the tug is bound to obey the orders given her by the person in charge of a ship she is towing, and if in this case the captain of the *Robert Dixon* had insisted on the *Commodore* continuing to lay that course I think she would have been bound to do so unless it obviously led her into a position in which the tug would be injured; at all events, had the captain of the *Robert Dixon* so ordered, he could not complain of the consequences of the tug obeying his orders. But here the only order given was one at the commencement of the towage, and that was to tow the ship in a course which at that time was a right course, but, as the towage proceeded, the weather became threatening and the wind increased, and that course then ceased to be a safe course; if, then, no further order was given from the *Robert Dixon*, it was the duty of the *Commodore*, who had command of the course to use reasonable care and skill to steer a safe course. In consequence of the increasing badness of the weather the *Robert Dixon*, which was in ballast, began to fall to leeward of her course. The tug ought then, in the absence of orders to the contrary, at all events to have altered the course so as to counteract this sagging, and by keeping further from the shore avert the danger. But the master of the *Commodore* does not do so, and by his negligence in not doing so—I do not for a moment accuse him of anything worse than negligence—the *Robert Dixon* gets into a place considerably to leeward of where she ought to have been; she went inside of the in-shore pilot

boat instead of outside of it. I do not say that she ought to have passed seven, eight or nine miles from the shore, but I say that she did pass too close along shore and inside of the track where she should have gone. The Trinity Masters in the court below and our assessors in this court are all clearly of opinion that this ship on that night ought not to have been where she was, and, unless the master of the tug can show that he was there in consequence of orders from the ship, he cannot excuse himself from the charge of negligence causing or contributing to the position of the ship, as he is bound to do before he can convert his towage contract into a salvage service. It is true that, being in that improper place, he may have done the right thing. He altered his course to the northward, but it was too late, and he could not in the then condition of the weather get the vessel to windward. The plaintiff has not, therefore, shown that his want of care or skill was not the cause of the *Robert Dixon* being in the position of peril from which he ultimately rescued her; that being so, the towage service was never converted into salvage. The question whether they are or are not entitled under the circumstances to towage under the contract is not now before us, but certainly they are not entitled to salvage.

As to the counter-claim the burden of proof here also lies on the plaintiffs in the action. It once being proved that the *Robert Dixon* was brought into a position of danger by the negligence of those in charge of the *Commodore*, and was obliged to anchor on a lee shore, unless the plaintiffs can show that the conduct of the captain of the *Robert Dixon* was in some way unreasonable or improper in slipping his cables, the plaintiffs must take the responsibility of the natural consequences of their negligence in bringing the ship into that dangerous position. In my opinion the plaintiffs have entirely failed in discharging themselves of this burden, and therefore they must be held liable for the loss.

Appeal dismissed with costs.

Solicitor for the appellants, owners of the *Commodore, Ayrton.*

Solicitor for respondents, owners of the *Robert Dixon, J. Neal.*

SITTINGS AT WESTMINSTER.

Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

Dec. 11, 12, *and* 13, 1879.

(Before COCKBURN, L C.J., BRAMWELL, COTTON, and THESIGER, L.JJ.)

JONES AND ANOTHER *v.* HOUGH AND ANOTHER.

Ship and shipping — Charter-party —Refusal to sign bills of lading—Breach of contract—Penalties—Deduction of, from freight—Non-delivery of cargo—Conversion—Trial by judge without jury—Appeal on facts and law.

A charter-party provided that a steamship should go to Cardiff, take on board a cargo, and therewith proceed to Bilbao, and there deliver the same on being paid freight at a rate named; "the master hereby agrees to sign" bills of lading "as presented . . . within twenty-four hours after the cargo is on board, or pay 4d. per registered ton per day for each day's delay as damages." At Cardiff, the master refused to sign bills of lading, unless a clause was inserted to protect the shipowners against a possible rise in the duties on the cargo. The ship sailed without any bills of lading having been signed. The charterers indorsed and sent the unsigned bills of lading and the invoice to their consignees. The ship arrived at Bilbao, and the master began to discharge the cargo at the consignees' wharf. When a small part had been delivered, the consignees acting under instructions from the charterers, informed the shipowners that they should only pay the freight after deducting 10l. (being 4d. per registered ton), a day for penalties for delay in signing the bills of lading. The master thereupon refused to complete delivery, and warehoused the cargo. In an action by the charterers against the owners of the ship,

Held (affirming the judgment of Lindley, J.), that the captain's refusal to sign bills of lading was a breach of contract on the part of the defendants, but that (reversing the judgment of Lindley, J.) there had been no conversion of the cargo by the defendants, and the plaintiffs were only entitled to nominal damages for the breach of contract, the non delivery of the cargo being occasioned by their own act in instructing the consignees to make a deduction from the freight not authorised by the charter-party.

THIS was an action for damages for the wrongful conversion of a cargo of coals, and for breach of contract in not signing bills of lading, tried before Lindley, J. without a jury.

The plaintiffs were the charterers, and the defendants the owners of the steamship *Ellen*. The charter-party was made on the 13th June, 1877, and it was agreed thereby that the *Ellen* should go to Cardiff, and "there take on board as tendered a full and complete cargo of coke . . . . and being so laded shall therewith proceed to Bilbao . . . . and there, as ordered, deliver the same alongside . . . . on being paid freight at the rate of 9*s.* per ton of twenty cwt.; the ship paying trimming, wharfage, consulage, lights, pilotage, and all other port charges whatsoever . . . . The freight to be paid as follows: one third (if required) in cash on signing bills of lading, less 3 per cent. for all charges, and the remainder on the right delivery of the cargo in cash. A sufficient quantity of cargo to be taken on board for ship's use . . . . to be indorsed on bills of lading, which documents the master hereby agrees to sign as presented . . . . within twenty-four hours after the cargo is on board, or pay 4*d.* per registered ton per day for each day's delay as damages." It appeared at the trial that the plaintiffs had contracted to sell a cargo of coke to certain merchants, by name Ybarra and Co., at Bilboa, and they accordingly shipped on the 30th June 564 tons of coke on board the *Ellen*, at Cardiff, under the above charter-party, and presented bills of lading in the ordinary form to the master for his signature. The master, however, declined to sign them, unless he were allowed to insert the following clause: "The vessel not liable for duties on cargo caused by non-arrival before the 1st July," as there was some reason to suppose that the Spanish Government would charge extra duties after that date; and the ship sailed, no bills of lading having been signed. The plaintiffs indorsed and sent the unsigned bills of lading and the invoice to Ybarra and Co.,

their consignees, requesting them to deduct 4*d.* per ton per day, *i.e.*, 50*l.* for the refusal of the master to sign the bills of lading. The *Ellen* arrived at Bilbao on the 4th July, and the master began to discharge the cargo at Ybarra's wharf. When about thirty tons had been delivered, Ybarra, acting under instructions from the plaintiffs, informed the defendants that he should only pay the freight subject to a deduction of 10*l.* a day, being the amount of the penalty named in the charter-party, from the date of the presentation of the bills of lading at Cardiff. The master thereupon refused to complete the delivery of the cargo, and warehoused it at Olaveago for whom it might concern. Lindley, J. reserved the case for further consideration, and ultimately gave judgment for the plaintiffs for 399*l.* 17*s.* 6*d.*, the value of the cargo of coke, holding that the master was not justified in insisting on the insertion of the clause as to non-liability for duties, and that there was a conversion of the cargo by his sailing from Cardiff without having signed the bills of lading.

The defendants gave notice of motion on appeal from this judgment.

On the 19th April the Court of Appeal granted a rule *nisi* for a new trial, on the grounds of misdirection, that the verdict was against the weight of evidence, of surprise, and that the damages were excessive.

The argument on the appeal motion, and on the rule nisi, now came on for hearing.

Holl, Q.C. and *Douglas Walker* for the defendants.—The plaintiffs thought that they would have to pay extra custom duties and threatened to charge us with them; in consequence the captain had a stipulation put in the bill of lading to give the consignees notice that we would not pay them. We left a bill of lading with that stipulation at Cardiff, and set sail for Bilbao. The consignees at Bilbao refused to take the cargo on the ground that we had not signed the bills of lading, and were bound, as they contended, to pay the penalty of 4*d.* per registered ton (which amounted to 10*l.*) per day. They practically refused, because they would not pay us freight without deducting the penalties, and we were not bound to deliver the cargo without payment of our freight. We were entitled to put anything in the bill of lading that was reasonably necessary for our protection. [BRAMWELL, L.J.—Your argument is that because you were right in the dispute, you were entitled to a statement in the bill of lading that you were in the right. COCKBURN, C.J.—You seek by inserting something in the bill of lading to prejudge the question in your favour.] At all events, they were not entitled to deduct the penalties. The clause in the charter-party refers to "delay" in signing the bills of lading, and is not applicable to a refusal to sign. There has been no conversion here. The ship proceeded to Bilbao direct, and commenced to deliver to the consignees of the plaintiffs; that delivery was only stopped by the conduct of the consignees, acting under instructions from the plaintiffs. The plaintiffs evidently did not at that time consider that there had been a conversion, as they instructed the consignees to deduct the penalty from the freight. They referred to

Falke v. *Fletcher*, 18 C. B. N. S. 403.

Cohen, Q.C. and *Jelf* for the plaintiffs.—The consignees were entitled to deduct the penalties from the freight. The refusal to sign the bill of lading was a breach of contract. A promise to pay penalties is good in a building contract; why not in a contract to carry by ship? In *Hiort* v. *Bott* (L. Rep. 9 Exch. 86; 30 L. T. Rep. N. S. 25), Bramwell, L.J. said: "Mr. Bosanquet gave a good description of what constitutes a conversion, when he said that it is where a man does an unauthorised act which deprives another of his property permanently or for an indefinite time." Accepting that definition, there has been a conversion here. The coke was put into the hold only upon the terms of the contract; and directly there was a breach of those terms there was a conversion of the coke. It is an unauthorised dealing with goods put on board ship under an inchoate contract for the master to sail away before that inchoate contract is completed: (*Peek* v. *Larsen*, 1 Asp. Mar. Law Cas. 163; L. Rep. 12 Eq. 378; 25 L. T. Rep. N. S. 580.) [BRAMWELL, L.J.—Here you did not even try to stop the ship. Conversions are of two kinds; such a conversion as this is not an actual, but a legal conversion, and that is optional with the owner of the goods. Here you have not chosen so to treat it.] The damage we have suffered here is actual, not technical. [BRAMWELL, L.J.—You told the consignees not to take the goods unless the defendants would agree to a deduction from the freight which they were not bound to agree to.] If the findings of fact are right, the judgment entered on them is right, and those findings cannot be impeached on appeal, they can only be reversed by a new trial.

COCKBURN, C.J.—We think that this appeal should be allowed to a certain extent. We think that the plaintiffs are entitled to recover for the defendants' breach of contract in their captain's not signing the bill of lading, but that they have sustained no real damage. It is quite clear that the consignees would have been ready to take complete delivery under the contract, if the plaintiffs had let them do so. Now I think the learned judge below was wrong in saying that the departure of the vessel without a bill of lading being signed amounted to a conversion. I think this case is distinguishable from *Peek* v. *Larsen* (*ubi sup.*). There it was held that a person who had put goods on board a general ship without any knowledge of the charter-party under which that ship was chartered, was, on discovering the nature of that charter-party, entitled to have his goods returned to him. Now I do not at all say that, if at the time that the captain refused to sign the bill of lading, the plaintiffs had said, "Give us back our cargo," there would not have been a conversion in sailing away with it; but they did not say anything of the kind. Now there were two parts to the defendants' contract. Their captain was bound to sign a bill of lading in the usual form, and he was also bound to take the cargo to Bilbao. One of the things he was to do, viz., sign the bill of lading, he did not do; the other, viz., take the cargo to Bilbao, he did. I do not think his doing so was a conversion of the cargo, there being no protest on the part of the plaintiff.

But even if there was what plaintiffs might have treated as a conversion, it would merely

have placed it at their option to treat it as a conversion or not, at the time when the goods were taken out of their order and disposition. In my opinion, their conduct shows that they elected not to treat it as a conversion, ut to speculate upon the chance of enforcing the penalties under the charter-party. Ybarra and Co. were quite willing to take the cargo without the bill of lading having been signed; they knew what the agreed freight was, and were content to pay it. But the plaintiffs interfere and tell them not to take it unless certain terms were agreed to by the captain. What was the captain's position? Did his refusal to deliver the cargo, without payment of his freight in full, amount to a conversion? By the charter-party the charterers were absolved from liability as soon as the cargo was loaded, and were no longer liable for the freight. If he had received it subject to the deductions, the shipowners would have lost that portion of their freight. Therefore he was perfectly justified in saying to the consignees, "Pay me my freight." Their answer is, "We will not, as we have received instructions to deduct 10*l.* a day penalty." The captain says, "Then I cannot deliver the cargo." It is impossible to say that if there was any conversion at Cardiff it was not waived by the plaintiffs' subsequent conduct, or that what took place at Bilbao was wrongful on the part of the defendants. Therefore, there has been no conversion in this case; but there has been a breach of contract in not signing the bills of lading; for the breach of contract the plaintiffs can recover only nominal damages, the plaintiff having sustained no loss, as but for this act in stopping delivery no one would have been damnified. As both parties were wrong each party will bear his own costs.

BRAMWELL, L.J.—I entirely agree with the Lord Chief Justice; but, out of respect for the learned judge from whom we are differing, I will give my reasons. As to our jurisdiction in this case, in my opinion we are to arrive at a conclusion upon the materials which were before the learned judge, and, if we differ from him, and find that his conclusions on questions of fact are erroneous, we must act on our own conclusions, and not accept his finding. When there has been a trial by jury, the case is very different. There the parties have agreed that a jury shall decide the facts, and we cannot be substituted for that tribunal. Where there is no jury, this court can and ought to review a finding of fact by a learned judge. Now I quite agree with the judgment of the Lord Chief Justice, that there has been no conversion in this case. The cases that have been cited are entirely different from this. Here the consignees of the plaintiffs, who were persons acting under the plaintiffs' instructions, actually accepted part of the cargo. If there had been a conversion the plaintiffs did not treat it as one. As to the penalties, if the plaintiffs were entitled to demand them at all here, they may be running now and may go on for ever. Mr. Jelf says that it is the same with every building contract; but that is not so, because penalties under a building contract can only run until the building is finished. The true construction of the clause in the charter-party is that the penalties only accrue when there has been delay in giving a bill of lading, but do not accrue when it is refused altogether. So that there was no right to deduct anything from the freight. But there has been a breach of contract by the defendants. The captain refused to sign a bill of lading when he ought to have done so. Without blaming him at all, because I do not wonder that he did not want to sign a bill of lading that might leave him liable for extra customs duties, I still think that he was not legally justified in his refusal. He was bound to sign the bill presented; it was in the ordinary form, and he had no right to refuse to sign and insist upon inserting an unusual condition. The plaintiffs are therefore entitled to recover nominal damages; and both parties having been in the wrong, each will pay his own costs.

COTTON, L.J.—I agree with the judgments which have been delivered. I cannot but think that what has been done here in obtaining a rule for a new trial is unnecessary. Where an action has been tried by a judge without a jury, there is no need to apply for a rule for a new trial except on the ground of surprise, or where there have been issues settled or a judge has decided separately the questions of law and of fact. It is quite competent for the court to say upon the hearing that they have not sufficiently full materials before them to enable them to decide the question in dispute, and to refer the matter back to the court below. That has been done here in many cases. But the only question in this case is, what is the proper conclusion to be drawn from certain letters? Here we have, in my opinion, all the materials before us for coming to a conclusion. But it is said that it is hard that a man who has had facts found in his favour by a judge should be at a disadvantage as compared with a man who has had facts found in his favour by a jury. That may be; but the answer is, that a man who agrees to try before a judge alone has waived his right to have the facts adjudicated upon by a jury. The Court of Appeal is and ought to be most unwilling to interfere with the conclusions formed by a judge on matters of fact; but if those conclusions are clearly wrong we must reverse them. In this case, I cannot find in the judgment of Lindley, J. any fact which the court would have found differently. I nowhere find in his judgment that he has found that Messrs. Ybarra and Co. were willing to pay full freight for the cargo delivered, or that the master would have refused to deliver the cargo in tender to him without deductions of the freight. Messrs. Ybarra and Co. were not ready to pay, except after deducting what the plaintiff had requested them to deduct from the freight; hence, in my opinion, the master was perfectly right to refuse to deliver the cargo unless the freight was paid in full.

One word on the question of conversion. A contract was entered into to carry a cargo of coke and to give a bill of lading for that cargo. The master wrongfully refused to give a bill of lading; he had the cargo on board and this refusal is said to be a conversion. The plaintiffs did not object to this cargo being carried to Bilbao and delivered to Ybarra and Co., they only objected to the master not giving a bill of lading; Ybarra and Co. were willing to receive the cargo subject to certain deductions from freight; that, in my opinion, cannot be considered a conversion. The cargo was not taken to a person whom the plaintiffs did not intend to have it, as in the case

of *Falke* v. *Fletcher* (18 C. B. N. S. 403). He did not as was the case in *Hiort* v. *Bott* (L. Rep. 9 Ex. 86; 30 L. T. Rep. N. S. 25), deliver the documents of title to some person other than the consignees of the plaintiffs. I think, therefore, that there was no conversion at Cardiff in sailing away without signing the bill of lading; and no conversion at Bilbao in refusing to deliver the cargo under the circumstances.

Thesiger, L.J.—I agree.

As to the power of this court to deal with the facts where the action has been tried by a judge without a jury, I will say a few words. There may be cases in which a judge has dealt separately with the issues of fact and the issues of law. It appears to me that Order XXXVI., r. 6, contemplates such a case; and, no doubt, *Krehl* v. *Burrell* (L. Rep. 10 Ch. Div. 420; 39 L. T. Rep. N.S. 461) has decided that there may be such cases. But this appeal comes before us just as an appeal came up from a vice-chancellor in the Court of Chancery under the old system. It was proper for a motion to be made here for a rule *nisi* for a new trial on the ground of surprise; but, except for that ground, there would have been no necessity for such a motion.

The Lord Chief Justice has fully dealt with the facts of the case, and I agree with him. We have to look to what occurred at Cardiff, to what occurred at Bilbao, and particularly to the point of time at which the vessel left Cardiff. Now I quite agree with Lindley, J., that what occurred at Cardiff constituted a breach of contract. But there was no conversion there.

Three cases have been cited which illustrate very well in what conversion consists, and show that here there is not what amounts to a conversion. The first case is that of *Falke* v. *Fletcher* (18 C. B. N. S. 403), where the facts were that there was a question as to the ownership of the goods, and the captain carried them off, and refused to sign a bill of lading, asserting a title in some person other than the plaintiff. The plaintiff proving his title to the goods, it was held that a conversion had been committed; but that was not merely because he refused to sign a bill of lading, but because he refused to sign a bill of lading and sailed away with the goods, disregarding the direction of the true owner. The second case is *Hiort* v. *Bott* (*ubi sup.*), where the facts where that the defendant desired to give the goods, of which he had become accidentally possessed, to the true owner, and signed a delivery order by means of which a person other than the true owner obtained them. That was a conversion by the defendant, because he signed a delivery order, which was an assertion of title; and, of course, when an agent acts on his own responsibility he is liable for the consequence to his principal. The third case is that of *Peek* v. *Larsen* (L. Rep. 12 Eq. 378; 1 Asp. Mar. Law. Cas. 163), where the facts were that a person had put goods on board a general ship without any knowledge of the charter-party under which that ship was chartered. It was, in fact, attempted to make the shipper enter into a contract different from that which he had made. Under such circumstances it was held that the captain was bound to return the goods.

But here, under his charter-party, the captain was bound to carry the cargo to Bilbao; and looking at the fact that the goods had been sold to Ybarra and Co., I think that he was bound to deliver them to Ybarra and Co., and that they were intended to be conveyed to Ybarra and Co. Then was there a conversion at Bilbao? I think not. I think that there would have been no question of damages in this case, provided that Ybarra and Co. had not been instructed by the plaintiffs to refuse to pay freight. The damages which have been incurred flowed not from the original breach of contract by the defendants, but from the acts of Ybarra and Co. and the plaintiffs, and the plaintiffs are entitled only to nominal damages.

Judgment for the plaintiffs for 1*s. without costs.*

Solicitors for the plaintiffs, *Popplestone* and *Beddoe*, agents for *Vaughan*, Newport.

Solicitors for the defendants, *Lyne* and *Holman*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. Poyser, Esq., Barrister-at-Law.

Monday, Jan. 12, 1880.

(Before Bowen, J.)

Spaight and others *v.* Farnworth and another.

Ship and shipping—Charter-party—Freight payable on "intake measure of quantity delivered"—Loss of portion of cargo—Adjustment of freight.

The plaintiffs sought to recover balance of freight upon a charter-party, one of the provisions of which was that freight should be payable "on the intake measure of quantity delivered." The cargo, which was one of timber, had been measured at the place of shipment, the measurements being entered by the shipper in his specification, and also chalked upon each piece of timber. During the voyage a portion of the cargo was lost, on some of the pieces of timber delivered the measurement put on at the port of shipment had become obliterated, on some it still remained marked. There was evidence that the timber lost was of average dimensions.

The defendants contended that the correct mode of ascertaining the amount of freight due from them was by adopting the figures that remained legible on the timber, and by measuring de novo, on the same system as that adopted at the port of shipment, all the pieces where the figures had been obliterated.

The plaintiffs, on the other hand, contended that as the pieces of timber lost were of average size, the proportion which they bore to the rest of the cargo should be deducted from the specification total and freight charged upon the residue.

Held, that the plaintiffs were entitled to recover, as it was the object of the charter-party that the shipment measures should be taken as accurate, and not merely that the "intake method of measurement" should be adopted, and that the plaintiffs' method of measurement showed the intake measure," that is, the intake figures and dimensions actually attributed at the port of loading to so much of the cargo as had been delivered safely.

FURTHER CONSIDERATION.

This was an action tried before Bowen, J. at the Liverpool Summer Assizes 1879, and was brought to recover the balance of freight stated to be due under a charter-party dated the 5th Sept. 1878.

The case was reserved for further consideration. The facts and arguments material to the question at issue are fully set out in the judgment below.

Herschell, Q.C. and *Kennedy*, for the plaintiffs.

C. Russell, Q.C. and *Warr*, for the defendants.

BOWEN, J.—The question in this case is as to the manner in which freight should be calculated and paid upon a cargo of deals and battens carried by the ship *Shannon* from St. George's, New Brunswick, to Liverpool.

The plaintiffs are managing owners of the ship *Shannon*, and the defendants are timber merchants and brokers at Liverpool, and consignees of the cargo in question. The charter-party under which the freight was payable, and on the construction of which the matter partly turns, was dated the 5th Sept. 1878. The cargo was to consist of deals and battens, with deal ends for broken stowage. Freight was by the charter-party to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1980 super feet, and on deal ends at the rate of 2*l.* 1*s.* 8*d.* per the like hundred 8 ft. and under. The charter-party contains the following provision as to freight: "Freight payable on deals and sawn timber on the intake measure of quantity delivered." A cargo of deals and battens and deal ends was duly shipped at St. George's by A. H. Gilmore, jun. and Brothers for Liverpool, consigned to the defendants, and the bill of lading was signed for a specified number of pieces, deals, battens, and scantling, and a specified number of pieces, deal ends, and freight was payable as per charter-party. The usual course of business at St. George's, and the one adopted in this instance, with respect to the measurement of timber is for the shipper to make up his specification showing the number of pieces shipped of various dimensions. The dimensions are arrived at by measuring the length, breadth, and depth of the various pieces of timber, and on each piece of timber before shipment is chalked the figures representing its dimensions. There are various ways of measuring the dimensions of timber; the overall method of measurement is one; measurement by the diaper is another. The overall measurement is that adopted at St. George's. In the measurement of the timber the ship takes no part. The pieces are measured alongside of the ship by the surveyor of the shipper, and pass directly from the surveyor's hands to the ship.

There is no dispute as to the exact number of pieces of timber that were shipped. The cargo consisted of between 30,000 and 40,000 deals, and between 3000 or 4000 deal ends. During the course of the voyage, owing to the severe weather encountered by the vessel, 348 deals and 303 deal ends were lost. The remainder was duly delivered. On some of the pieces delivered the measurement put on at St. George's had become obliterated during the voyage. On some the measurement still remained marked. The dimensions of the timber that was lost were not known either to the ship or consignees, but there was some general evidence that the dimensions of the quantity lost were average dimensions as compared with the rest, What was done on landing was as follows: The defendants took the St. George's marks as the true dimensions on all the pieces where the figures still remained visible. They remeasured *de novo* according to the overall mode of measurement all the pieces where the figures had become illegible. The defendants claim to pay freight upon these two sets of figures. The result, however, of this mode of calculation would be that the dimensions so arrived at for the delivered cargo if deducted from the total dimensions in the specification would make the residue representing the quantity lost on the voyage to have been of most unusual and abnormal dimensions three or four times as great as the other sizes of timber shipped assuming always that the specification was accurate. The plaintiffs, the shipowners, object to this method of assessing freight assuming that the pieces lost were a fair average of the cargo, and propose to deduct the proportion which the lost pieces bore to the rest of the cargo, and to pay for what has arrived and been delivered on the St. George's specification. It is between these two methods of assessment that I have to decide, and the question is the meaning of the words in the charter-party—"freight payable on the intake measure of the quantity delivered." The plaintiffs contend that these words mean freight payable on the measure actually attributed at the port of shipment to so much of the cargo as was delivered subsequently. The defendants on the other hand contend that "on the intake measure of quantity delivered" must be construed as equivalent to "on the quantity delivered measured according to the intake mode of measurement;" that is to say, the overall mode of measurement to be adopted on measurement taken, not at the port of shipment but at the port of discharge.

As a general principle, freight, in the absence of special agreement to the contrary, becomes payable only on so much cargo as has been both shipped, carried, and delivered. If less has been shipped than has been delivered as in the case of cargoes which heat under sea-water damage, freight is payable on the lesser quantity shipped. If less has been shipped and carried than has been delivered, as for instance in the case of goods which are compressed during the voyage and expand on being unloaded, freight is payable on the compressed and not on the expanded measurements. If on the other hand, less has been delivered than shipped, as in the case of goods lost on the way; then freight would be payable only on the quantity delivered.

For the convenience of business contracts are frequently made to vary this *primâ facie* rule. Inconvenience in practice must often obviously arise unless some one measurement of the quantity delivered is agreed upon for the purpose of the calculation of freight. Timber, of course, is a cargo that is not liable to change its dimensions between its time of shipment and its time of delivery; but the mode of measuring timber differs in various ports, and probably there is a considerable difference in the accuracy of the modes, and the measurement of large cargoes of timber, moreover, is probably conducted with more expedition than exactness. There is nothing accordingly unnatural that the ship and the charterer should agree that freight is to be paid on the measure-

ment figures arrived at at the port of lading. The shipper, who is interested as between himself and the consignee, in not understating the timber in his specification, is a person whose measurements the ship can afford to trust. This is what seems to me to have been done in the present instance. The plain meaning of the words in the charter-party is that freight is to be paid on the intake, that is to say, the shipment measure, *i.e.*, dimensions of the actual quantity delivered. The measure, that is to say, which the surveyors put upon the timber when it is measured for the purposes of the specification before shipment alongside the ship. I see no reason for attributing to the words "intake measure," the less obvious meaning "intake method of measurement." A provision that one principal of measurement should govern would, no doubt, for purposes of business, be more convenient than no provision at all, but it would not obviate all measurement disputes which, I think, this charter-party desired to prevent; and it seems to me that it is more probable that freight was meant to be paid on the "intake" figures which will be found recorded in the specification, and so far as they remain legible on the timber actually delivered.

Assuming this to be the true construction of the charter-party is the calculation proposed by the defendant or the plaintiff the best mode of arriving at the question what freight is to be paid? In the present instance part of the timber was delivered with the marks still on it, on part the marks were defaced, and part has been lost midway. If the above construction of the charter-party be correct, what has to be discovered is not the accurate measurement as taken here of the quantity delivered, but the measurement attributed at the port of lading to so much as has arrived and been delivered safely. The competitive modes of calculation between which I have to decide are as follows:

First, the pieces thrown overboard or lost are assumed in accordance with the captain's evidence to be a fair average size as compared with the rest of the cargo. The proportion which they bear, on this assumption, to the rest of the cargo is deducted from the specification total, and freight is charged upon the residue—that is the plaintiffs' method. Secondly, the pieces on which the marks remain are taken at the figures still chalked upon them, the pieces on which the marks are obliterated are re-measured, freight is paid upon the total so arrived at—this is the defendants' method.

It is obvious to my mind that neither of these methods can be said to be anything but a rough way of arriving at the measure attributed at the port of shipment to the quantity delivered here. As to (1) the plaintiffs' method, it is based in the first place on a rough calculation of the average size of the cargo that has been lost. It was not suggested before me that the specification figures were not correct reproductions of the measurements actually arrived at at the port of loading, though, if the point had been taken up and pressed, evidence might have been necessary to show that the measurements taken, whatever their correctness, at St. George's, were actually entered in the specification. It was no doubt contended on the part of the defendants that they ought not to be bound by a measurement to which they were no parties; but though the defendants are not bound by the specification as such they are bound in my opinion by the figures taken at the port of loading; and assuming as I do that these figures are correctly entered in the specification, in that sense, and to that extent, the defendants are bound by the specification. I can conceive that far better proof might have been given of the exact dimensions attributed at St. George's to the timber delivered here, but rough and rude as the plaintiffs' method of calculation is, it seems to me to be founded on the real materials for a judgment, viz., the shipment figures, or what, in this case, I treat as synonymous, with those in the specification. The asumption that the pieces lost were of an average is a piece of evidence which might certainly have been displaced, but still until it is displaced may properly be acted on. It is not exact evidence, but it is *primâ facie* evidence, and having no better, I accept it. The weakness of (2) the defendants' method of calculation, to my mind is that in re-measuring the unmarked timber here the defendant forgot that what has to be discovered is not the exact measurement of the goods delivered but the measurement affixed to those goods at St. George's on shipment. It is evident that there was some difference—probably some mistake—in part of the St. George's figures and this mistake was one to the benefit of which the ship was entitled so far as it related to the timber actually delivered. The defendants' method, by adopting the St. George's measure in part only, deprived the ship of the chance which, in this case, is a very appreciable one, that the St. George's measurements of the timber on which the marks had been obliterated were more in the ship's favour than the measurements retaken here. The object, I think, of the charter was that the shipment measurements should be taken as accurate. Errors of measurement in part would be corrected by opposite inaccuracies in another part. This object the defendants defeat by assuming that as to part the shipment figures are correct, while as to part the defendants substitute remeasurement of their own. I prefer of the two the plaintiffs' method as directed, however roughly, to the true problem which has to be solved, viz., the intake measure; that is to say, the intake figures and dimensions actually attributed at the port of loading to so much of the cargo as has been delivered safely.

Judgment will, therefore, be for the plaintiffs with costs.

If there was no mistake in the St. George's measurements, and if the mode of measuring here must produce identical results with the mode of measurement at St. George's the plan of the defendants would be unimpeachable, but the defendants have no right to take the benefit of either of these assumptions.

Judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, *Gregory* and *Co.*, for *Stone* and *Fletcher*, Liverpool.

Solicitors for the defendants, *Field, Roscoe*, and *Co.*, for *Bateson* and *Co.*, Liverpool.

HIGH COURT OF ADMIRALTY (IRELAND).

Reported by F. Blackburne Henn, Esq., Barrister-at-Law.

Feb. 23, 24, 25, *and* 27, 1880.

(Before Townsend, J.)

Hamilton *v.* Harland and Wolff; The Acacia.

Practice—Priorities of material men and mortgagees—Cause in Admiralty Court to determine before appraisement and sale—English and Irish Admiralty Court Acts.

A material man into whose hands a vessel has been put for repairs by a mortgagor left in possession by the mortgagee has, so long as he retains his possession, a promissory lien for the repairs done, giving him priority over the mortgagee.

The possessory lien of material men is not determined by the arrest of the vessel by warrant of the High Court of Admiralty in a suit by them for equipment and repair (*a*).

This cause was heard on petition, answer, and conclusion, before the judge on the 23rd, 24th, and 25th Feb., for the purpose of ascertaining the respective priorities of the parties in obedience to the order of the Court of Appeal. The facts appear sufficiently from the previous report (*ante* pp. 226, 229; 41 L. T. Rep. N. S. 742) and from the judgment.

The *Queen's Advocate* (Walter Boyd, Q.C., LL.D.) with him *Kisbey*, for the plaintiffs.—Our claim against the vessel is by virtue of our mortgage dated the 22nd March 1879, which has been admitted, and which *primâ facie* is a prior charge, and protected by the Admiralty Court Act, and also by the Merchant Shipping Act. No doubt that charge can be displaced by material men such as the Messrs. Harland and Wolff claim to be; but to displace us there must be a possessory lien, and, even if the defendants had one at one time, it was put an end to by the arrest of the vessel under the Admiralty Court warrant. As regards the lien by Messrs. Harland and Wolff, it appears that no repairs were effected on the defendants' premises, but were all made in a public dock. We contend that no possessory lien ever existed; but, even assuming that it did, we assert that it was abandoned by the course the defendants have adopted in arresting the vessel, and, having been once abandoned, it cannot be revived. This abandonment was the deliberate act of the defendants, and if they have adopted a course to their own detriment they have themselves alone to blame. *Williams* v. *Alsupp* (10 C. B. N. S. 417) was an action of trover, and not a suit to ascertain priorities as here. They referred to

The Two Ellens 1 Asp. Mar. Law Cas. 40, 208; L. Rep. 3 Ad. & E. 346; on appeal, L. Rep. 4 P. C. 161;

The Aneroid, 3 Asp. Mar. Cas. 418; L. Rep. 2 P. Div. 189;

Barr and Shearer v. *Cooper*, Court of Session, vol. 2., p. 651.

Seeds Q.C., LL.D. (with him *Corrigan*, LL.D. and *E. P. Johnson*).—This cause is new alike to the jurisdiction and the practice of the court. By the order of the Court of Appeal it appears that the plaintiffs were obliged to admit the validity of our claim against the vessel as a condition precedent to the obtaining of the order under which they are now before this court. The owner gave the vessel into the hands of the defendants for the purpose of being repaired. He was then mortgagor in possession, and there can be no question, on the authority of *Williams* v. *Alsupp*, but that he had then the right so to deliver her. The fact that the mortgage was not at that time due, and that the mortgagees had no right then to go into possession under it, is conclusive on this point. In the case of *Wolff* v. *Scow Celt* (2 Asp. Mar. Law Cas. N. S. p. 107) there only existed a maritime lien, and that is as nothing compared with our case. It is true that the vessel was not repaired on the defendants' own premises, but these repairs were all executed in a dock hired in the defendants' own name, and paid for by them, and executed while the ship was in the sole possession of the defendants; and, on the authority of *Barr and others* (apps.) v. *Cooper* (resp.), W. N. 1875, p. 67, our lien was a perfect possessory lien. In Ireland, material men may proceed to enforce their lien under the Admiralty Court Act. That statute differs from the English Admiralty Act. By the latter a material man has not any right of enforcing his claim in Admiralty unless the ship or its proceeds are under arrest. In the Irish Act that exemption does not exist, and no authority has been cited to the court to show that, by arrest of the vessel under a warrant issued at the suit of the defendants by the Admiralty Court, our possessory lien has been destroyed. We submit that the owner, who was mortgagor in possession, had a perfect right to give up the vessel to us for necessary repairs, even had the mortgagees been in a position to take possession under their mortgage, which it has been shown to the court they were not; that, on the evidence, the repairs which were executed were executed with the consent and approval of the plaintiffs, and that our possessory lien has never been lost. It was not lost by the fact that the vessel was repaired in a public dock, and we submit that it is still intact, although the vessel at our instance has been arrested by the warrant of this court. *The Scio* (L. Rep. 1 Adm. and Ecc. 355; 1 Mar. Law Cas. O. S. 527) is a conclusive authority for us.

(*a*) The doctrine of the High Court of Admiralty of England, has for a long time been that the possessory lien of a material man ought not to be infringed on except in cases having a paramount claim; that is to say, where there are maritime liens existing at the time the ship gets into the possession of the material man (*The Gustaf*, Lush. 506). On the 29th May 1879, Sir R. Phillimore, in the case of *The Sussanah Thrift*, upheld the same principle; in that case the vessel was in the possession of the shipwright, who had repaired her, when she was arrested at the suit of a mortgagee, and also of her master, who both obtained decrees against her; the shipwright also proceeded against her, and obtained a decree for his claim, retaining his possession; on application for payment out of the various amounts found due, it was held that the master, whose contract of service entitled him to a month's notice or a month's wages on dismissal, and who continued on board the ship after she got into the shipwright's hands, was entitled to his wages due up to the time the ship got into the shipwright's hands, and for a month afterwards, upon the ground that the shipwright takes the ship with all her existing obligations; but that as regards the mortgagee, by leaving the ship in the mortgagor's hands, he had authorised the latter to enter into all engagements necessary to keep the ship in good condition, and consequently to place the material man in a position to acquire a possessory lien. It is to be noticed that in neither of the above cases was it ever suggested that the suits instituted by the material man put an end to their liens; nor has such a contention ever been raised in this country, although cases of this nature have of late been common in the Admiralty Division.—Ed.

Kisbey in reply.—A lien is lost by giving back the *res* into the hands of the owner. A possessory lien is good against the world, provided possession be not parted with. Here possession has been abandoned by giving up the vessel to this court under the warrant. Under the English Act no such arrest as took place in this case is possible, but the court would, at the instance of another plaintiff, seize the vessel and hold her subject to the possessory lien on the authority of claimants in a position similar to the defendants here. The court must hold that this possessory lien has been deliberately abandoned by the defendants here, who have chosen to substitute another security for that under which they could have made a claim against the *res*. Counsel at the conclusion of his argument cited

Jacobs v. *Latour*, 5 Bing. 130;
Burrowes's Estate, Ir. Rep. 1 Eq. 445.

Feb. 27.—Townsend, J.—This cause of *The Acacia*, of which I have now to dispose, is a suit instituted by the Messrs. Hamilton against the Messrs. Harland and Wolff, to determine the priorities of their respective charges on the defendant vessel.

The Messrs. Hamilton claim on foot of a mortgage for 5800*l.* executed and registered on the 22nd March 1879 for the balance due to them for the unpaid purchase money of the vessel itself; for this mortgage they claim priority over the Messrs. Harland and Wolff, to whom a debt is due for equipment and repairs of the same vessel. On the 14th Oct. 1879 the Messrs. Harland and Wolff caused a warrant of this court (No. 732) to issue, in which they claimed a sum of 700*l.*, and under which the vessel was arrested. On the 31st Oct. 1879 they issued a citation *in rem* (No. 735), in which they claimed 672*l.*, making the total amount of claim a sum of 1372*l.* Those causes having been consolidated, this court on the 14th of the last month pronounced a decree whereby the Messrs Harland and Wolff were declared entitled to the sum of 1021*l.* 10*s.* 1*d.* and costs, and according to the practice of the court I ordered a sale of the defendant vessel. The Messrs. Hamilton having on the 4th Nov. 1879 instituted a cause (No. 739) in this court on the foot of their mortgage, and there being no question as to its validity, the court, on the 26th Jan. last, pronounced for it, and declared it to be well charged on the defendant vessel. As it does not appear that either side denies the validity of the other's charge, this contest is simply one of priority. The Messrs. Hamilton sought to have the conduct of the sale of the vessel, and brought forward a motion in this court for that purpose. The court, however, declined to grant that motion, it being unusual to decide priorities before sale and realisation of the fund. Such was undoubtedly the practice of this court, and it appears to me to be a reasonable practice, for it might turn out that a costly investigation was unnecessary if the vessel produced enough to pay both demands. However, the Messrs. Hamilton, being dissatisfied with my ruling, obtained on the 28th Jan. last an order from the Court of Appeal [here the learned Judge read the order reported *ante*, p. 229; 41 L. T. Rep. N. S. 742]. In accordance with this order, the Messrs. Hamilton have filed their petition, which sets forth the grounds on which they claim priority, which grounds are in substance: first, their mortgage; secondly, that the equipment and repairs executed in Sept. and Oct. 1879 were not done or executed with their sanction and authority. They then claim that under the mortgage, as registered, they are entitled to be paid the amount so decreed with interest and costs in priority to the claim of the Messrs. Harland and Wolff, and they pray that it may be pronounced that their demand is in priority over that of the others The Messrs. Harland and Wolff have filed an answer alleging, first, that the mortgagees never were in possession—a fact which is not disputed; secondly, that the repairs done were executed on the credit of the vessel; thirdly, that the owner, Mr. J. S. Campbell, was in insolvent circumstances before the repairs were begun, and that this fact was within their knowledge. They say that the equipment and repairs were done by the order, direction, and with the assent of the mortgagees, and allege that under the circumstances they are entitled to be paid the amount of their charge in priority to the claim of the mortgagees.

The repairs were commenced early in the month of Sept. 1879, and Mr. J. S. Campbell became bankrupt on the 24th Oct. in the same year. No doubt the vessel was unseaworthy when she arrived in Belfast, and repairs were necessary to enable her to resume her traffic in safety. The Messrs. Hamilton's mortgage was not due until the 21st Sept.; they knew of the vessel's arrival in Belfast, and thought she might be sent to sea in a disabled condition; so accordingly Mr. W. Hamilton went to Belfast to look after his interests. He appears to have gone over to ascertain the condition in which the vessel was, and he attended the survey which was made as is usual in such cases. So far as I can form any opinion of his conduct, I do not think he ordered any repairs; he was asked to give his consent, and he replied that he had no power one way or the other—that he was there as mortgagee of the vessel, and to protect his own interest—he would take no responsibility, and he appears more than once to have repudiated ownership, stating that his firm were interested only as mortgagees. I do not lay much stress on the letter of the Messrs. Hamilton of the 29th Sept. in which they state that the Messrs. Harland and Wolff had "a preferable claim;" they may have thought so, just as the Messrs. Harland and Wolff thought that they had a claim prior to that of the plaintiffs. The vessel was docked by Messrs. Harland and Wolff in a public dock, for the use of which they paid. It was, in fact, hired to them, and was, so far as I can discern, used exclusively by them during these repairs. On the 13th or 14th Sept. the crew were paid off by the Messrs. Harland and Wolff, and the captain on his cross-examination said, "I was paid off about that time, and the mate left in charge by Mr. J. S. Campbell's orders. Harland and Wolff paid me and him our wages. I was to look after the workmen, and see that the protest was in proper form." Unquestionably the vessel was put in the Messrs. Harland and Wolff's hands by Mr. J. S. Campbell, and he had then full and complete right to do so, for a mortgagor has the right to get repairs done. [The learned Judge here referred to various letters and telegrams as showing that the vessel was placed in the hands of Messrs. Harland and Wolff in the ordinary way, and that they received her as

they would any other vessel.] The insolvency of Mr. J. S Campbell was known at an early date, and also that the vessel was insured for 6000*l.* by the Messrs. Hamilton, and for 2000*l.* by Mr. J. S. Campbell. Three witnesses concur in a statement that the Messrs. Harland and Wolff were to wait for payment of their account until the amount could be recovered from the underwriters on the policies of insurance. It is denied by one, Mr. McLean, and even if Mr. McLean had authority to make such an arrangement on behalf of the Messrs. Harland and Wolff (of which I do not think there is evidence before me), no such arrangement was in fact made. I do not think that the repairs were effected, so to speak, on the credit of the policies, or that payment was to be conditional on the payment of the policies. No doubt all parties expected the policies to cover the losses, and no doubt, if sufficiently secured, the Messrs. Harland and Wolff would have waited for payment of their claim. [The learned Judge here referred to various letters which contained offers on the part of Messrs. Hamilton of handing over the policies held by them in discharge of the claim of the Messrs. Harland and Wolff against the vessel, and continued:] The Messrs. Hamilton indeed say, if they could get the vessel with the repairs they would hand over the policies to the Messrs. Harland and Wolff, but whether they are paid or not on foot of them, the Messrs. Hamilton do not care. However, I consider that the Messrs. Harland and Wolff are entitled to get something more than the mere ground of a suit against the insurers. I have already observed that I do not rely on the expressions "preferable claim," "take steps to prevent the ship leaving port," nor on the statement which was made in the affidavit to lead the warrant, "that the plaintiffs require the assistance of the court;" both parties seem to have dealt throughout with questions of law rather than of fact, and a mere money lien would not enable the contending parties to realise their demand. Still there is the question, did the Messrs. Hamilton not know of and assent to the execution of the repairs?

I find ample authority in the case of *Williams* v. *Alsupp* (10 C. B. N. S. 473), and in the judgments delivered in that case by Erle, C.J. and Willes, J., for the proposition that Mr. J. S. Campbell had ample power to place the vessel in the hands of Messrs. Harland and Wolff, and so confer a lien, and I consider the doctrines laid down in *Barr and Shearer* v. *Cooper* (W. N. 1875, p. 67) and *Wolff* v. *Scow Celt* (2 Asp. Mar. Law Cas. N. S. 107) are applicable here. In *The Scio* (L. Rep. 1 Adm. & Ecc. 353; 2 Mar. Law Cas. O. S. 827), no doubt, mortgagee prevailed against material man, though the mortgagee had knowledge of the repairs being made, and the vessel rendered thereby more valuable security, and that the material man expended a large amount in equipment and repairs; but that decision went on the ground that the material man was not in possession as in this case. The cases are therefore different.

There is another and serious question to be considered, which was glanced at by counsel for the plaintiffs in his opening statement, and not much relied on until the case had almost closed; nor can I say that it has ever been fully argued. It is this: assuming that the Messrs. Harland and Wolff had a valid possessory lien on the vessel for repairs done and materials supplied, have they, by the institution of suit [No. 732] for the recovery of their account, now forfeited their possessory lien? No doubt, if the Messrs. Harland and Wolff had not been active, if they had rested on their rights, and if a suit had been brought by some other creditor, the case of *Williams* v. *Alsupp* would apply, and the court would not dispossess them of their possessory lien without the satisfaction of their demand. A possessory lien may be lost or waived in various ways, as by claiming goods as one's own, or on the foot of an old debt, or by a party not in possession of them. We are familiar with the cases of solicitors and title deeds in the Landed Estates Court here. When title deeds are brought in, they are deposited expressly subject to the lien, which is protected either by the order of the court, or by the statute itself. Now, just at the close of the argument in this case, the case of *Jacobs* v. *Latour* (5 Bing. 130) was mentioned, which was said to rule the present case. In *Jacobs* v. *Latour* goods were taken in execution by a sheriff under a *fi. fa.* sued out by a person claiming a possessory lien on the goods, and were sold to that person by the sheriff: it was held that the lien had been thereby waived. But is a common law writ identical with a warrant of this court? The writ of *fi. fa.* is an execution directed to the sheriff commanding him to cause the debt "to be levied." The warrant of this court is merely a process commanding the marshall to arrest the property proceeded against, which when arrested is deemed to be in the custody of the marshal, although it may really remain in the hands of the party claiming the lien. The fact is, that in this case the vessel has never left the possession of the Messrs. Harland and Wolff, and is this moment fastened to their quay; the marshal seems to have adopted their possession; his possession is merely constructive and technical, for the actual possession is still with the defendants. If I felt myself coerced to follow *Jacobs* v. *Latour*, I should be bound to hold that the possessory lien was gone, and if the possessory lien be gone this case cannot be distinguished from *The Aneroid* (L. Rep. ? P. Div. 189); but I am reluctant to decide for the first time that the effect of an Admiralty arrest is to destroy the lien for the active enforcement of which it was sued out, or that a party having a valid claim up to that moment can be deemed to forego it by asking the statutory aid of the court to make it effectual. In the absence, therefore, of authority to show that the taking out of the Admiralty warrant would discharge the possessory lien, I cannot in reason or in justice hold that the Messrs. Harland and Wolff are to lose the fruit of their expenditure, when the repairs were, as I think sanctioned, and some of them actually suggested, by the mortgagees, who now seek to obtain the advantage of these repairs and outlays without contributing one farthing. Had these mortgagees never come on the field—had they never been in Belfast—had they not been themselves shipbuilders, and so well aware of the great outlay necessary in such repairs, the case might perhaps be different, but having allowed those repairs to go on, not only with their full knowledge, but with their encouragement, I think it would be unjust to apply the principle of *Jacobs* v. *Latour* to this case.

I shall therefore pronounce for the priority of the claim of the Messrs. Harland and Wolff over

that of the Messrs. Hamilton, and condemn the latter in costs.

Solicitor for the Messrs. Hamilton, *Bennett Thompson.*

Solicitors for the Messrs. Harland and Wolff, *J. Hamerton* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by E. S. Roche, J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

Wednesday, Feb. 25, 1880.

(Before Jessel, M.R., James and Cotton, L.JJ.)

Brown and Sons *v.* The Russian Ship Alina

*Jurisdiction—County Court admiralty jurisdiction. in action for breach of charter-party—*31 *&* 32 *Vict. c* 71—32 *&* 33 *Vict. c.* 51.

By a charter-party the master of the ship A. agreed with the plaintiffs to proceed to a foreign port, and there load a cargo of timber, and deliver the same in this country to the plaintiffs. At the foreign port the master of the ship A. refused to receive the cargo of timber, and the plaintiffs were compelled to forward the timber to England by steamer at a greatly increased rate of freight. Plaintiffs entered an action in rem in a County Court having admiralty jurisdiction for damages for breach of charter-party, and arrested the vessel; but upon application to a judge in chambers a writ was issued prohibiting the County Court judge from further proceedings in the action, and this was affirmed by a divisional court.

Held (reversing the decision of the Divisional Court), that the County Court had Admiralty jurisdiction in cases of breach of charter-party under sect. 2 *of the County Court Admiralty Jurisdiction Amendment Act* 1869, *notwithstanding that the Admiralty Court had not original jurisdiction in such matters.*(a).

(a) If anything were wanted to corroborate the authority of this decision, it is to be found in the Irish Admiralty Court Acts. By the Court of Admiralty (Ireland) Act 1867 (30 & 31 Vict., c. 114), s. 37, the Irish Court acquired jurisdiction "over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port in Ireland in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew, of the ship." The jurisdiction so conferred is given almost in the same words as those in which that of the English Admiralty Court is given by the Admiralty Court Act 1861, and would not include jurisdiction over breaches of charter-party. By the Court of Admiralty (Ireland) Amendment Act 1876 (39 & 40 Vict. c. 28), the jurisdiction in Admiralty of the Recorders of Cork and Belfast (given by the Act of 1867) is extended, and by sect. 3, sub-sect. 2, they acquire jurisdiction in the precise words contained in the County Courts Admiralty Jurisdiction Amendment Act, sect. 2, sub-sect. 1, and by sect. 16 of the Act of 1876, the same jurisdiction is given in the same words to the Irish Admiralty Court. It could not be suggested that the latter section does not give jurisdiction over charter-parties, and hence the Recorders of Cork and Belfast must have such jurisdiction. The Act was passed after the conflicting decisions mentioned in the present case had been given, and it cannot be supposed that if the Legislature had thought the meaning of the words doubtful, it would not have altered them so as to make them clear.—Ed.

Cargo ex Argos (1 *Asp. Mar. Law Cas.* 519; 28 *L. T. Rep. N. S.* 745; *L. Rep.* 5 *P. C.* 124) *followed.*

This was an appeal by the plaintiffs from an order of the Lord Chief Baron and Stephen, J. confirming an order of Denman, J. for the issue of a writ of prohibition to the Judge of the County Court at Yarmouth against further proceedings in an action by the plaintiffs against the Russian ship *Alina* arising out of the breach of a charter-party. It appeared that by a charter-party dated the 21st July 1879 the master of the *Alina* agreed with the plaintiffs, who were timber merchants at Luton, Bedfordshire, to proceed to Cronstadt, and there load a cargo of timber, and deliver the same in this country to the plaintiffs. At Cronstadt the master refused to receive the cargo of timber, and the plaintiffs were compelled to forward the timber to England by steamer at a greatly increased rate of freight. The *Alina* shipped another cargo at Cronstadt, and upon her arrival at Great Yarmouth in Oct. 1879 the plaintiffs commenced an admiralty action *in rem* in the Norfolk County Court for damages for breach of the charter-party, and arrested the vessel.

Upon an application to Denman, J. in chambers an order was issued prohibiting the County Court judge from further proceedings in the action, and that order was affirmed by the Divisional Court, consisting of the Lord Chief Baron and Stephen, J.

The question, which turned upon the construction of the County Courts Jurisdiction Act 1868 (31 & 32 Vict. c. 71) and the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) has been already raised in three cases with different results. In 1872, in the case of *Simpson* v. *Blues and others* (1 Asp. Mar. Law Cas. 326; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 290) the Court of Common Pleas held that sect. 2 of 32 and 33 Vict. c. 51 ought not to be construed "so as to create this large, novel, and inconvenient jurisdiction," and did not enable the County Court to entertain a claim in respect of breach of charter-party, the intention of the Act being not to give the County Court admiralty jurisdiction in cases where the High Court of Admiralty would not have had jurisdiction, but only to give to the County Court a portion of the jurisdiction of the High Court of Admiralty. Subsequently, in the same year, the Judicial Committee of the Privy Council, disapproving of the decision in *Simpson* v. *Blues and others*, held, in the case of the *Cargo ex Argos* (1 Asp. Marit. Law Cas. 519; 28 L. T. Rep. N. S. 745; L. Rep. 5 P. C. 134) that sect. 2 of 32 & 33 Vict. c. 51 gave the County Court jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships, although the Court of Admiralty might have no original jurisdiction in such cases. In 1875 the question was again raised before the Court of Exchequer in the case of *Gunnestead* v. *Price* (2 Asp. Mar. Law Cas. 543; 32 L. T. Rep. N. S. 499; L. Rep. 10 Exch. 65), when the court, consisting of Cleasby, B. and Bramwell, B., approving of the decision in *Simpson*

v. *Blues and others*, and dissenting from that in *Cargo ex Argos*, held that sect. 2 only gave jurisdiction to the County Court to try and determine causes which were within the jurisdiction of the Admiralty Court. In the present case the ground for issuing the writ of prohibition was that the County Court had no Admiralty jurisdiction in cases of breach of charter-party.

On the appeal,

Cohen, Q.C. and *Aspinall*, for the plaintiffs, contended that the County Court Admiralty Jurisdiction Amendment Act of 1869, sect. 2, clearly gave those courts jurisdiction in cases of claim arising out of charter-parties. This was held by the Judicial Committee of the Privy Council in the case of the *Cargo ex Argos* (*sup.*) and they submitted that that decision gave the true construction to the section, although it had not been adhered to in *Gunnestead* v. *Price* (*sup.*) They also referred to

Abbot on Shipping p. 16.
Kent's Commentaries, vol. 3, p. 210.

as showing that Admiralty Courts always exercised jurisdiction over charter-parties until prohibited by the Common Law Courts, and consequently there was no reason against restoring such jurisdiction.

De Covio v. *Boit*, 2 Gall. (Amer.), 398;
The Volunteer, 1 Samm. (Amer.), 551.

Herschell, Q.C. and *Wood Hill*, for the respondents, submitted that the words of the enactment were in themselves far from clear, and that if construed as the appellants contended, there would be this anomalous result, that by going to a County Court you could in all such cases arrest the ship, while in the superior Court there would be no power to arrest the ship, and thus the County Courts would have a wider jurisdiction than the Admiralty Court to which the appeal from them lay. They relied upon

Simpson v. *Blues and others*, 1 Asp. Mar. Law Cas. 326; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 290;
Gunnestead v. *Price*, 2 Asp. Mar. Law Cas. 543; 32 L. T. Rep. N. S. 499; L. Rep. 10 Ch. 65.

Jessel, M.R.—The question which we have to decide cannot be treated as an easy one, inasmuch as it has given rise to such a conflict of decisions as to the construction of a clause in an Act of Parliament. But, applying the well-known rules of construction, I must say, speaking for myself alone, it does not appear to me to be so very difficult a question as to have necessarily caused so much conflict of opinion. The rule of construction as laid down in all the cases, and notably in the House of Lords is this, that where you have plain terms used in the enacting part of an Act of Parliament nothing less than manifest absurdity will enable a court to say that the ordinary and natural meaning of the terms is not the true meaning. Where there are two or more readings possible—that is, where there is ambiguity—there, of course, you let in arguments of inconvenience; arguments of the more useful or more likely interpretation may be fairly considered. Therefore it appears to me that we must first determine whether the words are in themselves unambiguous, and if we must arrive at that conclusion then we must consider whether there is any such manifest absurdity as will enable a court of construction to say that the natural meaning of the words could not possibly be the meaning intended by the Legislature to be put upon them.

Now, first of all, as to the words themselves. The Act is to amend the County Courts Admiralty Jurisdiction Act 1868, and to give jurisdiction in certain maritime cases. If you judge by the title it certainly extends to giving jurisdiction in certain maritime cases. The second section is, "Any County Court appointed or to be appointed to have admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: As to any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship provided the amount claimed does not exceed 300*l*." I am at a loss to see any ambiguity in those words. An agreement in relation to the use or hire of a ship must include a charter-party. It would be difficult to define a charter-party otherwise than as coming within those terms. In fact, it is very often so defined. I see no doubt or difficulty, as far as I am concerned, in reading the words in their proper sense, and they do appear to me to be quite clear. I am very glad on this point at all events to see that, with one exception, the judgments of all the judges who have given an opinion or decision upon this section are unanimous, though the exception is one of great weight and importance.

In the case of *Simpson* v. *Blues* (*sup.*), where there were four judges, Justices Willes, Byles, Brett and Grove, no one alleged, although somethiug of that kind had fallen from Willes, J. on a previous occasion, that the words were anything but clear in themselves, and the ground of the decision in that case was totally different from that in the present. In the case in the Privy Council again we have four judges present, being the four ordinary judges of the Privy Council, and all four agree that the words were clear, and then, when a similar case came before a common law court there were only two judges present, Baron Cleasby and Baron Bramwell. Baron Cleasby does not state the words to be otherwise than clear in themselves, but I admit that Baron Bramwell does, and he states that he considers them ambiguous. Whether or not they are ambiguous is a question, of course, not to be lightly passed over with the opinion of Baron Bramwell the other way, and, therefore, I wish to say a word or two on the grounds which induced him to think them ambiguous.

He says this: "The words are "claim arising out of any agreement in reference to the use or hire of any ship,' not a 'claim arising out of any agreement for the use or hire of any ship.' I cannot think that the enactment is in plain and intelligible language, free from any ambiguity. If I find the words without anything to control them or guide me in their interpretation, I should say they included the cases before us and much more. But, as it is, I declare I do not know what they mean or were intended to mean. A charter-party is not an agreement for the use or hire of a ship, but it is said to be included in a claim arising out of any agreement made with reference to the use or hire of any ship. Would that include a shipbroker's claim for finding a charter?" Then he says: "Take the next words, 'does that include a claim on a policy of insurance?" Some restriction must be put upon the words. Now, it appears to

me first of all there is some slip about the charter-party. A charter-party certainly may be an agreement for the use or hire of a ship, and consequently the ambiguity which the learned Baron is then speaking of is one of his own creating. He does not doubt for a moment that a charter-party would be included under the terms. What he doubts is whether something else not before him would be included under the terms. Therefore there was no ambiguity as regards the case then to be decided. The supposed ambiguity there related to something totally different, and the learned Baron did not dispute that the words would include an action for breach of a charter-party, so that one may consider substantially that all the judges are agreed that the words are clear and unambiguous.

Well, now, if the words are clear and unambiguous, are there other words in the Act of Parliament to show that they have a different meaning? That is not suggested, but what is suggested is that by reason of the third section great inconvenience will follow, great alteration of the law will be made, and those inconveniences are such as will induce the court to control the plain meaning of the words.

Now, unless those inconveniences amount to manifest absurdity, it appears to me the law does not allow any such control to be exercised over the plain words of an enactment by a court of construction, and consequently that the judgments given by the Courts of Common Pleas and Exchequer could not be supported in point of law, because all that was relied upon was inconvenience. But I again admit that there is the exception in the case of Bramwell, B. He does put it on what appears to me a true legal ground —the ground of manifest absurdity. It only remains for me to consider whether there is any such manifest absurdity. Now, that I am not misinterpreting the statements given in the judgment in the Common Pleas is plain, I think, from a very few words of the judgment itself. I nowhere find in the elaborate judgment of Brett, J. anything like absurdity, or words equivalent to it in any shape or way. What he says (L. Rep. 7 C. P. 296; 1 Asp. Mar. Law Cas. 328) is this: "These considerations lead me to the conclusion that we ought not to construe the words of these County Court Acts so as to create this large, novel, and inconvenient jurisdiction, when we find from the context that the general intention was only to distribute the Admiralty jurisdiction by allowing suits of limited amount to be instituted in inferior courts." And when we look in detail into his reasons, his reasons are these. First, he says, "The Admiralty Court is the Court of Appeal, and it has no jurisdiction to entertain these causes in the first instance." Now, to my mind, that is not a good reason, either on the ground of inconvenience or otherwise. It has frequently happened that the Court of Appeal has no original jurisdiction, and it has not unfrequently happened that even when the Court of Appeal has an original jurisdiction of its own, it has no jurisdiction in respect of the matters as to which the appeal is given, nor is there in that respect any inconvenience, because the Court of Appeal may be a very good Court of Appeal, and yet not a good court of original jurisdiction. Then, the next ground is this, that there is a power of transfer in different cases from the County Court to the Admiralty Court. Well, I will assume for this purpose that the power of transfer applies to these particular cases. Then it is said that the result will be to give to the Admiralty Court at its will and pleasure a new jurisdiction which it did not possess at the time the Act passed. I am not very much impressed by that argument. In the first place it is not to be presumed that the Admiralty Court will transfer causes except in the case in which the Legislature intended the causes to be transferred, cases of such peculiar difficulty that they ought to be tried in the first instance by the Admiralty Court; and therefore there will be no arrogation of jurisdiction except where it was conferred by the Legislature. Then it is said, why confer that jurisdiction on the Admiralty Court? I do not know that there is any objection to it. At that time the Admiralty Court took evidence and conducted its proceedings very much in the same way as the common law courts. There might be some trifling differences, but substantially justice was administered very much in the same way. What inconvenience would arise by giving this jurisdiction to the Admiralty Court? The only suggestion we have heard is that the plaintiff might not get a jury, or the defendant might not; but the answer was very simple. It does not follow that that was considered an evil by the Legislature. We know perfectly well that by the comparatively recent Judicature Act, that very option is given to a plaintiff of going to a division where there is no jury, instead of to a division where there is a jury.

The third objection is this, that, looking at the 3rd section of the Amendment Act, the jurisdiction is conferred on the County Court to proceed *in rem*, thereby enabling the County Court to arrest a ship in cases where before the passing of the Act the ship could not be arrested. Well, there again I am at a loss to see the inconvenience. It might have been considered by the Legislature to be of very great importance that in these cases you should have the power to arrest a ship. Inconsistency there is, and that is really a part of the argument. It is inconsistent that the County Court can arrest the ship where the claim is for the smaller amount, and the Admiralty Court or the common law court cannot arrest the ship where the claim is for the larger amount; yet, although it is, in one sense, an inconsistency, in another sense it is not. It may be the view of the Legislature that additional remedies are to be given in cases of claims for small amounts, or of a peculiar character relating to ships, which are not given in cases of larger amounts, or of an ordinary character not relating to ships. The remedy to the seamen for their wages, for instance, is different from the remedy of domestic servants for their wages, and it does not at all follow that all that was not contemplated by the Legislature, and I am again at a loss to see the great inconvenience.

Well, then, it was said that charterers and shipowners of smaller vessels would be at a disadvantage, because their ships would be liable to arrest. Of course the answer would be that if the amounts claimed were small the amount of bail would be small, and the inconvenience therefore, as far as they are concerned, would not be the subject of very great consideration.

I have gone through all these reasons because it does not appear to me that the case is made out

even as to great inconvenience, but I am also of opinion that even if it were made out it would not be sufficient to enable us to control the plain words of the Act of Parliament.

Now, with regard to the second case at common law *Gunnestead* v. *Price* (*sup.*), the judgment of Baron Cleasby I need not comment upon. He does not really take any new ground which has not been already considered; but Bramwell, B. does. He says: "Shortly, the objections are that, on the construction contended for by the defendant, the County Court has admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction;" that I have dealt with. "That the High Court would have an appellate jurisdiction where it has not an original jurisdiction;" that I have dealt with. "That there could be transferred to it from the County Court causes which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the County Court;" that I have dealt with. "So these objections are to be added, not as aiding the construction of the statute, but helping us to the probable intention of the Legislature, the objections so forcibly stated in the judgment of the Common Pleas to admiralty procedure being applied to such cases as those in question." Therefore, according to Bramwell, B, those last objections are not sufficient—a remark in which I cordially concur. We have only got the remaining three objections therefore, and what does he say is the effect of the three. He says as to the limited construction, that is, confining it to admiralty causes, "With great respect, it seems to me a meaning may be given to the words without the admittedly preposterous consequences the defendants contend for;" and he says further, "This construction gives a meaning to the words without the absurd consequences which would follow on the defendants' construction." Consequently, he alone comes to the conclusion that those three objections are so preposterous and so manifestly absurd that they could not have been within the intention of the Legislature.

Now, with the greatest possible respect for Bramwell, L J.—and no one entertains a greater respect for him than I do—this only shows how different consequences strike different minds. Not only do the objections not appear to me to be either absurd or preposterous, but I cannot see any objection to them at all. I cannot see any objection on the ground that the Appeal Court has no original jurisdiction over the same subject matter. I cannot see any objection that the County Court should have admiralty jurisdiction when the Court of Admiralty has no jurisdiction; nor can I see any objection, which is the third and only one remaining, that the Court of Admiralty should transfer to itself especially difficult cases relating to maritime matters, though the court itself had no original jurisdiction to deal with such a course.

That being my opinion, it appears to me there is no absurdity and nothing preposterous in these reasons to induce us to overrule or control the plain meaning of the Act of Parliament. I am therefore driven to the conclusion that the decision of the Judicial Committee of the Privy Council in *Cargos ex Argos* (*sup.*) is the correct decision, and consequently that we should allow this appeal.

JAMES, L.J.—It appears to me that everything that could be said has been said in the judgments we have heard, with the addition made by the Master of the Rolls. All I can say is that, having considered everything, I do most entirely adopt the language of the judgment of the Privy Council, as it seems to me to dispose of almost the whole of the case.

The only thing that I shall say is that it does appear to me that if you construe this last Act of Parliament irrespective of the third section, merely considering it as a question of ordinary jurisdiction to be exercised by the County Court, there could not have been the shadow of a doubt as to the meaning of the first clause; that is to say, supposing there had not been the third section giving the power of proceeding *in rem*, it would have been the merest matter of course to have held that the County Court had the ordinary power of a County Court to deal with the claims in question in its ordinary jurisdiction. Well, if that was so—if that was the meaning of the Act of Parliament, irrespective of the third section, it is inconsistent with the ordinary rules of construction of an Act of Parliament to say that a clause, saying in so many words: "In all the cases aforesaid the court shall have jurisdiction *in rem*," is to be held to take away the jurisdiction in cases which it had in the plainest terms given before? It is as if, in order to remove all doubt, the Legislature had said, "though you may think we could not have meant it, we do in so many words say that in every one of these cases the County Court shall have jurisdiction *in rem*." It is said that because they say in those cases the court shall have jurisdiction *in rem*, that is to cut down the cases in which jurisdiction is given. If it had been intended to have said merely that the County Court shall have the jurisdiction of the Court of Admiralty in those particular cases, it appears to me it would have said so in so many words; that is to say, the Act being an Act to amend a former Act and to give jurisdiction in certain maritime causes, the first section would have said "the court shall have such jurisdiction as the Court of Admiralty possesses in the following matters," and then the whole thing would have been made quite clear. It seems to me that the Legislature intentionally did not do so, but gave jurisdiction in certain matters, and then went on to give the particular remedy of the Court of Admiralty to all the cases in which it had given jurisdiction before.

I will only add these few words to what has been said before, that I adopt as my judgment from beginning to the end the judgment of the Privy Council in the case of *Cargo ex Argos*.

COTTON, L.J.—If in this case there had not been such a difference between the different judges before whom this question had come, probably I should have contented myself by saying that in my opinion the judgment of the Privy Council in the case of *Cargo ex Argos* exhausted the case, and was the correct decision; but, under the circumstances, I think it not right so to leave the matter, though I have but little to add. What we have to consider as the primary question in this case, and that really on which the whole question turns, is whether or not the Act of 1869

does or does not clearly include actions which have been commenced in the County Court. Now the words seem simple enough, "that the County Court shall have power and authority to try and determine the following causes:—As to any claim arising out of any agreement made in relation to the use or hire of any ship." We must consider whether or not there is any ambiguity in those words without reference to the question as to what will be the consequence of holding that they do or do not include a particular cause of action. Now it has been said that a charter-party is not a contract for the use or hire of a ship. In some cases no doubt the person who enters into the charter-party becomes for the time being, as it were, the lessee of the ship; but it is quite sufficient to refer to the well-recognised authority, Abbot on Shipping, for the purpose of showing that these words do aptly refer to and include a charter-party; because what he says is this, "A trading ship is employed by virtue of two distinct species of contract, first the contract by which an entire ship or at least the principal part thereof is let for a determined voyage to one or more places. This is usually done by a written instrument called a charter-party" (11th edit. p. 100). So that he does refer to it as a contract for the letting of a ship, and no one can for a moment say that when it applies to the whole of the ship it is not a contract for the use of a ship, or where it does not apply to the whole of the ship it is not a contract for the use of a part of a ship. That being so, here are words which, as regards the particular section with which we have to deal, have in themselves no ambiguity at all, and do aptly refer to an action arising on a claim on a charter-party.

But then there is this to be considered. It is sought to restrain that by saying that this is to be any claim in which the Court of Admiralty has jurisdiction, and I asked Mr. Herschell as to whether or not he would point out any claim arising on a charter-party in which the Court of Admiralty had jurisdiction. He said, "No, except in a matter which would be dealt with and come within the second part of the clause on an agreement in relation to the carriage of goods in any ship." So that practically the argument comes to this, that we must disregard and give no effect whatsoever to the first words of this subsection which apply to contracts on charter-parties. No doubt it might be said that the Court of Admiralty has jurisdiction as regards goods carried under a charter-party, but then that is provided for by the second part of the clause. Are we to give no effect whatever to these words? Of course, in seeing what the particular construction of any clause is, we must not look only to the clause itself. We are bound to look to all there is in the same written instrument, and see whether that has given an interpretation to the words. But here there is nothing of the sort. It is only attempted to control those words which, in my opinion and in the opinion of the large majority of the judges before whom the question has come, are clear as regards the question which we have before us. I will not go through in detail all the matters which have been referred to by the Master of the Rolls; I will refer to two only. It has been said that this case comes within the grasp of an Act which transfers jurisdiction, and therefore we ought to restrict the power given by the section to powers which the Court of Admiralty has. Now, one must really consider here how this power is given. It is given, not in the original Act, and although this subsequent Act is to be read as part of the first Act, yet it is, in fact, a subsequent additional power given to the County Court, and one gets rid of a great deal of the argument adduced against the appeal by considering this, that Parliament had given by the first Act some part of the Admiralty jurisdiction to the County Court, and here it thinks fit to give the County Court this additional power, not altering the power of appeal, but still leaving the power of appeal to the Court of Admiralty, though that court had no original jurisdiction in this matter, and still leaving the power of transfer. It only comes to this, that Parliament having given certain admiralty jurisdiction to the County Court—giving it this additional power in matters or contracts relating to the use or hire of ships—still left a power of transfer to the Court of Admiralty, and still left the appeal to the Court of Admiralty.

Then the only further matter which I mention—and probably it is the most important—is that, according to our decision, there will be a lien practically on the ship in respect of a certain claim of a limited amount when there is no right in respect of claims of a greater amount; but it only comes to this, that Parliament has thought fit to pass an Act which, according to its true construction, does give that right, and, that being so, how it is for this court, a mere court of construction, to cut down the clear enactment of an Act of Parliament because Parliament has done something or the Act has done something which possibly Parliament did not think of, which may be thought inconsistent with the law being altered as regards claims of a larger amount. In my opinion, no such considerations ought to induce us to say that effect is not to be given to the clear enactment of an Act of Parliament. If that is wrong, Parliament who passed the Act must alter it.

James, L.J.—It may not be inconvenient to add this with regard to one point. A great deal has been said about the power of transferring to the Court of Admiralty. When the Court of Admiralty sits as an Appeal Court, its decision is final; but where the matter is transferred to it, it is transferred subject to an appeal.

Solicitor for the plaintiff, *H. C. Coote*, agent for *Charles Diver*, Yarmouth.

Solicitors for the defendants, *T. Cooper* and *Co.*

Friday, April 23, 1880.

(Before James, Baggallay, and Bramwell, L.JJ.)

The City of Manchester.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice—Costs—Cargo suing—Both to blame—Right to appeal—Interlocutory order—Discretion—36 & 37 Vict. c. 66. s. 25, sub-sect. 9, and s. 49—Order LVIII., r. 15.

Where an action is brought by owners of cargo laden on board one ship against another ship, for damages sustained by the cargo through collision between the ship in which it is laden and the

other ship, and both ships are found to blame for the collision, the plaintiffs will recover half their damages, in accordance with the practice of the Court of Admiralty and s. 25, sub-sect. 9, of the Judicature Act 1873, but no order will, as a rule, be made as to the costs.

On the subject of costs, The Milan (*Lush.* 388; 5 *L. T. Rep. N. S.* 590; 1 *Mar. Law Cas. O S.* 185) *overruled but on the subject of damages approved.*

Semble, if the defendant in an action brought by the owner of cargo laden on board another ship, for damages arising from a collision, admits his liability, but pleads contributory negligence on the part of the ship on board which the cargo was laden, and both ships are found to blame, the plaintiffs may be condemned in costs, and where cargo owners suing alone admit contributory negligence on the part of the ship in which their cargo was, and only claim half their damages and recover them, they will get costs.

A question of the principle on which costs are awarded is subject to appeal, notwithstanding sect. 49 of the Judicature Act 1873.

An addition made to a decree upon motion, giving directions as to costs as to which the decree itself was silent, is a portion of the decree, and therefore can be examined in an appeal from the decree, and is not an interlocutory order within the meaning of Order LVIII., r. 15.

This was an appeal from the decision of the judge of the Admiralty Division, by which, on the 25th April 1879, he had found the *City of Manchester* and the *Moselle* both to blame for a collision which took place between those vessels off Cape de Gatta and also from a decision of the same learned judge, by which he decreed, on the 20th May 1879, that the action being brought by the owners of the cargo on board the *Moselle*, and not by the owners of the ship, that they were entitled to their costs of suit. The case is reported on the subject of costs, *ante*, p. 106; 40 L. T. Rep. N. S. 591; 5 P. Div. 3.

The owners of the *City of Manchester* appealed from both decisions, and the owners of the cargo laden on board the *Moselle* gave a cross notice of appeal from that portion of the judgment which found that ship to blame.

April 23.—*Bult*, Q.C. and *Clarkson* for the appellants, defendants below, owners of the *City of Manchester*.

Benjamin, Q.C., *Dr. W. G. F. Phillimore* and *Stubbs* for respondents, owners of the cargo laden on board the *Moselle*.

The appeal was first heard on the merits, and the Court affirmed the judgment of the court below, finding both vessels to blame, and that therefore the plaintiffs should recover half their damage only from the defendants.

The question of costs was then argued.

Phillimore took the double preliminary objection: first, that the order as to costs which was appealed from was an interlocutory order, not having been made at the same time as the decree in the cause, but on a subsequent motion; secondly, that the order as to costs was a separate order, complete in itself, and therefore not subject to appeal by reason of the provisions of sect. 49 of the Supreme Court of Judicature Act 1873.

The Court overruled both objections.

Butt, Q.C. (with him *Clarkson*).—There is no reason why the position of the cargo owner who elects to sue separately from the shipowner should be better than that of a cargo owner who joins with a shipowner. The practice is well established that in an action by shipowner for damage by collision, where both ships are found to blame, and therefore the damages are divided, no order is made as to costs, and that results in the owner of cargo who joined in the action getting no costs. The owner of the cargo was sufficiently identified with the shipowner to prevent him recovering at all at common law in such a case (*Thorogood* v. *Bryan*, 8 C. B. 115), and he is only placed in a different position now by the rule of the Admiralty Court, as laid down in *The Milan* (Lush. 401; 5 L. T. Rep. N. S. 590; 1 Mar. Law Cas. O. S. 185), and which now is the statutory rule in all courts (Supreme Court of Judicature Act 1873, s. 25, sub-sect. 9 (*a*), and part of which was, undoubtedly, that the shipowner did not recover costs. As to the costs where the action was by the cargo owner, there was no special practice at the time the Judicature Act came into operation; but different orders had been made as to costs in different cases. See the report of the registrar referred to by Sir Robert Phillimore during the argument of the case in the court below (*ante*, p. 186; 40 L. T. Rep. N. S. 591).

Phillimore and *Stubbs* (with them *Benjamin*, Q.C.).—The case is merely that of a person who sues for 1000*l.* damages for breach of contract or tort and recovers 500*l.*, and who is always entitled to his costs. In *The Milan* (Lush. 401; 5 L T. Rep. N. S. 590) the plaintiff got his costs, and it cannot be supposed that an order was made in so careful a judgment without consideration, and therefore that establishes the custom of the Admiralty Court at the time of the passing of the Judicature Act, and therefore that practice is now binding by statute (Supreme Court of Judicature Act 1873, s. 25, sub-sect. 9) on the Supreme Court of Judicature. That the cases referred to by the registrar in his report were decided otherwise can only be taken to show that they were so decided *per incuriam*. Recently the case of *The Consett* (5 P. Div. 52, *sup.* p. 33) was decided in the court below on the same ground, and that decision has been upheld in this court (*sup.* p. 34). Besides, the cargo owners are innocent parties, and at common law would, previous to the Judicature Acts, have recovered in such a case as this the whole of their damages from the owners of the *City of Manchester* there being no contribution at common law between wrongdoers. By the provisions of the Supreme Court of Judicature Acts 1873, s. 25, sub-sect. 9, we are disabled from recovering more than half our damages, and that is a sufficiently great hardship without mulcting us in our costs of suit as well.

James, L.J.—I am of opinion in this case that the order as to costs is really part of the decree in the cause, although it was made at a subsequent date, otherwise there would be no right for me after the thing was disposed of, and the time for

(*a*) The section of the Judicature Act referred to is as follows: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law shall prevail."

appealing had expired, to make an order varying it. The litigation ended in final judgment, and therefore the order as to costs made a month after can only be considered as completing the decree, and ought to be part of it. Therefore it appears to me there is no foundation for the objection that it is an interlocutory order for costs, and therefore, an order coming within the principle of Order LVIII., r. 15, as to time. Then with regard to the substance of the order the learned judge below did not deal with the costs as a matter in which he was exercising his judicial discretion. He was dealing with them as subject to an universal rule, considered by him to be established in *The Milan* (Lush. 401; 5 L. T. Rep. N. S. 590; 1 Mar. Law Cas. O. S. 185), that wherever the owners of the cargo, suing on their own behalf, succeed in recovering damages, whether the half or the whole of those claimed, they are entitled to the whole costs of the litigation. Now I cannot agree with that as a statement of a general rule. It seems to me that to do so would be to encourage unnecessary litigation. The owners of the cargo in this case embarked in an action in which they aver in the most positive terms not only that the original defendant was to blame, but they aver and take upon themselves to prove that their ship, that is the ship, which was then carrying their goods, was totally free from blame. There were two distinct issues raised. The two questions were whether one ship was to blame solely or whether the other ship was solely to blame, and it seems to me probable, looking at the evidence before us, that the greater part of the costs were occasioned by that issue on which the plaintiffs fail, because they fail in the attempt to negative misconduct on the part of the vessel on which their cargo was laden, the court below having found two acts of misconduct against that vessel and only one act of misconduct against the other side, the owners of the *City of Manchester*. It seems to me it would be very unjust to fix the party who has simply failed on one issue with the whole costs of the litigation. I think if there were no fixed rule that there were to be no costs where both vessels are found to blame, the court would act in this case as in any other case before it, and make the costs of the litigation follow the event. What I mean by "follow the event" is the decision as to damages at the time of the hearing, except in so far as the court might think fit to vary it, having regard to the question of either of the parties to the litigation wilfully or intentionally increasing the costs.

Baggallay, L.J.—The judge of the Admiralty Court has given to the plaintiffs the costs of the action, but he has not done so by the exercise of any judicial discretion, but because he considered it right to adhere to the precedents established by the case of *The Milan* (Lush. 401; 5 L. T. Rep. N. S. 590). Now it appears to me to be clear that this is a question of principle on the subject of costs, and properly therefore brought under the consideration of the Court of Appeal. As regards the costs of the particular action, if we were called on to exercise the discretion not exercised for the reasons I have stated in the court below, I think the justice of the case would be met by there being no costs at all. At the same time, I do not desire to say that in all cases in which a cargo owner is plaintiff he is to be treated, in respect of costs, in exactly the same way as a plaintiff who is a ship owner. The circumstances of each particular case may introduce a variation in the way in which the costs are given.

Bramwell, L.J.—I am of the same opinion. If the learned judge in the court below thought there was an established practice of giving costs in cases like the present, I should have doubted whether it was only the exercise of discretion not to deviate from the practice. But I consider the question as one in which the practice is not settled, and as if permission had been granted by the learned judge below to appeal if such permission was necessary. I therefore have to consider whether the cargo owner should get the whole costs of this litigation. Suppose the *City of Manchester* had come and said, "We admit we ought to have done"—whatever they ought to have done—"but what we do deny is that you are free from blame as alleged," and that in the result the judge had found that which is now found, that considering the admission of the defendants and the case made against the plaintiff, "you are both to blame," could it be said that the cargo owner was to recover the whole costs of the litigation? He ought to pay the costs on the contrary, as he fails in the only issue in that case before the court. If in such a case he ought to pay the whole, what is to happen when he half succeeds and half fails? It almost follows to demonstration that he should get half.

Butt.—In a recent case (*The Lauretta*, *ante*, p. 118; 40 L. T. Rep. N. S. 444; L. Rep. 4 p. Div. 25) your Lordship held that when a cross notice of appeal was given by the respondent, the first appellants, being unsuccessful, paid the costs of the appeal, the respondents paying such costs, if any, as were occasioned by giving cross notice.

James, L.J.—I think the appellants will have to pay the costs of the appeal. It is all one appeal, except so far as those costs were increased by serving and preparing the cross notice. The decree was drawn up as follows: "The Court of Appeal, being assisted by Capt. Henry Needham Knox, R.N., and Capt. Charles Laing, nautical assessors, and having heard counsel on both sides, affirmed the decree of the 25th April 1879 appealed from, save as to costs; and directed that each party should pay his own costs incurred in the court below; but condemned the appellants (defendants) and their bail in the costs incurred in this appeal, save those caused by the cross appeal of the plaintiffs.—Dated the 23rd April 1880."

Solicitors for appellants, owners of the *City of Manchester* *Gellatly, Son*, and *Warton*.

Solicitors for respondents, owners of cargo laden on board the *Moselle*: *Stokes, Saunders*, and *Stokes*.

SITTINGS AT WESTMINSTER.

Reported by A. H. Bittleston Esq., Barrister-at-Law.

Thursday, Nov. 13, 1879.

(Before Jessel, M.R., Bramwell and Brett, L.JJ.)

Swann *v.* Barber and Co.

Ship and shipping—Shipping goods in own ship—Sales of cargo while afloat—Liability of ultimate purchaser—Freight—Purchase-money—Lien.

The plaintiff, a shipowner, sold a cargo of wheat, while afloat on board his ship, to H., at the price of 65s. per 500lbs., including freight and insurance: "freight for United Kingdom to be reckoned at 60s. per ton." While the cargo was still afloat, H. sold to L., and L. to the defendant, upon similar terms. Upon the arrival of the ship, the defendant paid 1000l. on account of freight, and invited the master to complete delivery of the cargo, which was done.

Held, that the conduct of the defendant amounted to an implied contract on his part with the plaintiff to pay freight at the agreed rate for all the cargo delivered.

By the indorsement on the writ of summons the plaintiff claimed 193*l.* 3*s.* 6*d.*, being the balance due on account of freight on 621 tons, 8 cwt., 1 qr., 22 lbs. wheat, ex the *Koh-i-noor*, at 3*l.* per ton, and of harbour dues on cargo.

The statement of claim referred to the indorsement on the writ as the particulars of the plaintiff's claim. The statement of defence denied that any freight was due from the defendants to the plaintiff, or that the defendants were indebted to the plaintiff in any amount whatsoever, as alleged by the plaintiff in the indorsement on the writ, or that the plaintiff was owner of the vessel in respect of which freight was alleged to be due, or that he was entitled to recover the same or any part thereof.

By way of set-off and counter-claim, the defendants alleged that Balfour, Guthrie, and Co. caused to be shipped on board the *Koh-i-noor*, in the port of Portland in Oregon, a cargo of wheat, to be carried by the plaintiff from Portland to Falmouth for orders, and thence to a port of discharge, and there delivered, upon the terms contained in a certain bill of lading, certain dangers and perils only excepted; and that the bill of lading provided that freight should be paid in cash, without discount, at the rate of 1*s.* per ton; that the bill of lading was duly indorsed to the defendants, and the property in the said wheat passed to them; that the delivery of the said wheat was not prevented by any of the excepted dangers and perils provided for by the bill of lading; that the plaintiff failed to deliver 290 sacks of the said wheat, the value of which, after deducting freight, amounted to 193*l.* 3*s.* 6*d.*, and the defendants claimed that sum.

By the reply the plaintiff joined issue upon the statement of defence, and denied all the allegations contained in the set-off and counter-claim, and averred that he duly delivered all the wheat shipped on board the *Koh-i-noor*, and that, if all the wheat was not delivered, such delivery was prevented by the dangers and perils excepted in the bill of lading. Issue was joined on the plaintiff's answer to the set-off and counter-claim. The action came on for trial at the Norfolk winter assizes 1878, before Kelly, C.B., when the following facts were proved:—

The plaintiff was the sole owner of the barque *Koh-i-noor*, and in the month of December 1876 a cargo of wheat was loaded on board of her at Portland, in Oregon, in the United States, for ship's account. The master signed bills of lading, which stated that the cargo was shipped by Balfour, Guthrie, and Co., of San Francisco, and consisted of 11,200 sacks of wheat "said to contain 1,427,222lbs.," to be delivered in good order and condition "(all and every the dangers and accidents of the seas and navigation of whatsoever kind or nature excepted), unto order or to its assigns. Freight for the said goods payable in cash without discount at the rate of one shilling sterling per ton of 2240lbs. gross weight delivered."

On the 26th April 1877, whilst the goods were in transit, the plaintiff, through his agents at Liverpool, sold the cargo to Messrs. Hamilton and Co. "as per bill of lading, at the price of 65*s.* per 500lbs., bill of lading weight . . . . including freight and insurance. Freight for United Kingdom to be reckoned at 60*s.* per ton." Whilst the goods were still in transit, Hamilton and Co. sold them on the same terms as regards freight to W. J. Leigh, of Liverpool, who, in his turn, sold them on the same terms as regards freight to the defendants. The defendants' contract was for the sale to them of the cargo "as per bill of lading, at the price of 68*s.* per 500lbs., bill of lading weights . . . . including freight and insurance, to a safe port in the United Kingdom . . . . calling at Queenstown or Falmouth for orders . . . . freight for U. K. to be reckoned at 60*s.* per ton."

On the ship's arrival at Falmouth, she was ordered by the defendants to Yarmouth to discharge cargo. She arrived there on the 16th May, and her cargo was in due course discharged and delivered to the defendants, who produced the bills of lading indorsed to them. Prior to the cargo being discharged, the defendants sent to the plaintiff a cheque for 1000*l.*, with a letter stating the payment to be "on account of freight." Part of the cargo on delivery was found to be sea-damaged, and there was also a short delivery, amounting to about 70qrs. of wheat less than the quantity stated by the bills of lading to have been shipped at Portland. After delivery, the plaintiff presented his freight account to the defendants, in which, after giving credit for the defendants' payments on account, a balance of 581*l.* appeared to be due to the plaintiff, freight being reckoned at 60*s.* per ton on 621 tons, which, as was admitted, were actually delivered to the defendants.

The defendants by subsequent payments reduced this balance to 193*l.* 3*s.* 6*d.*, which they refused to pay, on the ground that they were entitled to set off that amount against the plaintiff in respect of the short delivery of 70qrs. The plaintiff then brought this action. It was proved that during the voyage the *Koh-i-noor* encountered very bad weather, which caused her to labour and strain and become leaky, and the plaintiff alleged that the short delivery was owing to the water having got into the cargo, and caused a great number of the bags of wheat to become heated and rotten. The defendants alleged that the short delivery was owing to all the quantity of wheat specified in the bills of lading not having been shipped at Portland.

Kelly, C.B. in summing up the case to the jury, said that it seemed from the contract that 2854qrs. were shipped at Portland, but on the voyage to England part of the cargo had heated, and part had been damaged by sea water, so that upon discharging the vessel at Yarmouth the cargo was found to consist of only 2784qrs. instead of 2854qrs; that the plaintiff could not recover freight except for the number of quarters actually delivered, but that he was entitled to recover to that extent unless the defendant could make out a cross-claim to that amount. But by the bill of lading, perils of the seas were excepted, and the question for the jury was, did the short delivery arise from the excepted perils? Unless the deficiency was thus caused, the defendants would be entitled to a set-off against the plaintiff; but if it did, the defendants' only remedy was against their underwriters.

The jury found a verdict for the plaintiff for 193*l.* 3*s.* 6*d.*, and judgment was entered accordingly.

The Exchequer Division (Kelly, C.B. and Pollock, B.) refused an application to set aside the verdict.

A rule *nisi* for a new trial on the ground of misdirection was, however, obtained in the Court of Appeal on Feb. 7, and

Bulwer, Q.C. and *W. Graham* now showed cause.—We are entitled to be paid freight upon the number of quarters that we have actually delivered. When the vessel arrived the cargo was delivered to the defendants, short some few tons; the defendants had paid to their vendor the price of the wheat, less the freight, before it arrived, and he had in his pocket, therefore, the amount of our freight at 3*l.* per ton. The jury having found that the cargo was lost by excepted perils of the sea, the question of short delivery cannot be raised. [JESSEL, M.R.—You were the unpaid vendor to the extent of 3*l.* per ton. They could not have their goods till they paid you. It does not matter whether you call it freight or not. BRAMWELL, L.J.—What would be your rights against the original vendee?] We should be entitled as against him to freight for all the weight actually delivered. [BRAMWELL, L.J.—Assume that the 65*s.* per ton is the price of the article. Then that is to be divided into two parts, one of which is to be treated as freight.]

Ireland v. *Livingstone*, 1 Asp. Mar. Law Cas. 89; L. Rep. 5 E. & App. 395; 27 L. T. Rep. N. S. 79; Benjamin on Sales, bk. 4, pt. 2, ch. 2, p. 567 (2nd edit.)

The defendants had retained so much of the price of the wheat, they undertaking to pay us our freight. [BRAMWELL, L.J.—The difficulty is, how is the plaintiff to frame his claim? Not for freight; because the defendants would say, We never agreed to pay freight. Not for purchase money; because the defendants would say, We never agreed to purchase from you.] There was a bargain by the present defendants to repay this sum to the shipowner. [JESSEL, M.R.—If there is a contract with you, it is a contract arising from the facts. Having paid you for part of the cargo at a certain rate, you say that there is an implied obligation on his part to take the whole at the same rate.]

Finlay, in support of the rule.—First, This is a claim not only in form, but in substance, for freight. Now the defendant had never contracted with the plaintiff to pay freight. [JESSEL, M.R.—If you got delivery on an implied promise to pay freight you are liable.] The defendant paid direct to the shipowner, in pursuance of an arrangement with Leigh. But that will not justify the assumption that there was a new contract entered into by the defendant with the shipowner. [JESSEL, M.R.—If a man, knowing a shipowner has a lien upon goods for freight, goes to him and says, "Send me up the goods and here are 1000*l.* on account," he is liable for the rest of the freight.]

JESSEL, M.R.—Really, when one knows the facts, I think one can do justice in this case. The action was no doubt wrongly framed; but an amendment would no doubt have been made, if asked for, at the trial. The facts are, that the shipowner was also owner of the goods, and he shipped them under a bill of lading, which provided for payment of a nominal freight of 1*s.* per ton. Then there was a sale of the cargo afloat on the usual terms, "including freight and insurance," for 65*s.* per 500lbs. bill of lading weights; but a proviso was put in that freight should be reckoned at 60*s.* per ton, which really amounts to this, that part of the purchase money should be set aside for payment of freight. The first purchaser sold the cargo to a second, and the second purchaser had knowledge and notice of this provision. The second purchaser sold to a third, who are the present defendants, with the same notice. What was the effect of this notice? That the defendants were bound to keep this sum in their hands to pay to the agent of the shipowner, the captain, when the vessel arrived. The shipowner had a lien upon the cargo until the balance of his purchase money was paid. When the vessel arrives the third purchasers, the defendants, order the cargo to be brought on to Yarmouth, p y 1000*l.* on account of freight at the agreed rate, and invite the captain to complete delivery. He does so, a small balance of freight still remaining due. Then a dispute arises. It turns out that the cargo delivered is under weight. The defendants say that the full weight was never put on board, and the plaintiff says that it was put on board, but got damaged by perils of the sea. The jury found that the loss of weight was caused by perils of the sea. The claim of the defendants to set-off the short delivery against the balance for freight is disposed of by this finding. I think they are liable to pay that balance. Their conduct amounted to an implied contract to discharge the plaintiff's lien. They actually paid 1000*l.*, and they took delivery of the cargo on the implied undertaking that they would pay the rest. I think the rule should be discharged.

BRAMWELL, L.J.—In this case there was no contract of affreightment. The shipowner was the owner of the cargo, so that no freight could properly become due. I say nothing about the one shilling, it is not material to consider it. The plaintiff found a purchaser for the cargo, and the question of the payment of the carriage then arose. If the plaintiff had been merely the owner of the cargo, and another person the owner of the ship, then the plaintiff would have had to pay the freight. When a contract is entered into for the carriage of goods by sea, the freight is to be paid only if the cargo arrives. In order that the plaintiff and the first purchaser might be placed in the position of vendor and purchaser of a cargo

carried in the ship of a third person, the purchase money was divided into two sums—one representing the value of the cargo apart from the freight, the other the rate of freight, as if the cargo had been carried in the ship of another owner. One of these sums is paid by the purchaser as the price of the cargo; the other remains in the situation of real freight, and is to be paid on the delivery of the cargo at the port of discharge. Under these circumstances it is manifest that another shipowner would have a lien on the cargo as to that sum, which would be due to him as payment of freight. In point of law no freight is due to the plaintiff, but part of the purchase money which is to be treated as freight is due to him. I think there was evidence of a short delivery, but it is not necessary to decide that here. The defendants purchased the cargo afloat, and it is their misfortune that it is deficient. The policy of insurance was delivered to them, and their remedy is against the underwriters. The plaintiff had a lien on the cargo for the unpaid balance of the price against the first purchaser, and I think his right would be the same against the sub-vendee. The plaintiff's right would be that of an unpaid vendor to retain the goods until payment, and he did not lose that right because the purchaser sold the goods. The plaintiff being in the position of an unpaid vendor can maintain the action upon a contract that, in consideration of his giving up his lien, the defendants should pay the balance of the purchase money due for the goods delivered. I am of opinion that the plaintiff is entitled to recover. It is unnecessary to refer to any authority, and I need only say that I think *Keith* v. *Burrows* (3 Asp. Mar. Law Cas. 280, 427, 481; L. Rep. 2 App, Cas. 636; 37 L. T. Rep. N. S. 291) fully bears out what we have decided here.

Brett, L.J.— It seems to me that the whole question depends upon the contract between the plaintiff and Hamilton. The plaintiff is both shipowner and shipper. He sells his cargo of wheat to Hamilton at a price named, and then bisects that price into the price of the wheat and the freight. He had a lien against Hamilton for the freight when the cargo arrived on board his ship. It seems to me clear that the defendant had notice of that lien. Hamilton could not take away the plaintiff's lien by any transaction between himself and the defendants, even if he had tried to do so; but he did not try. I am of opinion that the defendant's conduct amounts to a contract by them that in consideration of the plaintiff giving up his lien the defendants would pay what remained due on the cargo.

Rule discharged.

Solicitors for the plaintiff, *Storey* and *Cowland*, for *Charles Diver*, Great Yarmouth.

Solicitor for the defendants, *George Lockyer*, for *W. R. Archer*, Lowestoft.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Jan. 27, *and Feb.* 25, 1880.

(Before Sir R. J. Phillimore.)

The Afrika.

Distribution of salvage—Seaman's rights—Settlement by solicitors—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 182—*Abandonment.*

Where solicitors are duly authorised by seamen to settle a claim against their employers for their share of salvage, after the whole reward to be paid is ascertained, and to make an agreement for that purpose, and the solicitors accept a sum in full satisfaction, such agreement is not void under the Merchant Shipping Act 1854, *s.* 182, *even if the amount accepted is less than the seamen would be entitled to recover in an action for distribution.*

Semble, that fraud or concealment or an extravagant disproportion between the amount actually received and the amount strictly due, is necessary to induce the court to re-open such an agreement.

This was an action for distribution of salvage, brought by William Bristow, and six other seamen, formerly part of the crew of the screw steamship *Durham*, against Messrs. Bailey and Leetham, of Hull, the owners of that vessel, in respect of services rendered to the steamship *Afrika* whilst in distress with her bows stove in on a voyage in the Gulf of Findland, in March 1879.

The statement of claim set out the circumstances under which the services were rendered, and the large and dangerous share which the crew took in them in shifting cargo from the *Afrika*, and stopping the leaks of that vessel, and then continued:

13. The defendants have received for and in respect of the said service the sum of 3000*l.*, as and for salvage reward for the services rendered as aforesaid to the *Afrika*, her crew and cargo, and before its ascertainment or receipt they paid to the plaintiff, William Bristow, the sum of 15*l.*, and to the remaining plaintiffs 12*l.* 19*s.* each on account of the sums due to them in respect of their services aforesaid; but the defendants, though requested by the plaintiffs so to do, have wholly refused to pay to the plaintiffs or any of them any further sum or sums, as their equitable proportion of the said sum of 3000*l.*, and there still remains due and owing to the plaintiffs a large sum as such proportion as aforesaid, and the plaintiffs are unable to obtain the same without the assistance of this Honourable Court.

In the statement of defence the defendants, as far as the plaintiff Bristow was concerned, paid into court a further sum of 20*l.* which was accepted in satisfaction of his claim, and in answer to the remaining six plaintiffs admitted that the said services were of an arduous nature and attended with exposure and risk, and that the said plaintiffs took their fair part with the other members of the crew in rendering them, and then continued:

6. In answer to the 13th paragraph, the defendants admit and allege that they have received the sum of 3000*l.* and no more, as and for salvage services rendered to the *Afrika*, her crew and cargo, by the *Durham*, her master and crew, and they say that the said certain plaintiffs and other members of the said crew of the *Durham*, three in number, instructed Messrs. Singleton and

Martinson, solicitors, to act as their solicitors, and to apply on their behalf to the defendants for the payment of their respective shares of the said salvage, and authorised the said solicitors to settle their respective claims in respect of the said salvage with the defendants, and that after the said sum of 3000*l.* had been finally ascertained and settled as the total of salvage in respect of the said services, and after such sum had come to the hands of the defendants or their agents, and after the said plaintiffs and their said solicitors had full knowledge thereof, the said plaintiffs and the said three other members of the said crew, by their solicitors, agreed with the defendants to accept from the defendants the sum of 132*l.* 10*s.* in settlement of the claims of the said plaintiffs and the said three others respectively for and in respect of the said salvage and their costs, and the sum of 132*l.* 10*s.* was on the 8th day of July 1879 accordingly paid by the defendants, and received by the said solicitors acting on behalf and with the authority of the plaintiffs and the said three others in settlement of their said respective claims for salvage and costs. The defendants crave leave to refer to the authority in writing given by the said plaintiffs to the said solicitors, and to the receipt for the said sum of 132*l.* 10*s.*

The plaintiffs joined issue on the defence, and also demurred to the sixth paragraph of the statement of defence.

On the ground that it does not allege that the sums stated therein to have been paid and received by the plaintiffs in settlement of their said claims were and are enough to satisfy the plaintiffs' claim in respect of the plaintiffs' shares of the said salvage, and also on the ground that the agreement in the said paragraph stated by and under which the plaintiffs agreed to accept and did accept the sums in the said paragraph mentioned in settlement of their respective claims was and is a stipulation by which the plaintiffs consented to abandon a right which they had or might obtain in the nature of salvage, and that such agreement is wholly inoperative under the provisions of the 182nd section of the Merchant Shipping Act 1854.

Jan. 27, 1880.—*James P. Aspinall* for the plaintiffs in support of the demurrer.—The paragraph of the statement of defence demurred to amounts to a statement that the plaintiffs have, in consideration of a sum of money paid to them, agreed to settle and forego and abandon their right to their share of the salvage reward received. Such an agreement is void under the 182nd section of the Merchant Shipping Act 1854, which makes void any agreement by which a seaman abandons any right he may have or obtain in the nature of salvage. The defendants have not pleaded that the sums paid to the plaintiffs were sufficient to satisfy the plaintiffs' claims and their equitable proportion of the salvage reward. It rested with the defendants to show that this is not an agreement to abandon a right to salvage by alleging that the sum so paid was the plaintiffs' equitable proportion of the sum of 3000*l.*, and was enough to satisfy the claims of the plaintiffs for their share of the salvage, and, as they have failed to do this, they have not made any answer in law to the plaintiffs' claim. The fact that this agreement was made through solicitors is immaterial, as the 182nd section of the Merchant Shipping Act says, "any stipulation to abandon a right to salvage shall be void;" and this case comes under the rules laid down in

The Rosario, 35 L. T. Rep. N. S. 816; L. Rep. 2 P. Div. 41; 3 Asp. Mar. Law Cases 334; and in *The Pride of Canada*, 9 L. T. Rep. N. S. 546; 1 Mar. Law Cases O. S. 406.

E. C. Clarkson, for the defendants, *contra*.—The agreement is binding on the plaintiffs. They have received an aliquot part of the 3000*l.*, and the fact that the agreement was made through solicitors shows that the best was done for the plaintiffs that could be done, and makes the agreement binding. The 182nd section referred to was not intended to apply to such a case as this. If it were, the rights of seamen to salvage reward would never be settled, and in whatever way a settlement was brought about with them owners would always be liable to be sued by seamen alleging that they had not received enough. In *The Enchantress* (Lush. 98) it was ruled that an equitable agreement and an equitable tender will both bar the operation of the section of the Merchant Shipping Act referred to, and the statement of defence sets up sufficiently that this is an equitable agreement.

J. P. Aspinall in reply.

SIR R. PHILLIMORE.—This is a case of distribution of salvage. A steamship called the *Durham* rendered certain services, on the 28th March 1870 in the Gulf of Finland, to a ship called the *Afrika*, and 3000*l.* had been accepted as the total sum of salvage remuneration paid over to the owner. Certain of the crew have brought an action in this court for the sum due to them, and the owners in their defence set up in the sixth paragraph that those members of the crew had instructed certain persons to act as their solicitors and agree with the defendants as to the payment of their respective shares of the salvage, and authorised the solicitors to settle their claims with the defendants, and "after the said sum of 3000*l.* had been finally ascertained and settled, and after it had come to the hands of the defendants or their agents, and after the plaintiffs and their solicitors had full knowledge thereof," the plaintiffs agreed to accept a sum of 132*l.* 10*s.* in settlement of their claims. This paragraph is demurred to principally on the ground that it sets up an agreement to accept a certain amount of salvage remuneration which is inconsistent with the provisions of 17 & 18 Vict. c. 104, which provides that "every stipulation by which any seaman consents to abandon any right he may have or obtain in the nature of salvage shall be wholly inoperative." I think that that is to draw a conclusion from the words of the Act which cannot be sustained, If I thought, by rejecting this demurrer, I was preventing the plaintiffs setting up a contradiction of the sixth paragraph, I should not take the course of rejecting it. I think it necessary to say a word as to the law laid down in *The Enchantress* (Lush. 98), and I take it as now settled. In that case the learned judge, Dr. Lushington, says: "I conceive a duty is hereby imposed upon me to decree, upon application made, what in my judgment is an equitable apportionment of salvage, unless I am barred by one of two circumstances, either an equitable agreement between the parties, or an equitable tender." The latter of these two circumstances we have not in this case to consider. But was there an equitable agreement? This agreement is not before the court at present in such a form that it can consider whether the agreement is equitable or not, but that will be done when the matter is properly brought before the court; and the court will then decide whether this agreement, made by solicitors, and approved of by the parties, was, having regard to all the circumstances, an equitable agreement. I think it is competent for the defendants to set up such a defence as is set up in the sixth paragraph, that after the total amount of salvage in

respect of the salvage services had been finally ascertained and settled, and had come into the hands of the defendants, and after the plaintiffs and their solicitors had full knowledge thereof, an agreement was made to receive a certain sum in settlement of the plaintiffs' claims, and that the agreement was made with the defendants before the plaintiffs received that sum, and it was accepted. I conceive that to be perfectly competent to plead. On the other hand, I conceive it to be competent for the plaintiffs to say, admitting the fact that the solicitors did make the agreement in question, that nevertheless, in regard to the circumstances, it is one of those inequitable agreements which, although not fraudulent or illusory, the court has always felt itself competent to consider. Taking that view of the law, I reject the demurrer in this case, and I wish it to be understood that I do so upon that ground. The demurrer must be rejected with costs. I grant leave to the plaintiffs to amend their reply.

The plaintiffs thereupon amended their reply as follows:

As to the sixth paragraph of the statement of defence the plaintiffs further say that, if the agreement in the said paragraph mentioned was made, and if the sum of 132*l.* 10*s.* was paid to the said solicitors in the said paragraph mentioned under the said agreement as in the said paragraph alleged (which the plaintiffs do not admit), the plaintiffs' part of the said sum, that is to say 12*l.* 10*s.* each, was less than the just and equitable share of the said sum of 3000*l.* due to the plaintiffs in respect of the said salvage services, and the said solicitors received the said part in settlement of the claims of the plaintiffs in ignorance of the just rights of the plaintiffs, and the said agreement and receipt limited the proportion of the said sum of 3000*l.* due to the plaintiffs, and surrendered without any consideration whatever the just rights of the plaintiffs to the remaining part of their fair share, and were and are inequitable and inoperative as against the plaintiffs.

To this paragraph as amended the defendants demurred on the ground that the said paragraph did not contain any good or sufficient ground for avoiding the agreement and settlement and payment pleaded in the sixth paragraph of the statement of defence.

The defendants obtained an order to have the demurrer argued at the hearing.

The case came on for hearing on Feb. 25.

The plaintiffs called evidence to prove the arduous nature of the service, and that the crew took more part in it than is usually the case in salvage by steamships. The defendants proved the making of the agreement set out in the sixth paragraph of the defence, and that at the time of the making thereof the solicitors there named had the plaintiffs' authority in writing and knew of the amount of salvage awarded, viz., 3000*l.*; but the plaintiffs denied that this was made known to them. From the defendants' answer to interrogatories it appeared that more than 30*l.* each had been paid to eleven members of the crew, and that 979*l.* 10*s.* in all had been paid to the master and crew in respect of the salvage services in point.

Milward, Q.C. and *J. P. Aspinall*, for the plaintiffs, contended that this was a case in which the court would have awarded to the plaintiffs, if they had brought their claim into court originally, a larger share of the salvage money than in most cases; that even allowing one-third of the amount to the master and crew, the plaintiffs were entitled to 22*l.* 10*s.* instead of 12*l.* 10*s.* which they had received, and that it could not therefore be said that the agreement was an equitable one; and that the defendants had shown by awarding over 30*l.* each to several of the crew what they considered was justly due, and the defendants admitted that the plaintiffs had done their duty equally well with those who had received over 30*l.*

Clarkson, for the defendants, urged that an agreement had been made through solicitors, and the plaintiffs had received a certain sum through solicitors in full satisfaction of their claims, and that there was no evidence or even suggestion of fraud or concealment, but the solicitors on both sides did their best for their clients, taking a different view of their rights. The plaintiffs' solicitors had received from the plaintiffs an authority in writing to make the settlement, and as the settlement was made by the solicitors in good faith, it was equitable, and the court had no power to interfere with it.

Aspinall, in reply, urged that the learned judge had himself decided on the plaintiffs' demurrer that, although the settlement through solicitors was *primâ facie* good, yet if it appeared inequitable the court could go behind it; that in this case the plaintiffs had received so much less than their fair share that the agreement was an inequitable agreement, and was therefore an agreement to take less than they were entitled to, and to abandon the rest, and consequently inoperative under the provisions of the Merchant Shipping Act 1854, sect. 182. If the learned judge decided against the plaintiffs, a way would have been discovered by which owners could avoid the Merchant Shipping Act, and great injustice would be done to seamen.

Sir ROBERT PHILLIMORE.—I am of opinion that this agreement does not militate against any of the sections of the Merchant Shipping Act that have been referred to, I am of opinion that the question is not whether, if this was an original suit, I should have awarded more than the sum actually paid or not, but whether any good ground has been shown for interfering with the arrangement that has been made. If there were any evidence of fraud or concealment, the court would not hesitate to reopen the whole case, but no evidence has been given of such fraud or concealment, or of any disreputable conduct made use of in order to induce the sailors to sign a receipt; and furthermore the plaintiffs were assisted throughout by solicitors of good local character who appear to have acted in perfect good faith throughout the whole transaction. Moreover, there is nothing extravagantly wrong in the amount paid, and therefore nothing which points to an inequitable settlement, and I am satisfied that the court would be wrong to allow the matter to be reopened. I must therefore dismiss the case with costs.

Solicitor for the plaintiffs, *H. C. Coote*, agent for *A. E. Cowl*, Great Yarmouth.

Solicitors for the defendants, *Rollitt* and *Sons*.

March 11, 18, 22, *and April* 20, 1880.

THE ARIZONA.

APPEAL UNDER THE SHIPPING CASUALTIES ACT 1879.

Practice—Appeals—Shipping casualties—Default of officer—Costs.

Where the report of those who hold an investigation into a shipping casualty does not show that a default on the part of an officer directly or by necessary inference causes or contributes to the casualty itself, his certificate cannot be taken away or suspended.

An officer's certificate cannot be suspended for a default appearing in the investigation which does not cause or contribute to the casualty.

Observations on the duties and position of look out men.

In appeals under the Shipping Casualties Act 1879, *costs of the appeal will, as a rule, follow the event.*

THIS was an appeal under the Shipping Casualties Investigation Act 1879 (42 & 43 Vict. c. 72).

An inquiry was held at Liverpool on the 4th, 5th, and 6th March, before the stipendiary magistrate of the borough and three nautical assessors, into the circumstances connected with a casualty occasioned by the s.s. *Arizona* running into an iceberg in the Atlantic ocean about 9 p.m. on the 7th Nov.

The Court arrived at the conclusion that the captain and second mate were in fault, and suspended their certificates for six months.

From this decision the captain was desirous of appealing.

March 11.—*E. C. Clarkson* applied *ex parte* to Sir James Hannen, president of the Probate, Divorce, and Admiralty Division, for instructions as to the mode of proceeding with the appeal.

The following are the provisions of the Act bearing on the case:

Rehearing of and appeal against investigation into shipping casualty on misconduct of officer.

Sect. 2. (1) Where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act, 1854, or any Act amending the same, or under any provisions for holding such investigations in a British possession, the Board of Trade may, in any case, and shall, if new and important evidence which could not be produced at the investigation has been discovered, or if for any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be re-heard, either generally or as to any part thereof, and either by the court or authority by whom it was heard in the first instance, or by the wreck commissioners, or in England or Ireland by a judge of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases, or in Scotland by the Senior Lord Ordinary, or any other judge in the Court of Session whom the Lord President of that court may appoint for the purpose, and the case shall be so re-heard accordingly.

(2) Where in any such investigation, a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a re-hearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts, namely:

(a) If the decision is given in England or by a naval court, the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice;

(b) If the decision is given in Scotland, either division of the Court of Session;

(c) If the decision is given in Ireland, the High Court of Admiralty, or the judge or division of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases.

(3) Any re-hearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may from time to time be prescribed by general rules made under sect. 30 of the Merchant Shipping Act 1876.

Rules to be laid before Parliament.

Sect. 4. Any general rule made in pursuance of this Act shall be laid before both Houses of Parliament within thirty days after it is made if Parliament be then sitting; if not, within thirty days after the then next ensuing session.

Commencement of Act.

Sect. 5. This Act shall commence and come into operation on the 1st Nov. 1879, provided that any rules which may be required for the purposes of this Act may be made at any time before the commencement of this Act, but, if so made, shall not come into operation until the commencement of this Act.

No rules had at this time been made under the Act. But a set of rules have since been published in the *Gazette*. (See *Gazette*, April 20, Mitchell's Maritime Register, April 23.)

Sir J. HANNEN.—In the present condition of affairs I think the application for directions should be made in the first instance to Sir R. Phillimore.

At a later period on the same day *E.C. Clarkson* applied *ex parte* to Sir R. Phillimore for directions, and urged that it would be rendering a right of appeal practically nugatory if the appellant had to go to the expense of having the evidence and judgment of the court below printed.

Sir R. PHILLIMORE.—Until rules are made under the statute to regulate the practice in these appeals, I am of opinion that the best course to pursue will be for the appellant to move this division of the High Court to rescind the judgment, he giving notice at once of his intention to appeal to the Board of Trade, and also four days' notice of trial after printed copies of the depositions and judgments of the court below have been filed. When these steps have been taken, the appellant can apply again for a day to be fixed for the hearing of the appeal, when directions may also be given as to how the hearing is to be conducted.

March 18.—*E. C. Clarkson* again applied *ex parte* that a day should be fixed for the hearing.

Sir R. PHILLIMORE.—I have consulted with the President of this Division of the High Court of Justice, and we have come to the conclusion to hear the appeal sitting together, and to have the assistance of two of the Elder Brethren of the Trinity House as nautical assessors, and have arranged to hear it on Monday next the 22nd inst.

March 22.—The appeal came on for hearing before Sir James Hannen and Sir Robert Phillimore, sitting together in the Probate Court, and assisted by two of the Elder Brethren of the Trinity House as assessors.

The report of the court below, so far as is material to the appeal, was as follows:

The court having carefully inquired into the circumstances attending the above-mentioned shipping casualty, finds, for the reason stated in the annex hereto, that the damage above mentioned was occasioned by collision with an iceberg, which was not seen in time to be avoided, and that the look-out was inefficient, and the court found the master, Mr. T. J., and the second mate, Mr. J. W. J., in default, and suspended their certificates for six calendar months.

The annex referred to above contained the following passages material to the appeal:

The *Arizona* is an iron screw steamer, ... of 5146 55-100ths gross and 2928 40-100ths registered tonnage . . . . and is of 1200 nominal horse-power . . . . The *Arizona* left New York on the 4th Nov. 1879 with a crew of 145 hands all told, about 250 passengers, and a full general cargo, under the command of Mr. T. J., who held a certificate of competency as master . . . . who had been nineteen years in the same employ, and who had commanded the *Arizona* for the last four voyages. . . . . On the morning of that date (Nov. 7th), the whale back which covers over the fore part of the vessel was painted, and owing to this circumstance, when the look-out was placed at 5.40 p m., they were stationed on the skid bridge instead of on the fore part of the whale back. The skid bridge is situated about 125ft. abaft of the stem head and about 40ft. before the main bridge. . . . . On each side of the skid bridge was a space of 6ft. or 7ft. for the look-out. It is about 8ft. lower than the main bridge, and about the same level as the whale back. At 8 p.m. the second mate took charge, and two A.B.'s . . . . were stationed on the skid bridge on the look-out, one on each side. The vessel's course at the time was E. by S., and she was going 15½ knots. The weather was fine and calm, with a slight head swell and tolerably clear, except that a heavy bank extended from E N.E. to S.E. across her bows which somewhat increased in density before the collision. The master was on the bridge at 8 p.m., but went below shortly afterwards, having seen the look-out men on the skid bridge, and apparently he approved of their being placed there. . . . . About 8.45 p.m. one of the look-out men saw something which he took in the first instance to be a cloud. He did not report anything, but consulted the other man on the look-out, and they had concluded that it was ice which they saw, when almost simultaneously with their arriving at this conclusion, the second mate sung out, "What's that ahead?" Upon which they replied, "An iceberg." The second mate ordered the helm to be put hard a-starboard and telegraphed to the engine-room "Stop," and immediately after "Full speed astern," all of which orders were promptly obeyed. But in one minute the ship collided with the iceberg which she struck on the N.E. corner, and which drove in her bows 20ft. The iceberg was about 150ft. to 200ft. long and 40ft. to 50ft. above the water. . . . . No lives were lost, and no one was seriously injured.

Upon the close of the evidence, *Mr. Squarey*, the learned counsel for the Board of Trade, put the following questions to the court:

1. What was the cause of the vessel coming into collision with the iceberg?
2. Whether the skid bridge was a proper place on which to station the look-out, and whether a good and proper look-out was kept?
3. Whether the temperature of the air and water was tested with sufficient frequency?
4. Whether, considering the fall in the temperature of the air and water which took place between 4 p.m. and 8 p.m, of the 7th Nov., the captain was justified in keeping his vessel at full speed, and in not stationing a look-out on the bows or on the upper bridge?
5. Whether prompt and proper measures were taken when the iceberg was seen?
6. Whether the vessel was navigated with proper and seaman-like care?
7. Whether the master and officers are, or either of them is, in default?

In giving judgment . . . . the court . . . . agreed unanimously . . . . upon the following judgment: As to 1 . . . . the vessel came into collision with the iceberg owing to its vicinity not having been discovered in time to avoid it. As to 2 . . . . the skid bridge was not a proper place on which to station the look-out on the evening in question. The evidence showed that from 8 p.m. there was a heavy black cloud rising across the ship's bows, and increasing in density, rendering it difficult to make out objects in time to avoid them, going as they were at so high a rate of speed. It was admitted that the skid bridge was not so good a place for the look-out as the main bridge, which was so much higher; but, of course, the fore part of the whale back was the best place, and the painting of the whale back, which really was the reason why the look-out were stationed there, was not considered by the court to be an adequate one. Upon the question of look-out, the court found . . . . they did see an object ahead about 8.45 p.m., but, unfortunately, instead of at once reporting it to the officer of the watch, valuable time was lost while they consulted with each other about it, and they only discovered that it was an iceberg simultaneously with the second mate, and too late to avoid a collision. But the second mate was in a higher and better position for seeing, and the court were compelled to conclude . . . . that had he kept a good look-out he must have seen the iceberg sooner. As to 3 and 4 . . . . so slight a fall as that which took place in the temperature of the air and water between 4 p.m. and 8 p.m. would not be any guide to the master as to the proximity of ice. As to 5 . . . . everything was done that could be done after the ice was seen to avoid collision. In regard to 6 and 7 . . . . no fault is found with the navigation of the ship except to repeat the remark as regards the master that they have already made as to the station of the look-out men. For this the master was solely responsible, and there was nothing in the state of the weather to render it necessary that they should be stationed on the skid bridge. . . . . Certainly the danger from which the *Arizona* received serious damage . . . . was a danger from which the master might fairly have thought himself to be exempt. . . . . The position of the look-out is at all times by night one of paramount importance. . . . . While, therefore, giving every consideration to all that may be fairly urged on the master's behalf, and also bearing in mind his long service in the one employ, the court felt compelled to find him in default for not placing the look-out in the most efficient position. . . . . The court suspend the certificates of Mr. T. J., master, and Mr. J. W. J., second mate, for six calendar months from this date.

The enactments to which reference was made were as follows:

The Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104).

Sect. 242. The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases (that is to say):

(1) If upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent or to have been guilty of any gross act of misconduct, drunkenness, or tyranny:

(2) If upon any investigation conducted under the provisions of the eighth part of this Act . . . . it is reported that the loss or abandonment of or serious damage to any ship, or loss of life, has been caused by his wrongful act or default.

The Merchant Shipping Act 1862 (25 & 26 *Vict. c.* 63).

Sect 23. The following rules shall be observed with respect to the cancellation and suspension of certificates (that is to say):

(1) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the Board of Trade, shall . . . , vest in and be exercised by the local marine board, magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade.

Shipping Casualties Rules 1878.

Rule 21. The judge may, if he thinks fit, order the costs and expenses of the proceedings, or any part thereof, to be paid by either the Board of Trade or by any other party to the proceedings. Form of order for payment of costs will be found in the Appendix No. 2.

E. C. Clarkson for the appellant.—The suspension of the master's certificate is not justified either by the facts of the case or the finding of the court. A certificate can only be suspended for a gross act of misconduct (Merchant Shipping Act 1854, s. 242, sub-sect. 1), which this offence, if offence it is at all, clearly is not; or where "serious damage to any ship has been caused by his wrongful act or default" (Merchant Shipping Act 1854, s. 242, sub-sect, 2). The finding here is that "the

damage" was caused by the inefficiency of the look-out, and not by the placing of them on the skid bridge, which is alleged as the default of the master. There is no connection between the two things, as it does not follow that, if the men had been stationed on the whale back, they would have kept a better look-out, or any the less have allowed valuable time to elapse between seeing the iceberg and reporting it. [Sir J. HANNEN.—Is it competent to us as a Court of Appeal to go behind the report, and, if we think the report as it stands is not justified by the reasons assigned for making it, consider whether on the evidence it may not be justified by other reasons than those assigned?] No, for this is a *quasi*-criminal proceeding, and a Court of Appeal cannot in a criminal matter amend the proceedings to the detriment of the accused without special power being given by the Act of Parliament so to do, and this court, sitting as it is under sect. 2 of the Shipping Casualties Act, is distinctly a Court of Appeal, and the hearing is not a re-hearing which is otherwise provided for. I submit that the sentence must be reversed, firstly, because it is not supported by the reasons from the report, and those reasons cannot be amended; secondly, because under the circumstances the look-outs were properly placed on the bridge, and their being so placed was not in fact the cause of the collision; thirdly, because, even if the skid bridge was not the best place, the stationing of the men there was not a default at all, but only an error in judgment, and the Act does not say that persons are to lose their certificates for mere errors in judgment. What difference could the position of the men make? They were some 100ft. further aft than they would have been on the whale back, and there was nothing to obscure the view of the iceberg; the ship was going 15½ knots an hour, and would therefore cover that 100ft. in about four seconds; it was not four seconds loss of time which caused the collision, but an "unfortunate" waste of time in reporting the iceberg when seen. The look-out men in front, in fact, did see the iceberg in time to have avoided the collision, and the officer of the watch might have done so had he been looking in that direction.

Muir Mackenzie for the Board of Trade.—The Board of Trade are in no sense prosecutors in these cases, they only act ministerially to put the court of inquiry in motion when a casualty takes place. Since the Merchant Shipping Act 1862 was passed they do not themselves deal with the officer's certificates (sect. 23), but the court itself deals with them. In this case it must necessarily be inferred from the report that the court was of opinion that the placing of the men on the skid bridge instead of the usual and proper place was the *causa causans* of the collision, and that act was the wrongful act of the master.

Sir JAMES HANNEN.—Having heard the valuable observations which have been addressed to us upon the evidence, and consulted with the gentlemen who assist us, we feel that we are in a position at once to state the opinion at which the court has arrived. With regard to the first point placed before us by the learned counsel for the appellant, that the finding of the court below is not one which brings this case within the terms of the sections of the Merchant Shipping Act to which reference has been made (sect. 242, sub-sects. 1, 2), inasmuch as it does not find that the master was "guilty of any gross act of misconduct," nor that "the serious damage" was "caused by his wrongful act or default," I have only to say that I do not think it necessary to determine that question on the present occasion, because we think that, putting the construction on the language of the finding which we think the right one, in order to make it a proper foundation for the suspension of the officers' certificate, I interpret it as though it had stated in terms that the default of the master was the cause of or contributed to the casualty, and I am of opinion that upon the evidence it does not appear that there was any default on the part of the master which did in fact contribute to the casualty. Although, however, I have stated that we do not consider it necessary to determine the question of law as to the construction of the statute on the present occasion, it is undoubtedly worthy of observation that neither in the formal report, nor in the reasons given for that report, does the learned stipendiary magistrate state anything from which it can be inferred that he entertained the opinion that the default of the master was the cause of the casualty. The manner in which that portion of the case is dealt with tends rather to indicate that the mind of the court was running in a different direction, and expressed only a general opinion upon the importance of there being the best possible look-out kept at all times, and that the master had not in fact used the best judgment he could in that respect, as the look-out men were not stationed in the best position. It is not, however, necessary to state any positive opinion upon that point; it may be that, if this had been the original investigation of the case, the gentlemen who assist us might not have taken so serious a view of the master's conduct in that respect as has been taken by the court below. But, accepting the finding of the court below in its entirety on that point, we have come to the conclusion that the default which is attributed to the master thereby did not cause or contribute to the casualty. This appears from the consideration of a very few undisputed facts in the case. It is obvious that where the men were stationed, on the skid bridge, they had an opportunity of seeing all before them, diminished only to the extent that the foremast could obscure their range of vision, and further, the part of the sea directly ahead and close to the ship, by the stem head; but, with these exceptions, the means of looking out were as good as if the men had been stationed right forward on that deck which is called the whale back. Now, without forming any accurate judgment as to the precise amount of time which elapsed between the object, which afterwards turned out to be an iceberg, being sighted and the collision, it is perfectly clear that the men in the place at which they were did see it for an appreciable time before the mate saw it; and it is equally clear that, instead of doing what it was their duty to do at once, that is to report the object seen they consulted together, and the language which it is proved they used shows that their eyes had been on the object for some time, for when the mate called out to them, at a time when the look-out man, who has been examined, says was a minute after they had observed the object, their joint answer was, "That is ice"—"We think it is ice," showing that the nature of the object had been the subject of their deliberation. There being

nothing in their position to prevent them seeing it sooner than in point of fact they reported it, the cause of the collision was that they did not report it sooner; that is, in effect, that they did not efficiently perform their duty as look-out men. The truth of the matter seems to be that they, like their superiors, did not contemplate the contingency of falling in with an iceberg, and that they therefore too long allowed themselves to imagine that the object they had observed was a cloud only, instead of a cloud in the bosom of which the iceberg was. For these reasons, treating the judgment as stating that the default of the master caused or contributed to the collision, we consider it is incorrect, and we reverse the finding and the sentence that the certificate of the master should be suspended, and we think the certificate should be returned to the master at once.

Sir R. Phillimore.—I am of the same opinion. I think the finding incorrect in so far as it finds that the master has by his conduct caused or contributed to the casualty. I am of opinion that the evidence shows that he did not do so, and, in addition to the remarks of the President on that matter, I would observe that the look-outs did see an object ahead at a time when it might have been avoided, but, unfortunately, instead of at once reporting it to the officer of the watch, valuable time was lost. The look-out men are not before the court, but the master is, and he is said to have caused a casualty; the cause of the casualty was the loss of the valuable time, and that was lost not by the default of the master, but by the default of the look-out men; not by placing the men on the skid bridge, but by the look-out men neglecting to report the iceberg when seen.

E. C. Clarkson applied for the costs.—The Board of Trade have been pronounced to have wrongly suspended the master's certificate; he has been put to great expense in defending himself and clearing himself from the charge of negligence, and he has succeeded. It may be that in ordinary cases in the court below a master is not entitled to costs, as he gets his expenses as a witness from the Board of Trade, and the fact of there being no charge against him, or the charge, if made, being dismissed, may be a reason for him not incurring costs in defending himself against a charge without foundation; but when he has been found guilty below and appeals successfully from that finding, there is no reason why he should not have the costs necessarily incurred by him in establishing his innocence.

Muir Mackenzie, for the Board of Trade, left the question as to costs in the hands of the court.

Cur. adv. vult.

April 20.—Sir James Hannen.—The court decided in this case that, assuming the correctness of the finding of the court below that the master was in default for not placing the look-out in the most efficient position, it did not appear from the evidence that the default caused or contributed to the casualty, and we therefore reversed the finding and the suspension of the master's certificate. On this decision the question arose what direction we should give on the subject of costs, and, as this was the first appeal under the provisions of the Shipping Casualties Investigation Act 1879, we took time to consider whether we could lay down any rule as to costs in this and future cases. We have come to the conclusion that, as the action of the court below in suspending the certificate proceeds on the invitation of the Board of Trade, we ought, where we think that the certificate has been improperly suspended, to give costs to the successful appellant, unless we should be of opinion that he has been guilty of such misconduct as rendered an inquiry as to the suspension of his certificate reasonable. In the present case we do not consider that the master has been guilty of such misconduct, and we therefore direct that the Board of Trade pay him the costs of the appeal. It must be understood that where the appeal is unsuccessful the appellant will, as a rule, be condemned in costs.

Solicitors for the appellant, *Gregory, Rowcliffe, and Co.*, agents for *Hill* and *Dickinson*.

Solicitor for the Board of Trade, respondents, *Murton*.

Wednesday, April 21, 1880.

The Fanchon.

Mortgage of ship—Charter by shipowner—Mortgagees—Charterer's rights—Arrest—Release.

Where the owner of a ship, which is mortgaged, charters her before the mortgagee takes possession, the mortgagee cannot interfere to prevent the execution of the charter-party unless it will materially injure or impair the value of his security, and if the vessel be arrested in an action of mortgage by the mortgagee, the court will release her on the application of the charterer, unless such injury is shown by the mortgagee.

This was a motion for the release of the *Fanchon*, which had been arrested by the plaintiff as mortgagee of twenty sixty-fourth shares in the said ship for the purpose of realising a mortgage upon the said ship for 1000*l.* under the provisions of the Admiralty Court Act 1861, sect. 11.

The *Fanchon* was a barque belonging to the port of Yarmouth, Nova Scotia, and was owned by several persons including one Ryerson, who owned twenty sixty-fourth shares in the barque, and was also managing owner.

On the 6th April 1877 Ryerson mortgaged his twenty shares to one Ford, of Yarmouth, Nova Scotia, to secure the repayment of a loan of 1000*l.* made by Ford to Ryerson, and by the mortgage, which was duly registered, the sum so secured became repayable on the 6th April 1880.

On the 28th March 1880 the *Fanchon* arrived from the United States at Queenstown with cargo on board, calling there for orders, and immediately afterwards she was ordered to proceed to Hull and there discharge. On the 31st March the agent of the ship in London, acting under instructions from the master, chartered the *Fanchon* to ship a cargo of cliff stone at Hull and carry the same to Philadelphia, U.S., for a freight of 12*s.* per ton. On the 3rd April the ship arrived at Hull, and there began to discharge her inward cargo. The mortgage before mentioned had, some time during the year 1879, been transferred to Messrs. Smith, Payne, and Co., of London, bankers, and on or about the 3rd April 1880 they gave notice to the ship's agent that they should object to the ship leaving England without their mortgage being paid off, and on the 6th April 1880 they put a shipkeeper in possession of the ship on their behalf; and on the 7th April 1880 they commenced this action, and on the following

day the ship was arrested. After the arrest of the ship the charterer began to load the cargo of cliff stone under the charter-party, and the ship was fully loaded and ready to proceed to sea on the 29th April 1880.

The charterer having intervened in the action, gave notice to the plaintiff of a motion to release the vessel to enable her to proceed on her voyage, and affidavits setting out the above facts were filed. In the affidavits filed by the charterer, it was alleged that the charter-party was the best that could be procured under the circumstances, and enabled the ship to proceed to America, and there load a profitable cargo in the ordinary course of her trade, viz., the carriage of bread-stuffs, and that the charter-party would not lessen or injure the value of the security of the mortgagee. The affidavits on behalf of the mortgagees alleged that they had reason to suppose that the charter-party was entered into by the owners in collusion with charterer to get the ship out of the jurisdiction, and prevent the plaintiff from realising his security; that this was shown by the smallness of the rate of freight, and by the hurry in chartering the ship; that Ryerson and Ford were both in liquidation, and the plaintiff would be deprived of all remedy if the ship left England. These allegations were wholly denied by affidavits filed on behalf of the charterer in reply.

E. C. Clarkson, for the charterer, in support of the motion.—The ship was chartered not merely on behalf of Ryerson, but of the other owners also. The latter are the majority of owners, and a mortgagee can have no greater rights to stop the ship than the owner whose shares he holds as security. Hence the plaintiff cannot restrain the ship from going to sea against the interests of a majority of owners. [Sir R. PHILLIMORE.—But you represent only the charterer here to-day.] But the charterer has made a contract with the majority of the owners by which he acquires their rights to use the ship. The question really is whether a mortgagee can be allowed to impede the execution of a charter-party made whilst the ship is still in the possession of the owners. [Sir R. PHILLIMORE.—Cannot a mortgagee come to the court and ask for a sale? Is not this a danger incidental to chartering?] A mortgagee can sell without coming to the court at all; but he cannot stop the vessel. Here the plaintiff has both stopped and arrested. He has entered into possession, and therefore is owner; how can he object to a charter-party entered into *bonâ fide* by his co-owners before taking possession? In *Collins* v. *Lamport* (34 L. J. N. S. 196, Ch.; 11 L. T. Rep. N. S. 497; 2 Mar. Law Cas. O. S. 153), Lord Westbury says that "under the statute, so long as the mortgagee of the ship does not take possession, the mortgagor, as the registered owner of the ship, retains all the rights and privileges of ownership, and all contracts made by him are valid so long as they do not impair the rights of the mortgagee. The same rule is laid down in *Johnson* v. *The Royal Mail Steam Packet Company* (L. Rep. 3 C. P. 38 17 L. T. Rep. N. S. 445; 3 Mar. Law Cas. O. S. 21). Here the charter-party was entered into by the charterers without any notice of the mortgage, and unless it can be shown that it impairs the mortgagee's interest it is binding.

Butt, Q.C. and *W. G. F. Phillimore* for the mortgagee.—The mortgage appears upon the register as being due upon the 6th April 1880, and the charterers knew or might have known when it was due. The charter-party was dated March 31, 1880, but the loading of the vessel did not commence until after the arrest. The other owners had full opportunity of knowing the date of the mortgage becoming due, and there was no necessity to effect this charter-party six days before that date. The charter-party is made in a hurry to carry a worthless cargo at a low rate of freight. All these facts point to collusion. *Collins* v. *Lamport* (*ubi sup.*) is distinguishable, as there the charter-party contemplated the ship going to her own port, whereas here she is being sent out of British jurisdiction. If they will give bail for safe return, the plaintiff will be satisfied; such bail is usually given in co-ownership actions, but there is no reason why it should not be given to a mortgagee. [Sir R. PHILLIMORE.—That appears to be contrary to *The Innisfallen*, L. Rep. 1 Adm. & Ecc. 72; 16 L. T. Rep. N. S. 71; 2 Mar. Law Cas. O. S. 470.] That case does not apply to a mortgagee in possession. If this charter-party were beneficial, the mortgagee might be content, but it is clearly intended to deprive him of his security. [Sir R. PHILLIMORE.—I do not see that you have at all proved the charges of collusion or intent to defeat the rights of the mortgagee. I see great difficulty in distinguishing the case from *Collins* v. *Lamport*, *ubi sup.*] It is a material prejudice to take the ship out of British jurisdiction. The freight is nominal, and the cost of the voyage will take precedent of our mortgage, and *pro tanto* diminish our security.

E. C. Clarkson in reply.

Sir R. PHILLIMORE.—This case is not without difficulty, and after some consideration I have arrived at the following conclusion. The case relied on as containing the law on the subject is *Collins* v. *Lamport* (*ubi sup.*), in which judgment was delivered by Lord Chancellor Westbury in 1865, and the passage which has been referred to more than once I must mention again: "As long, therefore, as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from or impair the sufficiency of the security of the vessel as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel; and if he has authority to act as owner, he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and full benefit of his property. Therefore the proposition of law is that the mortgagor has full power to deal with the ship, provided he does not materially impair the value of the security. I take it that it lies on the mortgagee to satisfy the court that this charter-party would materially prejudice his security; and I am not satisfied, on reviewing the evidence, that he has discharged this burden of proof. I am inclined to think that, on the whole, he has failed to show that the carrying the charter-party into effect would impair his security. It is a case in which the principle laid down in *Collins* v. *Lamport* (*ubi sup.*) would

apply, and I must order the release of the vessel. I do not think it is a case for costs.

Solicitors for the plaintiff, *Waltons, Bubb,* and *Walton.*

Solicitors for the charterer, *T. Cooper* and Co.

Tuesday, May 4, 1880.

(Before Sir R. PHILLIMORE.)

THE HJEMMETT.

Towage—Contract—Delay—Extra remuneration.

Where a tug contracts to perform a specified towage service for a specific sum, and, from causes beyond the control of tug or tow, the completion of the contract is delayed, the tug is not entitled to extra remuneration for such delay, provided it was reasonable under the circumstances.

A tug agreed to tow a barque from Sea Reach to London for 13*l. During the towage the barque suffered damage in a collision, for which neither tug nor tow were to blame, but which caused the barque to remain at Gravesend for three days before proceeding to London.*

Held, that the tug was not entitled to any remuneration for attending upon the barque at Gravesend for the three days, beyond the 13*l. agreed upon.*

THIS was an action of towage originally instituted in the City of London Court, but subsequently transferred by order to the Admiralty Division.

The facts which were agreed on between the parties were that, on the 26th Dec. 1879, it was agreed that the *Vivid* should tow the barque *Hjemmett* from Sea Reach, where she then was, to London for 13*l.*; that during such towage a collision took place between the *Hjemmett* and a steamer called the *W. R. Ricketts,* in which the *Hjemmett* was injured; that subsequently about 6.30 p.m. the *Vivid,* with the *Hjemmett* in tow, arrived at Gravesend, where the *Hjemmett* anchored; that the *Vivid* was always ready and willing to tow the *Hjemmett* to London in pursuance of the agreement, but the captain of the *Hjemmett* objected to such a course until he had cleared away the wreckage and partially repaired the damage she had sustained, as in the state she was then in it would certainly not have been a prudent course to have towed the vessel to London. The *Vivid* remained in attendance upon the *Hjemmett* during the time she was at Gravesend, and it was not until the morning of the 29th Dec. that the *Hjemmett,* having cleared away the wreckage, was in a position to be towed to London.

The owners of the *Hjemmett* brought an action against the *W. R. Ricketts,* in the Admiralty Division, for the damages sustained by the former vessel in the collision, and in that action the *W. R. Ricketts* admitted her liability.

On the action of collision being brought in the High Court, an application was made to transfer the towage action from the City of London Court to the High Court, and an order was made directing the transfer, and that the cause should be heard without pleadings.

The plaintiffs' claim was for 18*l.*, in addition to the agreed sum of 13*l.*, being an amount equal to three days' demurrage at 6*l.* per day.

There was no formal tender of 13*l.*, but it was agreed by the parties that certain correspondence between the respective solicitors should be read as part of the case, from which correspondence it appeared that the defendants had at all times, since the issue of the summons in the City of London Court been ready and willing to pay the 13*l.*

May 4.—The case came on for hearing.

E. C. Clarkson for plaintiff.—There is no dispute as to the facts. There was a delay at Gravesend whilst the tow was repairing her damages. That delay was not anticipated when the contract was made, and was not caused by any fault on the part of the tug. The only question then is, what extra pay are we to have for the extra service.

Dr. *W. G. F. Phillimore* for defendants.—The contract was a complete contract to tow from Sea Reach to London, taking the chances of such a voyage. We did not detain the tug at Gravesend. He might have done whatever he wished, provided he was ready to complete his contract to tow to London when called on to do so within a reasonable time. He referred to

The Queen of Australia, not reported; (*a*)
Cutter v. *Powell,* 6 T. R. 320;
The Annapolis, Lush. 359; 5 L. T. Rep. N. S. 37; 1 Mar. Law Cas. O. S. 12;
The Minnehaha, Lush. 335; 4 L. T. Rep. N. S. 811; 1 Mar. Law Cas. O. S. 111;
The Strathnaver, 3 Asp. Mar. Law Cas. 113; L. Rep. 1 App. Cas. 58; 34 L. T. Rep. N. S. 148.

There is no such thing in contemplation of law as extraordinary towage; towage is a contract express or implied to do a certain thing for a certain remuneration; here the thing has been done and the remuneration tendered.

Clarkson in reply.—*The Strathnaver* (3 Asp. Mar. Law Cas. 113: L. Rep. 1 App. Cas. 58: 34 L. T. Rep. N. S. 148) is not in point; there the suit was one of salvage, and it was held not to be salvage, and that the suit being of a specific nature, the plaintiff could not in that suit recover for towage. Here the contract is one of towage, and we ask for towage remuneration, or what is the same, remuneration for the employment of our tugs. If the vessel had come to Gravesend without a tug, or if the contract had been to tow to Gravesend, and whilst lying at Gravesend she had desired the services of a tug, she would have had to pay for those services, and the fact that for her own convenience she had divided the contract to tow to London into two parts and interpolated another service between them, cannot alter the right of the tugs to be paid for those services. It is illusory to say that we might have taken other employment during the delay; we could not tell how long the delay might be, and from the nature of the employment of a tug it would be impossible to take any employment with the liability of having to desist from it at any time when the first vessel might be ready to proceed.

Sir R. PHILLIMORE.—I wish it to be clearly understood that I am not expressing any opinion as to what decision the court would have arrived at if this were a case of salvage grounded on a

(*a*) This was a case in which an action was brought to recover towage under a contract, by which a tug engaged to tow the *Queen of Australia* from Fayal to Liverpool for a lump sum, and actually towed her for 900 miles and then left her, having no more coal. The master of the tug might have taken more coal on board at Fayal, and might, after leaving the vessel, have gone back to meet her when he had coaled at the nearest port. It was held that he could recover nothing, as the contract was entire. Adm. Ct. Feb. 18, 1880.—ED.

towage service. The question I have to consider is, whether, there having been a valid agreement to take the vessel in question from Sea Reach to London, the fact of her having been delayed on the road from accident released the tug from her contract, or, on the other hand, renders it necessary to pay the tug an additional sum. The former alternative does not arise, as she has fulfilled her contract and taken the vessel on from Gravesend. The contention of the tug is, that the time spent at Gravesend was a separate service outside the original towage contract, that it was in fact a sort of subsidiary service rendered at the request of the tow outside of and apart from the original service. I do not think that I can consider it in that light, or have power to make such an award, and I must reject the prayer of the plaintiffs, and dismiss the claim, with costs from the time the tender was made. I shall make no order as to the costs, if any, incurred before tender.

Solicitors for plaintiffs, *Lowless* and *Co.*

Solicitors for defendants, *Waddilove* and *Nutt.*

Tuesday, Dec. 16, 1879.

(Before the Right Hon. Sir R. J. PHILLIMORE.)

THE JUBILEE.

Salvage—Distribution—Distinction between salvage and towage—Steamer's mainshaft broken.

Where a steamship, carrying fore and aft sails only, and not rigged for proceeding under sail alone, breaks the mainshaft of her propeller, and is compelled to take assistance from another ship, which tows her forty miles into a port, the service is of a salvage character, although the service is not attended with any danger to the salvors.

THIS was a claim for distribution of salvage brought by Andrew Collins and eight others of the crew of the steamship *Bertha*, of 636 tons gross register, and ninety horse power, against J. P. Hornung and Son, of Middlesborough, the owners of the said steamship.

The facts of the case were, that on the 27th Feb. 1878, at about 8 a.m., the *Bertha* was about forty miles to the south of the Isle of Wight, bound from Dunkirk to Bilboa, in ballast, with a crew of eighteen hands all told, when those on board of her sighted a large steamer about six miles off, showing signals of distress, and the *Bertha* at once bore down to her, and found that she was the screw steamship *Jubilee*, of 790 tons gross register, bound from Dieppe to Cardiff, in ballast, and that the mainshaft of her propeller was broken. The masters of the two said vessels agreed that the *Bertha* should tow the *Jubilee* to a place of safety, and that the amount to be paid should be settled between the owners of the said vessels, and the *Bertha* thereupon took the *Jubilee* in tow, and about 7 p.m on the same day brought her safely into the port of Yarmouth, in the Isle of Wight. The *Jubilee* carried fore and aft sails only, and was not rigged for proceeding under sail alone. There was a conflict of evidence as to the state of the wind and sea, the plaintiffs alleging that there was a heavy sea on at the time, and that the *Jubilee* was rolling about in the trough of the sea and altogether unmanageable, while on the part of the defendants the officers of the *Jubilee* stated that the sea was moderate, that there was but little wind, and that the *Jubilee* was making about one knot an hour towards the Isle of Wight with the wind dead aft at the time the *Bertha* came up.

The defendants admitted that they had received 150*l.* in respect of the services thus rendered by the *Bertha* to the *Jubilee*, and that the *Bertha* towed the *Jubilee* to Yarmouth, but denied that the *Bertha* rendered any salvage services to the *Jubilee*, and that they received the said sum of 150*l.* from the owners of the *Jubilee* as salvage reward, or otherwise than for the loss of time of the *Bertha* in expediting the voyage and accelerating the progress of the *Jubilee*. It was also admitted that without the assistance of steam power the *Jubilee* could not have got into port, even if she had got off a port, but on the other hand it seemed clear that there was no actual danger to the salvors.

J. P. Aspinall for the plaintiffs.—The services rendered in this case cannot be said to have been towage services only. Even granting that the sea was moderate, a large steamship such as the *Jubilee* with her mainshaft broken forty miles away from the nearest port was a disabled ship and in a position of extreme danger. If the weather had remained fine (and it cannot be presumed in this case that it would have done so for the forty hours which it would have taken the *Jubilee* to reach the coast of the Isle of Wight) it would have been utterly impossible to manœuvre her so as to bring her into any harbour, and if assistance had not arrived, she would have stranded on the coast. It is absurd then to suppose that services rendered to a vessel in such a predicament were merely to expedite her voyage or accelerate her progress and nothing more, in accordance with the terms in which Dr. Lushington describes a towage service in *The Princess Alice* (3 W. Rob. 138). The *Jubilee* was not voyaging to the port of Yarmouth in the Isle of Wight, but to Cardiff, and the master of the *Jubilee* considered his position one of danger, or he would not have put up flags of distress. In *The Reward* (1 W. Rob. 174), a sailing vessel which had been driven on the Maplin Sand was backed off by her own sails, and was proceeding to Sheerness to repair with the loss only of two anchors and cables and the starboard end of the windlass and bulkhead carried away, but it was laid down that mere towage service was confined to vessels that had received no injury or damage, and "that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident."

Dr. W. Phillimore (with him *H. Lush-Wilson*) for the defendants.—The services in this case were rendered only for the purpose of expediting the *Jubilee* on her voyage. It is true her voyage was to Cardiff, but it had become necessary for her to put into Yarmouth, and the voyage thither became at once part of her voyage. The decision in *The Reward* (*ubi sup.*) was considerably modified by Dr. Lushington in *The Princess Alice* (3 W. Rob. 178), in which case there was evidence of much greater danger than in the present case, and Dr. Lushington held that the services rendered were only for the purpose of expediting the voyage of the vessel, and were only towage

services. In this case the *Jubilee* was making fair progress towards a safe port by means of her sails, and can be compared to a sailing vessel which has lost one of her masts making good progress with those remaining. There were absolutely no circumstances of danger. In *The Strathnaver* (L. Rep. 1 App. Cas. 58; 34 L. T. Rep. N. S. 148; 3 Asp. M.L.C. 116), it was decided that where a vessel is in neither actual nor imminent probable danger a vessel engaged to tow her renders towage and not salvage services. The *Jubilee* cannot be said to have been in either actual or imminent probable danger, and this case comes far within the principle so laid down in the *Strathnaver*.

J. P. Aspinall was not called upon in reply.

Sir R. PHILLIMORE.—In this case the services claimed for were rendered by a vessel called the *Bertha* to a screw steamship the *Jubilee* on the 27th Feb. 1878. The question is whether those services were of a salvage or towage character. The contest is between the owners of the *Bertha* and nine of her crew, and the owners of the vessel contend that this was a service of towage alone, and that the crew are not entitled to a share. The crew contend that it was a salvage service. First of all I will refer to the case cited of *The Princess Alice* (3 W. Rob. 138), an important case in this court, where there was a broad distinction laid down by Dr. Lushington between salvage and towage services. He says: 'I must consider in the outset what are the principles which distinguish a salvage service from a mere service of towage as they have been laid down and adopted in former decisions of this court. Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than accelerating her progress." I should be very sorry indeed if anything I were to say in this or any other judgment were in any way to trench upon that decision. I think, in this case, the circumstances show that something more was required than expedition and something more than mere acceleration of progress. Here was a vessel lying with her mainshaft broken. The great difficulty of a screw steamer is invariably when her shaft is broken. In this case she put up two flags for assistance. I am satisfied that the principle is laid down in many cases that under these circumstances flags are put up on the ship for the purpose of obtaining salvage services. The service therefore in this case was one of a salvage character. Still, however, I agree with what has been said that it was one of a very slight kind and not of a very meritorious description. A sum of 150*l.* has been paid by the owners of the *Jubilee* to the owners of the *Bertha* for this service, and, as the service was rendered by steam-power and in accordance with many decisions in this court the vessel is entitled, in such cases, to far the larger amount of salvage, I shall give, in this case to the plaintiffs 20*l.* with costs.

Judgment for the plaintiffs for 20l. with costs.

Solicitor for plaintiffs, *H. C. Coote*, for *A. E. Cowl*, Great Yarmouth.

Solicitors for defendants, *Lush* and *Holden*, for *Belk* and *Parrington*, Middlesborough-on-Tees.

Wednesday, June 9, 1880.

(Before Sir R. PHILLIMORE.)

THE MARGARET.

Damage—Collision—Thames bye-laws—Infringement—Penalty—Negligence—Contributory negligence—Causa sine qua non.

An infringement of a bye-law of the Thames Conservancy, subjecting the person infringing it to a penalty, is not of itself such negligence as to render him liable for damages caused by a collision, and much increased by the breach of the bye-law, if the collision itself was not caused by the breach of the bye-law.

If a collision is caused solely by the plaintiff, there is no cause of action against the defendant on account of the damages being increased by the breach of a bye-law on his part.

The Court decides the cause of the collision, and not in the first instance the cause of the damage.

Semble, it is negligence for a dumb barge to be so navigated in the Thames that she comes into contact with another vessel, even if under ordinary circumstances such contact would not result in any damage.

THIS was an action for damages sustained by the dumb barge *E. Wo.* in a collision with the schooner *Margaret*.

The collision occurred shortly after midnight on the morning of the 16th Oct. 1879. The *Margaret* was lying moored to a buoy off Samuda's wharf, in Blackwall Reach, in the river Thames, and was the outside vessel of those lying at the buoy; the tide was flood, and the *Margaret* lying with her head down stream. The weather was dark but clear. The *Margaret's* starboard bower anchor was hanging by the cable from the hawse pipe with its stock about 2½ft. or 3ft. above the water.

The *E. Wo.* was coming up with the tide from the Victoria Docks to Hay's wharf, and had two men on board, and was laden with a cargo of tea. The men on board the *E. Wo.* saw the riding light of the *Margaret* at a distance of about 500 yards, but did not row sufficiently far out into the stream to clear her altogether, and the pea of the *Margaret's* anchor perforated the side of the *E. Wo.*, in consequence of which considerable damage was done to the tea.

June 9.—The case came on for hearing before Sir R. Phillimore and two of the Elder Brethren of the Trinity House as assessors.

The argument turned principally on the effect of the following

Rules and Bye-laws for the Regulation of the Navigation of the River Thames, allowed by Her Majesty in Council on the 5th Feb. 1872.

19. No vessel shall be navigated or lie in the river with its anchor or anchors a-cockbill, except while fishing such anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way or for bringing it to anchor.

20. No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the *stock shall be awash*, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way.

72. Any person committing any breach of, or in any way infringing any of these bye-laws, shall be liable to a penalty of and shall forfeit a sum not exceeding 5*l.*, which said penalty shall be recovered, enforced, and applied according to the provisions of the Thames Conservancy Acts 1857 and 1864.

At the close of the plaintiffs's case, after a consultation with the Trinity Masters,

Sir R. PHILLIMORE said:—I have consulted with the Elder Brethren of the Trinity House, and they are of opinion that it cannot be said that this collision was caused by the *Margaret*. The question I have to consider is, which of these vessels caused the collision. The plaintiff alleges that the *Margaret* caused it, and I do not think that he has made out his case. The only question is, by whose fault did they come into contact? There was nothing to prevent the *E. Wo.* taking the necessary steps to keep clear of the *Margaret*, and she did not do so; we have nothing to do with the consequences of her not doing so. The position of the anchor cannot affect the question of which vessel is to blame for coming into collision. I therefore am of opinion that the suit of the *E. Wo.* should be dismissed; but, as it is possible that the case may be appealed, the defendants can, if they choose, call witnesses.

Clarkson (with him *Milward*, Q.C.) did not call witnesses, but relied on

The Gipsy King, 2 W. Rob. 537; 5 Notes of Cas. 282; *Sills* v. *Brown*, 9 C. & P. 601.

Butt, Q.C. and *Bucknell* for the plaintiff, owners of the *E. Wo.*—It cannot be denied that the *Margaret* is guilty of a breach of the bye-laws; no vessel is allowed to lie in the river with her anchor in any position except regularly stowed, that is, catted and fished, or lowered so far from the hawse pipe that its stock is awash. If the *Margaret's* anchor had been in the position required by the bye-laws, it would not have touched us, and the accident would not have happened; we should have cleared the vessel herself without any hurt, and we had a right to expect that she would observe the bye-laws. The breach of the bye-laws is in itself negligence on her part, and it was that negligence, and nothing else, which caused the damage. The case of the *Gipsy King* (*ubi sup.*) is not similar to this, and principally turns on the practice of pilots on board ordering particular manœuvres. *Sills* v. *Brown* (*ubi sup.*) does not refer to a case where the defendant's negligence in failing to perform a statutory duty causes or contributes to the collision.

Sir R. PHILLIMORE.—This is a case of collision which took place between twelve and one on the morning of the 16th Oct. last in the river Thames. The vessels that came into collision were a dumb barge called the *E. Wo.*, rowed by two men, which was going from the Victoria Docks to Hay's wharf with tea, and the *Margaret*, a schooner of 216 tons register. The *Margaret* was moored by a chain cable to one of the Thames conservancy buoys. The *Margaret* was run into by the barge. As to that there can be no dispute, but it has been contended that, having regard to the bye-laws for the regulation of the navigation of the river Thames, the damage was caused by the anchor of the *Margaret* not being in such a position that its stock should be awash as the bye-laws prescribed it should be. It appears to the Elder Brethren and myself that in this case the *Margaret* was lying at anchor in a proper place, that she was properly moored, that she carried a proper light which was visible at a considerable distance, that the night was clear and starlight, and that it was the careless navigation of the barge that brought these two vessels into contact in the first instance. The bye-law affecting the question is to this effect: [His Lordship read bye-law 20 set out above, and continued:] It is established in this case that the stock of the anchor was not awash, but was 3ft. or about that distance above the water's edge. This bye-law, therefore, appears to have been infringed, but the penalty for such an infringement is stated in the 72nd rule, which is in the following terms: [His Lordship read bye-law 72 set out above, and continued:] Now it appears to me that a confusion has been made in the argument of counsel for the barge. The question before the court to-day is who was in the first instance guilty of the collision? because without the collision no damage could have been done; and it appears to me—and the Trinity Masters have no doubt whatever—that the careless navigation of the barge in question brought the two vessels into contact. What may have been the consequences of that, and what may be the amount of damage caused by the collision, the collision being the consequence of the careless navigation of the barge, I have nothing to do with. In this view of the case I am fortified by the judgment in *The Gipsy King* (2 W. Rob. 537; 5 Notes of Cas. 212), and by the charge of the learned judge in *Sills* v. *Brown* (9 C. & P. 601). I think it only fair, however, that I should state my opinion, and in forming it I do not rely entirely on those cases, because the circumstances of the cases cited differ somewhat from this. I therefore think it right to state my own opinion that the cause of the collision was the careless navigation of the barge. I do not think it necessary to go into the evidence which establishes that the riding light of the *Margaret* was clearly visible at a very considerable distance. Therefore I pronounce the barge *E. Wo.* alone to blame for this collision, and I dismiss the suit with costs.

Solicitors: for plaintiffs, owners of the *E. Wo.*, *Cattarns*, *Jehu*, and *Hughes*; for defendants, owners of the *Margaret*, *J. T. Davies*.

Tuesday, July 1, 1879.

THE NEERA.

Costs—Reviewing taxation—Discretion of taxing officer—Retainers—Refreshers.

It is the practice in the Admiralty Division to allow retaining fees to both leading and junior counsel.

The practice in district registries in taxing costs should be same as that in the principal registry.

It is a reasonable exercise of the discretion of the taxing officer, with which the court will not interfere, to disallow refresher fees to counsel for the second day when a case has taken part of two days; but the parts together do not amount to a full day.

Harrison *v.* Wearing (11 *Ch. Div.* 206; 41 *L. T. Rep. N. S.* 376) *approved.*

THIS was an application to the court to review a taxation of costs by the district registrar at Liverpool. A collision had occurred at the entrance of the Sandon Dock Basin between a steam barge or *Mudhopper* No. 4, belonging to the Mersey Docks and Harbour Board, and the screw steamship *Neera*. Subsequent to the collision salvage services had been rendered to the *Mudhopper* and *Neera* by the steam tugs *Toiler* and *Lord Lyons*, and five actions were commenced: (1) A damage action

between the owners of the *Mudhopper* and the *Neera*. (2) A salvage action by the owners of the *Lord Lyons* against the *Mudhopper*. (3) A salvage action by the owners of the *Lord Lyons* against the *Neera*. (4) A salvage action by the owners of the *Toiler* against the *Mudhopper*. (5) A salvage action by the owners of the *Toiler* against the *Neera* By an order of the district registrar the second and fourth of the above actions were consolidated, and by a subsequent order the third and fifth were also consolidated with them, and the conduct of the four consolidated actions given to the solicitors for the *Toiler*, the owners of the *Lord Lyons* having permission to be represented by one counsel at the hearing. On the 3rd April the damage action came on for hearing, the consolidated actions of salvage being set down for hearing immediately afterwards on the 4th and 5th April. The case is reported (*Mudhopper* No. 4, *ante*, p. 103; 40 L.T. Rep. N. S. 462). The damage action was concluded on 4th April, and about 1.15 p.m. on that day the consolidated salvage actions came on for hearing, and were concluded about 12.30 p.m. on 5th April.

The district registrar, in taxing the bill of costs of the plaintiff's solicitors in respect of the *Toiler* as between party and party, disallowed retainer fees to the leading counsel for the plaintiffs, and also refreshers to counsel for the second day of the hearing.

On the 10th June the plaintiff's solicitors carried in an objection to these disallowances (Rules of the Supreme Court (Costs) Special Allowances and General Provisions, r. 30, 31); and the district registrar, having reconsidered his taxation, adhered to his former decision, and on 29th June stated his grounds and reasons as follows:

3. The plaintiffs have been allowed a retainer fee to one counsel, and it is not usual to allow more than one fee; moreover, it does not appear that the retainer to leading counsel was given before the brief was delivered, and it was therefore really unnecessary.

4. Both consolidated actions were by arrangement heard together. They were called on at about 1.15 on the 4th April, and, after ten witnesses had been examined, they were adjourned to the following day, and were finished on the 5th April about 12.30; thus, taking together, less than a day.

If each action had been heard separately, the question of refresher fees would not have arisen, as the hearing of neither of them would have extended fron one day into another. As the cases did not occupy one full day's time, although the hearing took portions of two days, and acting upon the principle laid down in the judgment of the Master of the Rolls in the case of *Harrison* v. *Wearing* (11 Ch. Div. 206; 41 L. T. Rep. N. S. 376), the effect of which was that refresher fees should be allowed to counsel where a case takes more than one day's time, I am of opinion that in this case counsel were not entitled to refresher fees.

On 1st July the motion came on for hearing.

E. C. Clarkson in support of the motion to review.

Squarey, for defendants, opposed.

Sir R. PHILLIMORE.—I shall allow the retainer which has been disallowed in this case. It has always been the practice in the London Registry of this court to allow retainers to leading counsel; and I see no reason why the practice should be departed from. I must, therefore, reverse the decision of the district registrar on this point. I think the dictum of the Master of the Rolls in the case of *Harrison* v. *Wearing* (11 Ch. Div. 206; 41 L. T. Rep. N. S. 376) that the taxing masters at common law adopted a reasonable and intelligible rule when they decided "that when the case occupied more than one day—that means more than one day's time, not more than one actual day, for it might occupy portions of two days, but the two portions together might not make a whole day . . . . refreshers might be allowed" is in favour of the decision the Liverpool district registrar has come to with respect to the refreshers in this case; and I do not think that I ought in the circumstances of the case to interfere with the discretion he has exercised in disallowing them. The taxation of the district registrar will therefore stand, except so far as it disallows the retaining fee to leading counsel. There ought not to be a different practice as to taxation of costs in the Liverpool District Registry from that which prevails in the principal registry.

Solicitors for the plaintiffs, *Stone* and *Fletcher*.

Solicitors for the defendants, *Field* and *Weightman*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Friday, June 16, 1880.

(Present: The Right Hons. Sir JAMES COLVILE, Sir R. J. PHILLIMORE, Sir MONTAGUE G. SMITH, and Sir ROBERT COLLIER.)

THE CASTLEWOOD.

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF BERMUDA.

Salvage—Apportionment—Master's share—Dangerous navigation—Citation of parties interested—Notice by appellants that no relief will be sought against them—Appearance—Costs.

Where 3500*l. had been awarded for salvage services rendered by a steamship,* 2000*l. was awarded to the owners, and* 700*l. to the master for his skilful navigation in dangerous circumstances; the order of the Vice-Admiralty Court being varied.*

On appeal against apportionment of salvage reward the owners of the salved vessel were cited, and asked for an indemnity for their costs, which the appellants refused, and gave notice that no relief would be applied for against the owners. The owners were held to be entitled to their costs up to the time of such notice.

THIS was an appeal from an order of Josiah Rees, Esq., the Judge of the Vice-Admiralty Court of Bermuda, in a cause of salvage lately pending in that court, instituted and promoted by the appellants, the Quebec and Gulf Ports Steamship Company of the Dominion of Canada, owners of the ship or vessel *Canima*, and the respondents, the master and crew of the said ship *Canima*, against the *Castlewood* and her cargo, for the recovery of salvage in respect of certain services rendered to the *Castlewood* and her cargo.

The facts proved in the said cause were that the steamship *Castlewood* of 1227 tons net, left Charlestown, South Carolina, on the 22nd Jan. 1879, bound to Revel, in Russia, with a cargo of 5032 bales of cotton, the value of the ship and cargo together being 80,000*l.* On the night of the 23rd an accident occurred to her propeller, and the next morning it was ascertained that

two of the four blades had been broken off. On the 20th she experienced hard gales, with heavy sea, and lost the other two blades, after which the engines were stopped and the ship kept running under sail, and on the morning of the 24th she was brought up with a view of making Bermuda to refit. On the evening of the 1st. Feb. the *Castlewood* made the Bermuda light, but experienced boisterous weather and was blown off again, and was beating about in the neighbourhood, the ship making more leeway then headway until 3.30 p.m. on the 6th Feb., when a steamer which proved to be the *Canima*, of 733 tons net, 175 horse-power (nominal), and 31 hands all told engaged in the mail service between Bermuda and New York, was observed going northward. The *Castlewood* hoisted signals to designate that she required assistance. The *Canima* ran down towards the distressed vessel, and came up with her when she was about five miles north-east of the north-east ledge of the reefs. The *Castlewood* was, after some trouble about the hawser, taken in tow, and proceeded with very carefully until about 9.40 p.m. when both vessels came to an anchor. The *Castlewood* on the next morning, getting up her anchor first, ran towards the *Canima*, and to avoid collision the latter steamed ahead, and her chain parting, she lost her anchor and chain. After taking pilots on board, the *Canima*, as she started ahead, parted the stops of the hawser which went over her stern, and in the delay caused thereby, the *Castlewood* coming down quickly, the *Canima* had to steam ahead to avoid a collision, and the slack of the hawser caught the *Canima's* propeller which fortunately cut the hawser in two, as otherwise the engines of the *Canima* must have been stopped, and a collision would have been inevitable. After much difficulty the *Canima* again got the *Castlewood* in tow, and steamed ahead and about half-past eight o'clock entered the Narrows, an intricate and dangerous passage, having a sudden turn in it requiring the greatest care and vigilance even when navigating a ship perfectly under control, but peculiarly dangerous for a ship having in tow a disabled vessel like the *Castlewood*, and the only channel through the reefs by which a ship of any size can be taken to the naval station at Ireland Isle, and having towed the *Castlewood* up the main channel to Grassey Bay, the *Canima* brought her to anchor there at about 11 a.m. on the 17th Feb. 1879. The passage of the Narrows is also difficult in consequence of the chance of the towing steamer running on to the western reef; and it would seem that the difficulty in this instance would be enhanced by the fact of the *Canima* towing a steamer larger than herself. Under these circumstances the learned judge of the Vice-Admiralty Court of Bermuda, awarded the sum of 3500*l.* as salvage remuneration for the services rendered by the appellants, the owners, and the respondents the master and crew, of the *Canima* to the *Castlewood* and her cargo; and by the order appealed against made on the 22nd May, 1879 apportioned it as follows:—To the appellants, as owners of the *Canima*, 1500*l.*; to the respondent, the master of the *Canima*, 900*l.*; to the respondents, the crew of the *Canima*, 1100*l.*

The appellants contended that the said apportionment was erroneous, and that a much larger proportion of the sum awarded ought to have been given to the appellants:

1. Because the *Canima* herself was by means of her steam power the main agent in rendering the said services.

2. Because the *Canima* although carrying mails and passengers, was turned back on her voyage and was delayed by rendering the said services.

3. Because the *Canima* incurred great risk in rendering the said services.

4. Because upon the facts proved in the said salvage clause, a larger proportion than the sum of 1500*l.* ought to have been awarded to the appellants.

The respondent, the master of the *Canima*, alleged that the navigation of the Bermuda coast is very intricate and dangerous, and that the currents during and after heavy gales set with great force and in various and unknown directions, and that towing the heavily laden *Castlewood* with the *Canima* right through these seas required very high qualities of seamanship and much skill on the part of the respondent and the crew of the *Canima*, and that the said respondent, the master of the *Canima*, was on deck and directing the navigation of the said vessel throughout; and the said respondent submitted that the judgment of the court below was right, and was fully justified by the evidence, and ought therefore to be affirmed. The respondents, the crew of the *Canima*, did not appear nor put in a case.

The respondents, the owners of the *Castlewood* and cargo, alleged that they had been made respondents by the appellants in this appeal, and had been served by them with an inhibition and citation to enter an appearance, and the said respondents submitted that they had been improperly and unnecessarily so made respondents, and so served with inhibition and citation by the appellants.

E. C. Clarkson for the appellants, urged that it was the vessel that ran the risk and performed the service, and it was they as owners who suffered by the delay in connection with the incident, and that on that ground they were entitled to a larger proportion of the salvage.

A. T. Lawrence for the respondent, the master of the *Canima*, resisted this claim on the ground that the salvage services, required very high qualities of seamanship and much skill; that the responsibility was great and rested solely on the master of the *Canima*; that very great local knowledge was necessary, and was the principal ingredient in rendering the service; and that the danger and responsibility and difficulty of the task were all augmented by the unfitness of the *Canima* for the task. The learned counsel also cited

The Enchantress, Lush. Ad. 93;
The Martin Luther, Swab. 289;
Scaramanga and Co. v. *Stamp and Gordon*, L. Rep. 4 C. P, Div. 316; 41 L. T. Rep. N. S. 191; 4 Asp. Mar. L. C. 161;

and quoted from the West Indian Pilot, published by the Lords Commissioners of the Admiralty, to the effect that the channel called the Narrows, through which the *Canima* towed the *Castlewood*, is most difficult and dangerous to navigate.

The judgment of the Court was delivered by Sir R. J. PHILLIMORE.—Their Lordships have carefully considered the authorities cited and the arguments of counsel on both sides, and have arrived at the conclusion that this is a case in

which they ought to exercise their own discretion and vary the amounts apportioned in the court below to this extent, They will award 2000*l.* to the owners of the *Canima*, and 700*l.* to the master. By this arrangement the master will receive rather more than masters usually do, but the facts of the case show that he displayed considerable skill in the navigation of the vessels under the more than usually difficult circumstances under which these services were rendered. Their Lordships will therefore award 2000*l.* to the owners, 700*l.* to the master, and 900*l.* to the crew.

C. Stubbs for the respondents, the owners of the *Castlewood*, applied for the costs of the said respondents occasioned by this appeal, on the ground that the said respondents had been cited, and an appearance by them was therefore necessary.

It appeared that the appellants' solicitors had asked the said respondents to accept service of the citation, and that the said respondents had offered to accept service on the terms that they should receive an indemnity for the costs incurred by them in so doing, and an undertaking not to make any application against their interests. To these terms the appellants would not agree, but gave notice to the said respondents that they did not intend to ask for any relief against them.

It was contended that it was unnecessary to cite the said respondents, but that although they had no interest in the matter, yet when cited they were bound to appear unless an indemnity was given. Without appearance, it was impossible for them to ask for costs, and costs might have been given against them in their absence.

E. C. Clarkson for the appellants, *contra*.—The owners of the *Castlewood* were cited because they were defendants, in case they should have thought that they had something to apply for. As they had nothing, their appearance was wholly unnecessary, more especially when we had given them formal notice that we did not intend to apply for any relief against them.

Stubbs in reply.—Such a notice was not sufficient; they ought to have given us the indemnity asked for.

Sir R. PHILLIMORE. Their Lordships consider that the respondents the owners of the *Castlewood* are entitled to their costs in this appeal up to the 9th April, the date on which the appellants gave notice that no relief would be sought against the owners of the *Castlewood*.

Solicitors for the appellants, *Bischoff, Bompas, Bischoff, and Co.*

Solicitors for the respondent, the master of the *Canima, Edmund Warriner.*

Solicitors for the respondents, the owners of the *Castlewood* and her cargo, *Stokes, Saunders,* and *Stokes.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by C. A. COOK, Esq., Barrister-at-Law.

May 6 and 13, 1880.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

Ex parte FALK; *Re* KIELL.

Stoppage in transitu—Duration of transit—Notice to shipowner— Delivery orders — Constructive delivery—Partial delivery for the whole—Sub-purchase.

Where the master of a ship has still the character of carrier and returns a lien for freight upon the cargo, the fact of a subsale and handing over of a delivery order for the cargo to the sub-purchaser, and actual receipt by him of part, does not put an end to the transitus, and the unpaid vendor has, upon giving the due notice to the master, the right to stop the surplus proceeds payable by the sub-purchaser, after discharging intermediate equities.

Ex parte Golding Davis and Co., *Re* Knight and Son (42 *L. T. Rep. N. S.* 270; *L. Rep.* 13 *Ch. Div.* 628) *followed.*

THIS was an appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge.

The facts were set out in a statement agreed to between Mr. C. F. Kemp, trustee in Kiell's bankruptcy, and Mr. Falk. From that statement it appeared that Kiell had been a London Merchant, using the style of G. M. Kiell and Co., and Falk was a salt merchant, at Liverpool.

On the 25th March 1878 Kiell entered into a contract with Falk for the purchase of a cargo of salt in the following terms :

> I agree to furnish you cargo Calcutta salt, half and half mats inclusive, for the *Carpathian*, as per charter-party, at the price of 13*s.* 5*d.* (say thirteen shillings and fivepence) per ton f. o. b. payable as customary charges, 4*s.* 5*d.* in cash on invoice, and balance by your acceptance at four months from date of shipment, *i.e.*, B. L.
>
> H. E. FALK.

On the 25th April 1878, the salt having been shipped on board of the *Carpathian*, which had been chartered by Kiell, Falk sent to Kiell bills of lading and invoice amounting to 1263*l.* 0*s.* 8*d.*, of which 415*l.* 12*s.* 2*d.* was for river freight, and drew a four months bill on Kiell for the balance, amounting to 847*l.* 8*s.* 6*d.*

Falk accepted the bill and returned it to Kiell, and paid the 415*l.* 12*s.* 2*d.* The bill was dishonoured.

The cargo of salt was consigned by Kiell to his agents at Calcutta, Messrs. Wiseman, Mitchell, Reid, and Co. Their agents in Great Britain were Messrs. T. Wiseman and Co., of Glasgow, through whom Kiell obtained an advance from the Bank of Scotland, upon the security of the bill of lading endorsed, and a bill of Exchange accepted. by Kiell.

The bill of lading and acceptance were in the ordinary course forwarded by the Bank to their agents at Calcutta, and advised by post by T. Wiseman and Co. to Wiseman, Mitchell, and Co., at Calcutta.

The consignees, as Kiell's agents, according to

the usual course of business, sold the cargo before it arrived, and before the 17th July 1878, at Rs. 80 per 100 maunds, guaranteeing to Kiell payment of the proceeds of sale in consideration of a commission of 6 per cent.

On the 20th July 1878 Kiell went into liquidation.

The *Carpathian*, which sailed from Liverpool on the 21st April, arrived at Calcutta on the 29th July 1878.

On the 27th July Falk served upon the owners of the *Carpathian*, Messrs. Diarmid, Greenshields, and Co., notice to stop the cargo *in transitu*, offering to pay freight on delivery to him.

Diarmid and Co. took no action upon this notice till the 31st July, when they telegraphed to Steele and Co., their Calcutta agents, as follows: "Charterers *Carpathian* failed: unless bill of lading held for value don't deliver."

The arrival of the *Carpathian* was entered at the Custom House at Calcutta on the 30th July.

On the same day the consignees presented the bill of lading to Steele and Co., and received in exchange delivery orders for the cargo, directing the master of the *Carpathian* to weigh and deliver the salt to the person who had purchased the cargo "to arrive."

On the 3rd Aug. 1000 maunds of the cargo were weighed and delivered over the ship's side to the purchaser. On the 5th 2800 maunds were similarly delivered, and the delivery continued till the 31st Aug.

The net price realised by the sale of so much of the cargo as was delivered to the sub-purchaser after the 5th Aug. exceeded 1000*l.*

On the 2nd Aug. Falk telegraphed to Balme, Lowrie, and Co., his agents at Calcutta, to stop the cargo *in transitu*, and on the 5th notice was given accordingly to the captain and to the consignees, offering to pay them the amount of their advances against the cargo, with interest and charges. To prevent inconvenience, it was proposed on Falk's behalf that the consignee's contract should be carried out on possession of the cargo being given up to Falk's agents, they accounting to the consignees for any surplus proceeds of sale that might remain after satisfaction of Falk's claim as unpaid vendor.

Steele and Co. and the captain of the *Carpathian* declined to recognise anyone as having any title to the salt except the holders of the bill of lading.

On the 10th Sept. the consignees sent to Kiell their account of sales for the consignment of salt, the balance due amounting to 1566*l.* 3*s.* 2*d.*, which they remitted to the Bank of Scotland. The Bank, after deducting the amount due to them in respect of their advance, paid the net balance of 426*l.* 10*s.* 2*d.* to the trustee in Kiell's bankruptcy.

Falk claimed this balance; but Mr. Registrar Hazlitt held that the trustee was entitled to it, on the ground that the transit was completed by the delivery of part of the cargo, so as to be constructive delivery of the whole, and that in any case valuable consideration having been given in the shape of payment in cash and bills to Falk before the stoppage, Falk was no longer an unpaid vendor, and the cargo having been sold to a sub-purchaser, and Kiell having been paid, the rights of third persons who had given value intervened to prevent Falk's right to stop *in transitu*.

From this decision Falk appealed.

Cohen, Q.C. and *F. Thompson* for the appellants. —If there had been no pledge of the bill of lading to the bank and no sub-purchase, the notice to stop would operate from the time when the shipowner might with reasonable diligence have communicated the notice to the master or agent. There was a duty on him to do so in his position as bailee. He should have telegraphed at once; that is what would under the circumstances have been reasonable. [James, L.J.—Can a telegram be good notice? It may come from anybody.] Notice to the shipowner was sufficient where notice could not be given to the person in actual possession of the goods. "It is now clearly settled that the vendor's rights are complete on giving the person who has the possession of the goods notice of the vendor's claim to stop the goods at a time when he can obey it, although there is neither an actual taking possession by the person stopping the goods or such an assent on the part of the holder as would amount to a constructive possession:" (Blackburn on Sale, p. 267.) "The notice of the stoppage must be given to the person in possession of the goods, or if to his employer, then under such circumstances and at such time as to give the employer opportunity by using reasonable diligence to send the necessary orders to his servant:" (Benjamin on Sale, 2nd ed., p. 717.) See also

Lytt v. *Cowley* 7 Taunt. 159;
Whitehead v. *Anderson*, 9 M. & W. 518.

The notice means, don't deliver. If delivery must take place by reason of a sub-purchase, then notice to the shipowner is good if the transit is not at an end. A vendor who has been nominally paid by a bill may, on the vendor's insolvency, stop *in transitu*. The shipowners ought to have telegraphed to the master:

Proudfoot v. *Montefiore*, 16 L. T. Rep. N. S. 585; L. Rep. 2 Q.B. 511; 2 Mar. Law Cas. O. S. 521;
Kaltenbach v. *Mackenzie*, 4 Asp. Mar. Law Cas. 15, 39; L. Rep. 3 C. P. Div. 467.

The transit was not at an end on the 30th July. The property did not pass till weighing had taken place. If neither property nor possession passed to the sub-purchaser, the transit was not at an end. There was no attornment by the master of the ship to the sub-purchaser. Handing over the delivery order was not equivalent to handing over the bill of lading:

Coventry v. *Gladstone*, L. Rep. 6 Eq. 44.

A delivery order is proof that the owner is satisfied for freight, and is not equivalent to possession being given:

M'Ewan v. *Smith*, 2 H. L. C. 309.

The question is not affected by the Factors Act 1877 (40 & 41 Vict. c. 39, s. 5), which provides that "when any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for valuable consideration the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*." The legal transitus exists as long as the contract of carriage. That contract includes delivery. Delivery of part

of a cargo may be delivery of the whole where constructive delivery is possible. But here, where there is to be weighing before delivery, partial delivery cannot be constructive delivery of the whole :

Ex parte Cooper ; *Re Maclaren*, 40 L. T. Rep. N. S. 105 ; L. Rep. 11 Ch. Div. 68 ;
Ex parte Golding Davies and Co. ; *Re Knight and Son*, 42 L. T. Rep. N. S. 270 ; L. Rep. 13 Ch. Div. 628.

[James, L.J.—*Ex parte Cooper* went on this, that the freight was not paid, and it could not be taken that the master meant to deliver the whole cargo and lose his lien.] Here not only was the freight but also the price payable per ton. There cannot be a constructive weighing of the whole :

Hanson v. *Meyer*, 6 East, 614.

Mere arrival at the destination does not necessarily end the transitus :

Bolton v. *Lancashire and Yorkshire Railway Company*, 13 L. T. Rep. N. S. 764 ; L. Rep. 1 C. P. 431.

The buyer may anticipate the end of the transitus, however, and this determines the vendor's right of stoppage *in transitu* :

James v. *Griffin*, 2 M. & W. 633.

But giving a delivery order does not determine the transitus. [Bramwell, L.J.—It might have been given if the ship had been spoken at the mouth of the Hoogly.] The vendor is entitled to the surplus proceeds of the purchase money payable by the sub-purchaser after the bank's claim is satisfied. The doctrine of stoppage as to surplus proceeds was stated in *Re Westzinthus* (5 B. & Ad. 817). It was upheld in *Spalding* v. *Ruding* (6 Beav. 376).

Benjamin, Q.C. and *G. W. Lawrance* (*Watkin Williams*, Q.C. with them) for the respondent, the trustee.—Notice of stoppage *in transitu* must be given to the person who has actual custody of the goods. Here notice to the shipowner was not enough ; there was no duty cast upon him of telegraphing that such a notice had been given to him :

Whitehead v. *Anderson*, 9 M. & W. 508.

But if the appellants rely, as they must in this state of things, upon the notice of the 5th Aug., the answer is that the transitus was then at an end. The handing over of the delivery order was the completion of the transitus. No attornment was requisite :

Factors Act 1877 ;
Crawshay v. *Eades*, 1 B. & C. 181 ;
Tanner v. *Scobell*, 14 M. & W. 28 ;
Johnson v. *Crédit Lyonnais*, 37 L. T. Rep. N. S. 657 ; L. Rep. 3 C. P. Div. 32.

When the documents of title have been dealt with the right to stop is gone, at all events to the extent of the dealing with them :

Lickbarrow v. *Mason*, 2 T. R. 63 ; Smith's L. C. 8th edit. vol. 1, p. 753 ;
Re Westzinthus, 5 B. & Ad. 817 ;
Spalding v. *Ruding*, 6 Beav. 376.

Here there was a complete transfer of the property, both legal and equitable ; and before *Ex parte Golding Davis and Co.* the right to stop the purchase money paid by the sub-purchaser had never been acknowledged. There were dicta in that case supporting such a right, but they were not necessary for the decision. The right of stoppage *in transitu* ought not to extend beyond the goods themselves :

Turner v. *Trustees of the Liverpool Docks*, L. Rep. 6 Ex. 543 ;
Ogg v. *Shuter*, 3 Asp. Mar. Law Cas. 77 ; 32 L. T. Rep. N. S. 114 ; L. Rep. 10 C. P. 159 ;
Berndtson v. *Strang*, 19 L. T. Rep. N. S. 40 ; L. Rep. 3 Ch. 588 ; 2 Mar. Law Cas. O. S. 511.

In this case there was constructive delivery of the whole cargo. It is a question of intention. In *Hammond* v. *Anderson* (1 B. & P. N. R. 69) there was a delivery order for a number of bales of bacon lying at a wharf. The purchaser went to the wharf and weighed the whole and took away several bales and then became bankrupt. The vendor sought to stop delivery of the rest, but it was held that the delivery already made was equivalent to a delivery of the whole. In *Slubey* v. *Heyward* (2 H. Bl. 504) the defendants, being in possession of bills of lading which had been indorsed to them as sub-vendees of a cargo of wheat, had ordered the vessel to Falmouth with the vendor's consent, and had begun to receive the cargo and had actually got 800 bushels, when the original vendor attempted to stop *in transitu*, the buyers having become insolvent. The court held that the transitus was ended by the part delivery, which must be taken to be a delivery of the whole, there appearing no intention either previous to or at the time of delivery to separate part of the cargo from the rest. It must be assumed here that the freight was paid, or that the master abandoned his lien for it, by allowing an unconditional delivery of the cargo. [James, L.J.—If the freight had been paid, so important a fact would hardly have been omitted from the agreed statement.]

No reply.

James, L.J.—Here the first thing to be decided is the question, Was the transit at an end at the time when the notice of stopping *in transitu* was given by the vendor to the master of the ship, so that, if there had been no sub-sale, the vendor would still have had a legal right to stop the goods *in transitu?* I am of opinion that the transit was not at an end by reason of the partial delivery of the cargo which had taken place, that is to say, neither the obligations nor the rights of the shipowners or carriers had been determined by what they had done. They were still liable, in the character of carriers, for the safe custody of the goods, and the delivery of them to the person who was entitled to them. And they would have had a right to say, We will not deliver another maund of salt until we have been paid our freight. That being so, the transitus was not at an end, and the goods remained in the possession of the master as carrier ; he had not attorned to anyone ; and in that state of things a notice given would have been effectual to stop the goods *in transitu* as against the original purchaser. And if so, the case is governed by the decision of this court in *Ex parte Golding Davis and Co.*, *Re Knight* (L. Rep. 12 Ch. Div. 628). Whether that decision was right or wrong, it appears to me that it is binding on me, because I was a party to it. It is an opinion of the Court of Appeal, and it is not open to be reheard, merely because the court now consists in part of the same judges. It seems to me that it is impossible to distinguish between the present case and *Ex parte Golding Davis and Co.*

Baggallay, L.J.—The real question is whether the transitus was at an end or no. I am of opinion it was not. The goods were in process of delivery ; weighing was necessary before there could be delivery. If so, the principle of *Ex parte Golding Davis and Co.* applies. We cannot pre-

judice the rights of third parties who have acquired those rights for value. As regards the surplus, however, the right of stoppage *in transitu* is well exercised. As to any doubt which I may have expressed in that case, it was merely that on the special circumstances I at first doubted whether there had not been an effectual delivery at Liverpool, and the doubt was entirely removed before the case was at an end.

BRAMWELL, L.J.—I am of the same opinion. There was no effectual stoppage until the person who had the goods was told to stop them. What took place at Liverpool was only telling somebody to cause stoppage. There was no duty as far as I can see on the part of that person to tell the other person to stop. It would be mischievous if a mere make-believe of stopping, telling some one to tell someone else to stop, should be held to be a stoppage. The captain of the ship had possession of the goods as carrier, and had not performed his whole duty as carrier, and therefore had not got rid of his rights; that is to say, he had not lost his lien. Mr. Benjamin was obliged to invent, as he did very ingeniously on the spur of the moment, a new contract between the captain and the sub-purchaser constituted by the delivery orders. But there was in fact no new contract. The old obligation, contract, and rights applied. As to the cases upon the point that part delivery is delivery of the whole in some circumstances, I think myself that if there is not delivery of the whole it is better not to say that there is. As to the case of *Slubey* v. *Heyward* (2 H. Bl. 504) it is nearly 100 years old, and I speak of it therefore with respect, but I cannot understand it. It appears that the sub-purchaser paid for the goods, and I cannot see how there could be stoppage *in transitu* against him. The court seems to have held that the carrier's business was at an end. The note of the case is, however, a very loose one. As to the other case which Mr. Benjamin relied on (*Hammond* v. *Anderson*, 1 B. & P. N. R. 69), there is in it not a word about delivery of part of the cargo being equivalent to delivery of the whole. For there the court held that there was an actual delivery of the whole: the man "had actual manual possession of every article, and having weighed them all, he took upon himself to separate them." Lord Mansfield there said: "On a former occasion this court decided that where a part of the goods sold by one entire contract was taken possession of the vendee had taken possession of the whole." But with regard to the case then before the court, what he said was this: "So much having been taken away, and the whole weighed by the bankrupt, it is insisted that the bankrupt had taken possession of the whole. . . . As to those bales which were sent away, the bankrupt had taken actual possession, and therefore no question can arise; and when it is admitted that he had taken possession of a part, how can it be said that he had not taken possession of the whole? The price was entire, and the whole to be paid by one bill." The effect of the decision is shown by the short judgment of Rooke, J., who said: "The facts of this case are too strong to be got over. The whole of the goods was paid for by one bill. A general order was given for the delivery of the whole, and the purchaser under that order went and took away a part. How could he more effectually change the possession?" It was a delivery of the whole cargo, because the wharfinger was holding the whole for the purchaser or his bailee, and with a duty to him. It is manifest here that the transitus was not at an end as to the undelivered part. There having been a sub-purchase, can the right of stoppage *in transitu* prevail? In one sense no right or interest remained in the original purchaser except that he might have stopped *in transitu* as against his sub-vendee. The claimant here is the trustee in Kiell's liquidation. Suppose Kiell had not gone into liquidation. Suppose he had said: "I can't pay; the sub-vendee will." What difference does it make that he is in liquidation? I think it is most equitable to allow the stoppage. The case is hardly one to be reasoned about, because there is *Ex parte Golding, Davis* and *Co.* But I don't want to shelter myself under its authority. I think it was rightly decided. A man sells goods to another for 500*l.* The money is not paid, when the goods are resold for 600*l.* In former cases it had been decided when instead of a resale there had been a pledge for 600*l.* with a right of sale, that the right of stoppage *in transitu* could be exercised as to the 100*l.* surplus. What difference does it make that there is a resale instead of a pledge, with right of sale? Why if stoppage is allowed in one case, can it not be allowed in the other? What mischief can be shown? I am at a loss to see any principle which was applicable in the case of *Re Westzinthus* (5 B. & Ad. 817), and *Spalding* v. *Ruding* (6 Beav. 376), and which is not applicable in the case of *Ex parte Golding Davis and Co.*, and to the present case.

Appeal allowed.

G. W. Lawrance asked for leave to appeal to the House of Lords.

JAMES, L.J.—This is just the kind of case when that application is proper.

Leave to appeal to the House of Lords granted.

Solicitors for appellants, *Field, Roscoe,* and *Co.*, agents for *Bateson* and *Co.*, Liverpool.

Solicitors for respondent, *Ashurst, Morris,* and *Co.*

SITTINGS AT WESTMINSTER.

Reported by A. H. BITTLESTON, and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

Feb. 23, 24, 25, 26, *and March* 24, 1880.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

ATWOOD *v.* SELLAR.

Ship and shipping — General average sacrifice— Putting into port to repair—Expenses of warehousing and reloading goods—Pilotage charges on leaving port.

When a vessel has put into port to repair an injury occasioned by a general average sacrifice, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average.

The practice of British average adjusters for the last seventy years dissented from.

Judgment of the Queen's Bench Division affirmed.

SPECIAL case stated in an action by the plaintiffs, as owners of the *Sullivan Swain*, to recover 13*l.* 14*s.* 9*d.*, in respect of a general average contribution from the defendants as owners and

consignees of certain goods on board the said vessel.

1. The plaintiffs are the owners of the ship *Sullivan Swain*, and the defendants are owners and consignees of goods shipped on board the said vessel, on the voyage hereinafter mentioned.

2. The said vessel sailed from Savernake to Liverpool on the 10th Feb. 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary, and was made, the master being compelled to cut away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st Feb. 1877, to repair the said damage.

3. In order to effect the said repairs, and to enable the vessel to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing and reshipping the same, and further expenses were incurred at Charleston for pilotage, and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The said vessel afterwards completed her voyage, and discharged her cargo at Liverpool.

4. It is, and for from seventy to eighty years past has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice, or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on the cargo, and the expense of the reshipping of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all, are not of frequent occurrence; but such cases and cases where the substantial cause of the putting into port is a general average sacrifice are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters which holds meetings from time to time at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March 1876 one eminent average adjuster formed the opinion that the practice, as above described, was wrong, and that all such expense as heretofore described up to the time when the ship was again at sea, and had resumed her voyage, ought to be charged to general average; and since March 1876 the said average adjuster has made up adjustments in two or three cases of the kind in accordance with his said opinion; but the practice of British average adjusters as above described has remained unaltered.

7. The case of the said ship, the *Sullivan Swain*, was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said average adjustment which has been so prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are so liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly; and the defendants contend, first, that apart from the said practice general average expenditure ceases in such cases when the cargo has been discharged from the ship; and, secondly, that the said practice of average adjusters is a valid and binding custom, regulating the treatment of the said expenses, and the contribution to be paid by the defendants.

The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters as stated in this case.

The Queen's Bench Division (Cockburn, C.J. and Mellor, J., *dissentiente* Manisty, J.) gave judgment for the plaintiffs: (*ante*, p. 153; 41 L. T. Rep. N. S. 83.)

The defendants now appealed.

Butt, Q.C. (with him *Webster*, Q.C. and *Fullarton*) for the appellants.—Hitherto expenses of warehousing and reloading have not been charged in general average. This is one of those cases where the law accepts the practice. In Phillips on Insurance (3rd edit.), vol. ii., p. 169, the author says: "Though it be admitted that the contract is to be construed according to the laws and usages of the place where it is made, it does not follow that no regard is to be had to the laws and usages of any other place. The reasons given by Lord Tenterden (in *Dalgleish* v. *Davidson*) are conclusive to the contrary." The captain has a lien on the goods, and it is a lien to secure the contribution to general average when adjusted. The whole argument on the other side in the court below was based upon the difference between a general and a particular average loss. Once the common danger has ceased, the liability to general average contribution ceases. As soon as the cargo and vessel are separated, the common danger has ceased. It is no answer to the appellants for the other side to say that what they contend for would be a reasonable practice. The appellants rely on the existing practice which is in accordance with the law on the subject. It is said that this is not found to be a practice of merchants and shipowners. Apart from the practice altogether, by English law the appellants are not compelled to contribute to the expenses of warehousing and reloading, because it is not something done against a common peril. *Plummer* v. *Wildman* (3 M. & S. 482) is relied on by the other side. But in a subsequent case of *Power* v. *Whitmore* (4 M. & S.

149), Lord Ellenborough, C.J. limits the application of that case. He says, "that the language of Beawes in the passage cited (Lex Merc. 166) was very loose, and that the same doctrine, he believed, was not to be found in other writers of equal authority. And he said that general average must lay its foundation in a sacrifice of part for the sake of the rest, but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather. That this was not like the case recently before the court (*Plummer* v. *Wildman*), where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed." In *Hallett* v. *Wigram* (9 C.B. Rep. 580) Cresswell, J., says: "Damage done to the ship by stormy and tempestuous weather never yet has been held to be the subject of general average. The pleas adopt the description of the damage in the declaration. They then go on to say that, in consequence of such damage, it became expedient and necessary for the vessel to put back to Adelaide. Could it be said at that time that there was an average loss? The only instance where this has been supposed to be so, prior to the case of *Plummer* v. *Wildman* (*ubi sup.*) is in the passage in Beawes's Lex Mercatoria (p. 245) cited by Buller, J., in *Da Kosta* v. *Newnham* (2 Term Rep. 407) where it is said that 'The charges of unlading a ship, to get her into a river or port, ought not to be brought into general average, but when occasioned by an indispensable necessity to prevent the loss of ship and cargo; as, when a ship is forced by a storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; in which case the wages and victuals of the crews are brought into an average from the day it was resolved to seek a port to refit the vessel, to the day of her departure from it, with all the charges of unlading and relading, anchorage, pilotage, and every other due and expense occasioned by this necessity.' But there was no authority in the English law, that I am aware of, until the case of *Plummer* v. *Wildman*, which undoubtedly does go to that extent. But Lord Ellenborough was in the next case that occurred anxious to protect himself from being thought to have intended to lay down the principle so largely; he qualifies and explains that case in *Power* v. *Whitmore* (*ubi sup.*) where he states the rule exactly according to what has always been, and still is, understood to be the law as to general average. And Lord Tenterden never meant to lay down the law larger than that. He refers, in Abbott, 8th edit., p. 475, to the Rhodian law. 'The rule of the Rhodian law, he says, 'is this: . . . . From the rule thus established by the Rhodians, various corollaries have been deduced. . . . Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held that the expense of unlading, warehousing, and reshipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage.' For this he refers—and evidently with an expression of doubt—to *Plummer* v. *Wildman*, which, as before observed, was afterwards explained by Lord Ellenborough himself." A dictum of Lord Campbell, C.J. in *Hall* v. *Janson* (4 E. & B. 500) will be relied on on the other side. Lord Campbell says, "Now, the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution, for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight." But the case with which he was dealing there was a question of particular loss, and, from what is conceded on the other side, that is a wrong dictum. The cases of *Job* v. *Langton* (6 E. & B, 779) and *Walthew* v. *Mavrojani* (L. Rep. 5 Ex. 166; 22 L. T. Rep. N.S. 310; 3 Mar. Law Cas. O.S. 382) are in the appellants' favour. There the court points out that if the re-loading of the goods is necessary to their safety, as in the case of the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe, the costs so incurred would then be general average, but not otherwise. He also cited

The Copenhagen, 1 Chris. Rob. 289;
Stewart and others v. *The West India and Pacific Steamship Company*, 2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 88, 362; 27 T. L. Rep. N. S. 820; 28 L. T. Rep. N. S. 742.

Cohen, Q.C. (*J. C. Mathew* with him) for the respondents.—If part of the apparel of the ship is sacrificed, and it becomes necessary to put into port and warehouse the cargo, all the expenses of repairs, unloading, warehousing, &c., are general average expenses, but wages are not. All foreign laws and usages are in the plaintiffs' favour. *Power* v. *Whitmore* (4 M. & S. 141) and *Plummer* v. *Wildman* (3 M. & S. 482) are decisions favourable to the plaintiffs, and *Moran* v. *Jones* (7 E. & B. 523; 29 L. T. Rep. O. S. 86) does not affect the present contention. He also cited

Abbott on Shipping, 3rd edit. pp. 335, 356; 8th edit., p. 478;
Arnould on Marine Insurance, 2nd edit., pp. 906, 927;
Lowndes on General Average, p. 267;
Hallett v. *Wigram*, 9 C. B. 580; 15 L. T. Rep. O. S. 137;
Wilson v. *Bank of Victoria*, L. Rep. 2 Q. B. 203; 2 Mar. Law Cas. O. S. 449;
Job v. *Langton*, 6 E. & B. 779; 27 L. T. Rep. O. S. 218;
Walthew v. *Mavrojani*, L. Rep. 5 Eq. 116; 22 L. T. Rep. N. S. 310; 3 Mar. Law Cas. O. S. 382;
Johnson v. *Chapman* 19 C. B. Rep. N. S. 563;
Stewart v. *Pacific Steamship Company*, 2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 362;
Achard v. *Ring*, 2 Asp. Mar Law Cas 442; 31 L. T. Rep. N. S. 647.

Butt, Q.C. in reply.—Where the law is at least doubtful, and where the practice for seventy years has been unimpeached by any positive decision, the courts will uphold the practice. *Johnson* v. *Chapman* (*ubi sup.*), cited by the other side, does not support the proposition that the courts have not been in the habit of regarding the practice. Lowndes on General Average is cited on the other side to show that the practice is different to that of other nations, and therefore unreasonable. But it is admitted that one-half of the English practice, though differing from the practice of other nations, is in accordance with

English law. It would produce confusion, therefore, rather than uniformity to alter the other half so as to make it in accord with the practice of other nations. The other side rely upon the case of *Plummer* v. *Wildman* (*ubi sup.*) and a passage in Abbott on Shipping. [BRAMWELL, L.J.—And the reason of the thing? *Plummer* v. *Wildman* is no authority. Lord Ellenborough himself says that it was wrong, and Lord Tenterden speaks of it "evidently with doubt" (9 C. B. 580, p. 609). It is submitted that the court will not disturb a course of business uniformly acquiesced in for seventy years.

Cur. adv. vult.

March 24.—The judgment of the Court was delivered by

THESIGER, L.J.—The question raised by this appeal is, whether in the case of a vessel going into port in consequence of any injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage, and other charges on the vessel leaving the port, are the subject of general average also.

The matter came before the court below in the form of a special case, and upon it the court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average. The special case states a long-continued practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as a general average, and the expense of warehousing it as particular average on the cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It was not, however, and could not reasonably be contended for the defendants that the practice could be put so high as a custom impliedly incorporated in the contract between the parties, and during the course of the argument we intimated our opinion, founded on the language of the special case with regard to this practice, and especially the language of the fifth paragraph, that the question between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow. The law governing the case is admittedly English law, for the expenses in dispute arose upon a voyage, the proper and actual termination of which was an English port. As a matter of principle, we are clearly of opinion that the judgment of the majority below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss immediate and consequential caused by a sacrifice for the benefit of cargo, ship, and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded; and that general average ceases at the point of time when the common danger is at an end. The proposition is, as will appear later, sound when applied to cases in which a ship is damaged by the perils of the sea, and before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped, and in safety; but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury, occasioned by a general average sacrifice, may be, and generally is, when in port in perfect safety; and if by the expression "common danger" be meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and, indeed, in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her, while the remainder of the goods is left on board. If, on the other hand, by "common danger" be meant the danger of the vessel with her cargo being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges paid in respect of the vessel leaving port and proceeding on her voyage, should not constitute general average, than there is reason for saying that unloaded and warehoused goods should not contribute, as it is clear in a case of a voluntary sacrifice that they must, to the expenses of the necessary repairs to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice, and necessary for the due prosecution of her voyage by the vessel with her cargo. Neither class can, as a general proposition, be said to be incurred exclusively for the benefit of either vessel or cargo. In some cases it might be for the interest of a shipowner to terminate the voyage at the port where his vessel puts in to repair a disaster, while it might be all important for the goods owner to have his goods carried on by the same vessel. In other cases the position of the parties in this respect might be reversed; but, however this may be, the going into port, the unloading, warehousing, and reloading of the cargo, and the coming out of port, are, at all events, parts of one act or operation, contemplated, resolved upon, and carried through, for the common safety and benefit, and properly regarded to be continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on shipping: "If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal." But it is said for the defendants that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages of crew and provisions should equally form

the subject of general average, and that, inasmuch as it is, as they suggest, undeniable that they do not, the principle itself must either be faulty, or at least not recognised in English law. As a matter of fact, it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average; but even if the assertion were correct, the conclusion drawn would by no means follow.

That the principle in question is not faulty we have endeavoured to show in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognised and carried to its so-called logical consequences as regards the wages of crew and provisions in all other countries than our own.

That the principle is not recognised in English law is not proved by showing that expenses incurred for wages of crew and provisions have been under certain circumstances disallowed as the subject of general average unless it be shown, which it has not been to us, at the same time that they have been disallowed upon grounds that negative the principle, and it is disproved if it be found that, notwithstanding such disallowance, the expenses in question in this case have been allowed. All that in such a case can be said is, that either the courts have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy.

If, then, the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it at least may fairly be asked what other principle, if it be not correct, is to be substituted in its place. But the authorities remain to be considered; and it is more necessary that they should be examined with attention, seeing that the practice of average adjusters professes to follow them.

In *Plummer* v. *Wildman* (3 M. & S. 482), a ship put back into port to repair damage partly caused by a collision with another ship, and partly by a cutting away of part of the rigging of the bowsprit, to which the master was compelled, in consequence of a previous injury due to the collision, and which it was contended for the shipowner was a general average cause. The cargo was necessarily relanded and warehoused in order that such temporary repairs might be done as would enable the ship to prosecute her voyage; and such repairs having been done, and a portion of the cargo sold to defray expenses, the remainder of the cargo was reloaded, and the ship proceeded to her port of destination. Among other expenses claimed as general average were the expenses of repair necessary to enable the ship to prosecute her voyage, the expenses of unloading and reloading the cargo, the master's expenses, at five dollars per diem, during the unloading, repairing, and reloading, and expenses for crimpage to replace deserters during the repairs. The question for the court was whether the case was one of general average, and if so to what extent. It is a little difficult to gather from the judgments in the case what was the exact view of the different members of the court who delivered judgment as to the separate heads of claim. Lord Ellenborough appears to have decided that only the captain's expenses in port and crimpage were to be disallowed. Le Blanc, J. said that the unloading might be general average if it were necessary in order to repair the ship, but leaves it in doubt whether the expenses of reloading would or not follow. Bayley, J. deals only with the question how much of the repairs should be allowed as general average, which was the principal question as regards items. Lord Ellenborough, however, laid down that if the return to port was necessary for the general safety of the whole concern, it seemed that the expenses unavoidably incurred by such necessity might be considered as the subject of general average; and that it was not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements or the collision of another ship, as whether the effect produced was such as to incapacitate the ship without endangering the whole concern from further prosecuting her voyage, unless she returned to port and removed the impediment.

But in the same year as that in which *Plummer* v. *Wildman* (3 M. & S. 482) was decided, the case of *Power* v. *Whitmore* (4 M. & S. 141) came before the same court. In that case the cause of damage was a peril of the sea, and the ship having in consequence of it been compelled to go into port for the safety of ship and cargo, a claim to have the wages and provisions of the crew during the stay in port, and the expenses of repair treated as general average was made. The claim was however, disallowed, and Lord Ellenborough, in delivering the judgment of the court, took occasion to qualify the proposition laid down in *Plummer* v. *Wildman* (*ubi sup.*), and to explain and justify the decision in that case upon the ground that there the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. The judgment then in *Power* v. *Whitmore* (*ubi sup.*) must be taken to recognise that there is, in reference to a port of refuge expenses claimed as general average, a distinction between a case of a vessel putting into a port for repair in consequence of a voluntary sacrifice, and a case of a vessel so putting into port in consequence of an ordinary peril of the seas, although in both cases the putting into port itself may equally give rise to a claim for general average contribution. In *Hallett* v. *Wigram* (9 C. B. 580, p. 607), Cresswell, J. in speaking of *Power* v. *Whitmore* (*ubi sup.*), said that Lord Ellenborough had there stated the rule according to what had always been and still was understood to be the law as to general average. Wilde, C.J. (9 C. B. at p. 603) in the same case quoted the following passage from Abbott on Shipping, 8th edit. p. 478: "Thus if it be necessary to unlade the goods in order to repair the damage done to a ship by tempest or by collision with another vessel, so as to enable her to complete and prosecute her voyage, it has been held that the expenses of unloading, warehousing, and reshipping the goods, should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage," and added that the reason there assigned might be applicable to the case the author has in his mind, *Plummer* v. *Wildman* (*ubi sup.*), but that as a general proposition it

was too large. The Chief Justice then points out that the decision in *Plummer* v. *Wildman* had been explained in *Power* v. *Whitmore* upon the ground that the expenses were consequent upon a voluntary sacrifice, and then quotes, apparently with approval, the following passage from Abbott, 8th edit. p. 497: "It seems to result from these decisions that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average, but if the damage was incurred by the mere violence of the wind or weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner, 'to keep his vessel tight, staunch and strong, during the voyage for which she is hired." The actual decision in *Hallett* v. *Wigram* (*ubi sup.*)was, that a claim to general average does not arise where a part of the cargo is sold to raise money at a port to which a ship has put back for the repair of damage incurred by ordinary perils of the sea. That case was decided in 1850, *Power* v. *Whitmore* in 1815, and we have therefore the law as laid down by the courts for a considerable portion of the period over which the practice of average adjusters stated in the special case extends, running counter to that practice by recognising, as regards port of refuge expenses, a distinction between cases where a ship puts into a port of distress for repair of damage caused by a voluntary sacrifice, and cases where it so puts in for repair of damage caused by perils of the sea; and admitting in the former case, as a matter of principle, if not of express decision, expenses such as those in question in this case to be the subject of general average contribution.

This distinction in principle is to be found asserted by Benecke, who was a member of Lloyd's, in his valuable work on the Principles of Indemnity in Marine Insurance, published in 1824. At page 191, he says: "If, setting aside all laws and received opinions, the case is examined merely according to the fundamental maxims which regulate general and particular average, it will in the first instance appear evident that not only all the port charges, such as pilotage, harbour dues, lighterage, &c., but also all the charges of unloading and reloading, repairs, and crew's wages will be general average if the ship put into port for the mere purpose of repairing a damage voluntarily incurred for the general advantage. For all these expenses, being the necessary consequences of a measure taken for the general benefit, belong to general average." And then, turning to the case where the port is entered in consequence of a particular damage sustained, by which the vessel is rendered unfit to prosecute her voyage, as where masts, sails, or other requisite apparel are lost in a storm, or a vessel has sprung a dangerous leak, he adds, "all the expenses of entering the port are a subject of general average, being the consequence of a measure voluntarily taken for the preservation of the whole. But as soon as the object of putting the vessel and her cargo in safety is accomplished, the cause for general contribution ceases, for whatever is subsequently done is not a sacrifice for the benefit of the whole or for averting an imminent danger, but it is the mere necessary consequence of a casual misfortune." Benecke then claims the allowance even of wages of crew and provisions where the putting into port is the consequence of a damage belonging to general average. On the other hand, he contends for the disallowance even of the expenses of unloading cargo where it is the consequence of a damage belonging to particular average. In Stevens on Average and Bailey on Average the distinction referred to is not adopted, except as regards the repairs of the ship; but both writers assert as a matter of principle, that where a ship necessarily puts into port to repair damage, whether the original cause of damage be a voluntary sacrifice or an ordinary peril of the sea, the expenses of warehousing and reloading as well as those of unloading the cargo and the outward as well as the inward port charges, should be the subject of general average contribution: (see Stevens, p. 22 and Bailey, p. 119). They look not to the more remote damage which undoubtedly was a particular average loss, but to the proximate act of putting into port for the safety of ship and cargo which would belong to general average, and in answer to the argument that their views if logically carried out would lead to the allowance as general average of the cost of the repair of the ship (Bailey at p. 119), replies that the damage which necessitated that repair being caused by a peril of the sea, the repair should be treated as particular average, but that the ship does not put into the port of refuge because she wants repairs, but because the voyage cannot be continued until she is repaired, or a total loss of ship and cargo will follow if she does not go into port. He adds at p. 120: "The immediate cause of putting into the port of refuge is the impossibility of completing the voyage in her then state or the expected total loss of ship and cargo; the damage which the ship has sustained is the remote cause only, for under other circumstances the crew are not justified in putting into port, although the vessel may have sustained damage which it will be necessary to repair." The views thus expressed are substantially those which are recognised in American law and practice, and they are carried out to the length of including the expense of wages of crew and provisions at the port of refuge in the amount to be contributed for in general average, in all cases where a vessel puts into port for the common safety, whether owing to an injury from a peril of the sea or a voluntary sacrifice: (see Phillips on Insurance, 3rd edit., s. 1322, 6, 8.) To return to the text writers of this country, Mr. Arnould, in his work on Marine Insurance, 3rd edit., vol. 2, p. 789, after discussing the principles relating to general average, says: "From these principles it follows that where a ship has either cut away her masts or rigging, or has been so damaged by a storm that it is necessary for the safety both of ship and cargo to put into a port of distress for repairs, all the expenses inseparably connected with the act of first putting into, and afterwards clearing out of, such a port of distress, give the shipowner a claim to a general average contribution, and this upon the plain ground that these expenses are a necessary consequence of an extraordinary measure taken for the general preservation."

Neither of the already cited cases of *Power* v. *Whitmore* and *Hallett* v. *Wigram* is a direct authority against the proposition just quoted, except so far as the disallowance of the expenses for wages of crew and provisions in the former case can be said to be such; for, as pointed out, the main subject of contention in those cases was the claim for expenses of repair made, notwithstanding that such repair was in each case rendered necessary in consequence of injury caused by ordinary perils of the sea, and neither the expenses of unloading, warehousing, or reloading cargo, nor port or pilotage charges, came in question. The case of *Hall* v. *Janson* (4 E. & B. 24 L. J. 2 B. 97), decided in 1855, is, on the contrary, direct authority in favour of the proposition that the expense of re-loading as well as of unloading cargo constitutes a claim to general average contribution, even though the original cause of putting into port was a particular average loss. There, in an action upon a policy of marine insurance, a count of the declaration states that the ship had been damaged by stormy weather and forced to go into port for repair, in order to enable her to prosecute her adventure and proceed on her voyage, and had there incurred expenses *inter alia* in and about unloading and reloading cargo which was necessarily unloaded for the repair of the ship. This count was upon demurrer held good as showing the accruing of a general average loss; and Lord Campbell, C.J., in delivering the considered judgment of the Court of Queen's Bench upon the point, said: "Now, the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be capable of proceeding on the voyage have been held to give a claim to general average contribution; for the acts which occasioned these expenses become necessary from perils insured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight." And after citing *The Copenhagen* (1 C. Rob. 289), *Plummer* v. *Wildman* and Stevens on Average, as authorities in support of the proposition, he added: "This doctrine is quite consistent with what is laid down in *Power* v. *Whitmore* and the other cases relied upon by Mr. Wilde." It is not necessary for us to decide in the present case whether *Hall* v. *Janson* was rightly decided, and whether the expenses in dispute in the present case would properly belong to general average, if the original cause of damage to the ship had only been a cause belonging to particular average. If, however, the Court of Queen's Bench, in the judgment just quoted, and the several text writers, other than Benecke, from whom we have quoted, are right in the propositions affirmed by them, and the expenses would in such a case belong to general average, it follows *à fortiori* that they would so belong when, as is the fact here, the original cause was a voluntary sacrifice, while, on the other hand, even if the proposition laid down in *Hall* v. *Janson*, and supported by the text writers referred to were too wide, there would still be left a consensus of opinion to the effect that in such a case as the present at least the expenses in question must be treated as constituting a claim to general average contribution. In either case the practice of the average adjusters as stated in the special case would be erroneous, and it is to be gathered from a recent edition of a modern work on the law of general average, by Mr. Lowndes himself, also an average adjuster of experience (3rd edit. 107), that as regards port of refuge expenses, where the bearing up into port is necessitated by a sacrifice, the principle that they should be treated as general average is apart from his own practice, which gave rise to the present action, at least beginning to be recognised in the practice of adjusters and underwriters. The two cases of *Job* v. *Langton* (7 E. & B. 779), and *Walthew* v. *Mavrojani* (L. Rep. 5 Ex. 116; 2 Mar. Law Cas. O.S. 382), do not really touch the point. In each of these cases a vessel having been accidentally stranded, so that the damage thereby caused was only a particular average loss was got off and taken into port for repair at considerable expense after the cargo had been unshipped, landed, and warehoused in safety. It was attempted unsuccessfully to make the cargo contribute to such expense as general average. There can be no doubt as to the correctness of the decisions in those cases, for the whole basis of any general average claim was gone as soon as the cargo was unshipped. The vessel was got off and put into port for repair, not to avert a loss to the whole adventure, but to repair the particular average damage. Lord Campbell, C.J. delivered the judgment of the court in *Job* v. *Langton*, and in the course of his judgment said, "That the stranding was fortuitous, arising directly from perils of the sea, and that the expenses must therefore, in order to constitute general average, be brought within the category of extraordinary expenses incurred for the joint benefit of ship and cargo." And it is obvious, from the whole judgement, that Lord Campbell not only did not consider that his observations would be applicable to the case of a voluntary sacrifice, but also did not consider that there was any conflict between his then decision and his former judgment in *Hall* v. *Janson*. There is nothing in the judgment in *Walthew* v. *Mavrojani* which alters the case. The result of this review of the authorities is to confirm the opinion which, apart from authority, we entertain and have already expressed upon the question submitted to us. The practice then of the average adjusters, as stated in the special case, appears to us to be neither founded on true principles nor to be in accordance with the views of the text writers, and, so far as there is case authority upon the matter, it appears to us to be opposed to legal decision. It is a practice too, which has not been, as the practice in *Stewart* v. *West India and Pacific Steamship Company* (2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 88) was, made a part of the contract between the parties, and therefore constitutes no impediment to our giving effect to the objections to its validity; and, in deciding as we do that the judgment of the majority of the court below was right and should be affirmed, it is satisfactory to us to know that the law as laid down in the judgment of the court below and of this court is placed upon a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile and maritime communities.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.*, agents for *Bateson* and *Co.*, Liverpool.

Solicitors for the defendants, *Parker* and *Clarke.*

Feb. 27 *and* 28, *and March* 1, 1880.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

WAGSTAFF AND OTHERS *v.* ANDERSON AND OTHERS.

APPEAL FROM THE COMMON PLEAS DIVISION.

Ship—Charter-party—Sale of cargo by master—Agency.

Defendants offered plaintiffs "room" in a certain ship for certain cargo for Callao on certain terms. The next day defendants chartered the vessel for a voyage to Callao.

The charter-party provided that the ship should receive on board at such berth as the charterers might appoint such goods as might be required: that the whole ship should be at the disposal of the charterers for the conveyance of goods; that the master and owners should give the same attention to the cargo, and in every respect remain responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master should sign bills of lading as the charterers might require; that the ship should be addressed to the charterers' nominees at Callao, and should proceed thither and deliver cargo; and that the charterers' liability, except for freight, should cease on the vessel being loaded.

On the following day it was agreed between defendants, "acting for owners" of the ship, and plaintiffs, that defendants should receive on board a cargo in accordance with their first offer.

The cargo was shipped, bills of lading were signed, and the ship sailed for Callao, but was driven by stress of weather into Monte Video, where the master improperly sold the cargo.

In an action for conversion of the cargo,

Held (affirming the judgment of Denman, J.), that defendants had not contracted with plaintiffs for the carriage of the goods, nor were they placed in the position of shipowners, so as to be responsible for the act of the master, and therefore they were not liable.

THE plaintiffs were contractors carrying on business under the name of Thomas Brassey and Co., and the defendants, Anderson and Co., were charterers of the vessel *F. K. Dumas.*

The action was brought to recover damages for the alleged wrongful conversion of certain stone and cement belonging to the plaintiffs, which had been shipped on board the *F. K. Dumas.*

The plaintiffs, through their brokers, having entered into negotiations with the defendants Moss and Mitchell, who were ship brokers in London, on the 24th June 1872, Moss and Mitchell wrote to the plaintiffs' brokers, as follows:

We now beg to offer you room in the ship *F. K. Dumas*, hence to Callao, for 750 tons of cement at 30*s.* per ton and 5 per cent., 250 tons of stone at 30*s.* and 5 per cent., the latter not to exceed two tons in each block, the ship to receive cargo on or about the 25th July, and to sail on or about the 25th Aug. next.

On the 25th June 1872, the defendants Anderson and Co., entered into a charter-party by which it was agreed between the master on the part of owners of the good ship *F. K. Dumas*, and the defendants, that the ship should perform a voyage from London to Callao; that she should be maintained in her class by the owners while under the charter; that she should receive on board at such loading berth as the charterers might appoint all such lawful goods as might be required; that the whole ship should be at the disposal of the charterers for the conveyance of goods, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be and remain responsible to all whom it might concern as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to the charter-party; that the ship should be addressed to the charterer's nominees at the port of discharge; that the ship, being loaded, should proceed to Callao and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted; the total freight to be paid for the use and hire of the ship was agreed at the sum of 2500*l.*, to be paid as follows, against captain's order, viz., by charterers' acceptance payable at ninety days from the ship's final sailing from Gravesend, or in cash at 5 per cent. discount, at captain's option; but the owners were to accept in satisfaction of freight all bills of lading bearing freight payable abroad not exceeding one-third of the amount of charter; and the charterers' responsibility, except for the freight, was to cease on the vessel being loaded.

On the 26th June 1872 the following agreement was made:

It is this day mutually agreed between Moss and Mitchell, acting for owners of the *F. K. Dumas*, and Thomas Brassey and Co. (the plaintiffs) that the former shall receive on board in the London Docks 1000 tons of cement in casks $\frac{\text{and}}{\text{or}}$ stone in blocks (the latter limited to 250 tons, and no piece to exceed two tons weight) at the rate of 30*s.* per tons of 20cwt., with 5 per cent. primage thereon freight from London to Callao, the ship to receive the cement on the 25th July, and to sail on the 25th Aug. The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss and Mitchell undertake to pay demurrage on barges; the cargo to be received at Callao as customary, freight to be paid as follows: say, one-half on signing bills of lading less two months discount at 5 per cent. per annum, and the remainder on final discharge at Callao; Brassey and Co. to have the option of shipping two boats not exceeding two tons each. Penalty for non-performance of this agreement 1500*l.*

The acts of Moss and Mitchell, it was admitted, were binding upon the defendants Anderson and Co.

About 1000 tons of stone and cement were shipped, and the vessel sailed; before sailing the master signed bills of lading for the cement and stone "to be delivered at Callao unto" the plaintiffs' "order or their assigns on paying freight for the goods 786*l.* 17*s.* 4*d.*" The sum of 780*l.* 6*s.* 1*d.* (the half freight, minus the discount of 5 per cent. for the two months) was paid by the plaintiffs to the defendants before the ship sailed, leaving the residue, which was the sum mentioned in the bill of lading, to be paid at Callao. The vessel met with bad weather, and was compelled to put into Monte Video, where she was surveyed and condemned. A portion of the cargo was sent on to Callao in other vessels, but the master, without communicating with the plaintiffs, sold the plaintiffs' cement and stone. At the trial, before

Denman, J., the jury found that the master was not justified in selling, and assessed the value of the goods at the time of sale at 1445*l*. The case was argued on further consideration before Denman, J., who gave judgment for the defendants on the ground that they were not responsible for the act of the master in selling.

From this judgment (which is reported *ante*, p. 163; 41 L. T. Rep. N. S. 227) the plaintiffs now appealed.

Watkin Williams, Q.C., *A. L. Smith* and *Hollams* for the plaintiffs.

Butt, Q.C., *Cohen*, Q.C., and *J. C. Mathew* for the defendants.

The arguments are sufficiently noticed in the judgments.

BRAMWELL, L.J.—I am of opinion that this judgment ought to be affirmed. In the first place the document dated the 26th June 1872 is on the face of it an agreement made by Moss and Mitchell, "acting for the owners of the *F. K. Dumas*." There are cases in which it has been held that a signature as agent, where the person signing signs professedly "as agent," does not conclusively exclude personal liability; but I am of opinion that those cases are not applicable to the present. Here the persons signing are ship brokers, and ship brokers do not usually act for themselves. Therefore it becomes manifest on the face of the document, in such a case as this, where it was known that Moss and Mitchell were ship brokers, that on this agreement Moss and Mitchell were not acting for themselves, but were acting for the owners of the vessel. I know that the agreement contains this clause, "The barges as they come alongside shall be immediately discharged, say within the usual seventy-two hours, or Moss and Mitchell undertake to pay demurrage on barges;" but I think that means that Moss and Mitchell acting as agents so undertake. Then if they were acting without authority the only action which could be maintained against them would be one for professing to have an authority which they did not possess, for an agent who has no authority to contract cannot be sued as principal. It seems to me that the document, on the face of it, purports not to bind the defendants as principals, but to bind the ship.

Then it is said that the defendants were acting for the ship and the shipowners, and that an action could be maintained against them if it turned out that they had some interest which might have enabled them to enter into a contract to carry; but it seems to me impossible, on the face of this agreement, to hold that the defendants in any sense undertook that they would carry.

Supposing, however, that difficulty were got over by the plaintiffs, the defendants would still be entitled to say, "What have we undertaken that we have failed to perform?" The agreement states that it is "agreed between Moss and Mitchell, acting for owners of the *F. K. Dumas* and Thomas Brassey and Co. (the plaintiffs), that the former shall receive on board in the London Docks 1000 tons of cement," &c.; they have done so. Then, after providing for the dates of loading and sailing, it contains the stipulation which I have already read as to the barges. If Moss and Mitchell had no authority to enter into that stipulation, possibly the plaintiffs might have said, "You had no authority to bind your principals to all the terms of the agreement, and therefore we will have nothing to do with it," and might have brought an action against Moss and Mitchell for misrepresentation as to their authority; but I am inclined to think that they had authority, as ship brokers, to agree to that stipulation, and moreover no difficulty has arisen in consequence of that clause. The agreement then goes on to provide for the receipt of the cargo and payment of freight, &c. Every word of that agreement has been complied with by the defendants. I cannot see that the plaintiffs have any right to maintain this action. They set out the charter-party in their statement of claim, because otherwise they could not contend that there was a contract by the defendants to carry, and then the statement of the claim goes on to say, "The defendants thereupon for the purposes of loading the ship at freights to be paid to them and of making profit out of the said ship put the said ship up as a general ship to convey goods on the voyage as aforesaid, and contracted with the plaintiffs amongst other persons as follows." Then the letter is set out, and the statement of claim proceeds thus: "The said defendants entered into the said agreement on their own behalf and for their own purposes and not for the shipowners as therein alleged." I think the plaintiffs can have no right to state that. Then Mr. Williams says, to whom is the freight payable? The answer is, that it is payable to the shipowners. Then this difficulty is put: suppose that when the ship arrived at Callao the plaintiffs had refused to receive the goods and pay the freight, who could have maintained an action against them? The answer to that is, that the shipowners could. It is true that the freight received by the shipowners would be something different from that which the freighters would pay, but that was a matter of arrangement between the shipowners and the defendants. I do not like to invent trusteeships, but I do not think that any necessity for doing so exists here, because it would seem that the figures must have been arranged, so far as this particular lot is concerned, in such a manner that the only persons who have any interest in the receipt of these bills of lading are the shipowners, and therefore there is no necessity to invent, what might otherwise be invented without difficulty, a supposed trusteeship. I say there would be no difficulty in inventing, because if it should turn out that the shipowners received the lump freight it would then be a matter of arrangement between them and the defendants that they should pay it over.

I wish to add that I have no misgiving as to the decision in *Colvin* v. *Newberry* (1 Cl. & F. 283). It seems to me to have been rightly decided. I do not think that because a bill of lading is signed by the captain as agent for the ship, a contract is made between the shipowner and the freighter, the freighter having previously arranged with the charterer that the charterer shall carry his goods. I should think that the remedy which the freighter would have would be against the charterer with whom he had entered into the contract of affreightment, and that he would not gain any additional remedy by having taken a bill of lading from the shipowner. It is sometimes said that a bill of lading contains in it a contract, and such is the language of the Bills of Lading Act (18 & 19 Vict. c. 111). This statement may in

many instances be correct, but to say that a bill of lading contains a contract which supersedes, adds to, or varies the previous contract contained in the charter-party, is a proposition to which I am entirely unable to assent.

I am not satisfied that if this had been a contract of carriage between the charterers and the plaintiffs, the charterers would have been liable for the misfeasance of the captain, although he might have been acting within the scope of his authority in such a way that the owners would have been bound. As to this I express no opinion. It might be that the owner would be liable to the shipper, as the Court held in *Ewbank* v. *Nutting* (7 C. B. 797), but possibly he would also be liable to the charterer, who would be bound, in the interest of those with whom he had made some contract of affreightment, to enforce his remedy against the owner, or the captain, or both, and then to account to those with whom he had entered into some contract, although not liable, as the plaintiffs in this case seek to make the charterers liable, as if the misfeasance had been his own act, or that of his agent acting within the scope of his authority. As to this I express no opinion. On the grounds which I have stated I think the judgment ought to be affirmed.

BAGGALLAY, L. J.—I am of the same opinion.

The first question is as to the relations between the plaintiffs and the defendants, and the answer to that question depends upon the construction of the agreement of the 26th June 1872. That document taken by itself seems to me to be nothing more than an agreement entered into by the loading brokers on behalf of the shipowners, whosoever they may be; and so far as any contract was entered into by the defendants with regard to their own acts, I think that contract is limited in the manner stated by Denman, J. in his judgment in the court below, where he says, speaking of the agreement of the 26th June 1872, "It appears to me that it merely amounts to a contract that the owner of the ship shall receive the goods on board and enter into a contract by bills of lading to carry them at certain rates of freight, and that the ship shall sail on or about a certain day named, and that the defendants will pay certain demurrage if the barges are delayed" (*ante*, p. 166; 41 L. T. Rep. N. S. 230).

If any latent ambiguity arises out of the terms in which the contract is expressed, it appears to me on looking at the letter of the 24th June 1872, which preceded the contract, that there is the strongest evidence that the contract was only intended to be a broker's contract, for the letter was written on one of the printed forms used by the ship brokers, and was addressed to the brokers who acted on behalf of the shippers, and amounted to nothing more than an offer of room for a certain quantity of tonnage at a certain freight. If that construction is the correct one, what rights can the plaintiffs have under the contract if there has been any breach of it? If the contract was not authorised by the shipowners the plaintiffs would only have a right of action for damages for misrepresentation of authority. It could in no respect have the effect of putting the defendants into the position of the shipowners, so as to make them responsible for the acts of the master; and, with regard to that particular part, if it did amount to a contract on the part of the defendants to receive the goods in the sense I have referred to, there is no suggestion that they have committed any breach of any such undertaking on their part.

Then it is contended on behalf of the plaintiffs that construing the contract as made on behalf of the shipowners, having regard to all the circumstances, and to what had taken place between the shippers and Moss and Mitchell and Anderson and Co., that Anderson and Co. had become quasi-owners, that is to say owners of the ship for this particular voyage, and therefore that the contract of the 26th June 1872, which was entered into on behalf of the shipowners, was a contract entered into by them on their own behalf, and in respect of which they are liable. I am of opinion that the provisions of the charter-party entirely negative that view. The effect of the charter-party is this: the shipowners accept from the brokers a lump sum of 2500*l.* in respect of the freight to be earned on this voyage leaving the ship brokers to make a profit or sustain a loss according to what the actual return might be, and in all other respects leaving the shipowners and the master to act as if there were no arrangement.

I am therefore of opinion that the contention that the defendants are to be considered as the true owners of the ship, and are therefore liable to be sued under the agreement of the 26th June 1372, cannot be supported.

THESIGER, L.J.—I am of the same opinion.

It is argued on behalf of the plaintiffs that the defendants are responsible for the act of the master of the ship in selling the cargo at Monte Video, upon the ground that the master in selling was the agent of the defendant; that being such agent he was acting within the general scope of his authority, and therefore that, although in this particular instance the sale was, as the jury have found unjustifiable, nevertheless the defendants are responsible for the act done by their agent upon the principle which is laid down in *Ewbank* v. *Nutting* (7 C. B. 797) and other similar cases. Several propositions are involved in this contention. The plaintiffs have to make out that the master of the ship was the agent of the defendants, and I think they have failed to establish this. The goods in question were carried under a bill of lading, and the master when he signed that bill of lading would *primâ facie* be acting on behalf of the shipowners, and the shipowners would be the persons who would be liable for the carriage of the goods, and for everything to which the agent would be entitled to bind the shipowners in connection with the goods. But it is open to the plaintiffs to negative this presumption as to the liability of the shipowners, and they might negative it in either of two ways, by showing that the transactions between the ship owners and the defendants were such as in reality to put the defendants in the position of shipowners for that particular voyage, in accordance with the principles laid down in *Colvin* v. *Newberry* (1 Cl. & F. 283), or by showing that although the transactions between the shipowners and the defendants had not the effect of putting the defendants in the position of shipowners, nevertheless, the defendants had so conducted themselves, or had so contracted with the shippers of the

goods, as to make themselves personally responsible.

In the first place, have the plaintiffs succeeded in establishing that, so far as regards the real transaction between the shipowners and the defendants, the defendants were, for the purposes of this particular voyage, placed in the position of shipowners? I am of opinion that they have not. No doubt there are certain expressions in the charter-party (as, for instance, the paragraph which speaks of the use and hire of the ship, or that which speaks of the whole of the ship being at the disposal of the freighters for the carriage of the goods), which, if read by themselves, would seem to involve the idea that for this particular voyage the defendants were to be placed in the position of the shipowners. But on examining the whole document it becomes apparent that such was not the intention of the parties. There is one clause in the agreement which distinctly negatives the idea that the defendants were to be placed in the position of the shipowners; the clause which I mean is that which provides that the master and owners of the ship shall give the same attention to the crew, and shall in every respect be and remain responsible to all whom it may concern, as if the ship were loaded in the berth by and for the account of the owners independently of the agreement; also near the close of the charter-party there is a provision which, if it were taken by itself, perhaps would not necessarily negative the liability of the defendants as shipowners, but which is very important in favour of the defendants when read with the clause I have just referred to; I mean the provision "That the charterers' responsibility under this charter-party except for freight as provided shall cease on the vessel being loaded."

Shortly, then, what is the meaning of that document? We have in this case foreign shipowners. They have their ship in the port of London, and are desirous of obtaining a full cargo for their ship. They deal with a firm of London ship brokers, to whose responsibility they may well look, and they might reasonably argue in this way: "There is a risk, if we put the ship up as a general ship, of not getting a full cargo; but if we can find a responsible ship broker to guarantee us a certain lump freight, and take the chance of being able to fill up the ship sufficiently to get for himself a freight beyond that lump freight, we are ready, in consideration of the lump freight, to come under all the responsibilities and liabilities that shipowners usually come under." That seems to me, apart from any question of custom, which has not been proved, to be a reasonable agreement, and one which, to judge from its language, the parties contemplated and entered into. This is sufficient to dispose of the question as to whether the real transaction between the parties was such as to substitute the defendants for the shipowners.

But then, in the second place, the defendants might have so conducted themselves and contracted with the shipowners in such a manner as to take upon themselves the responsibilities of shipowners. I do not, however, think that they have done so. Moss and Mitchell were the ship brokers on whose behalf jointly with Anderson and Co. the charter-party was executed by Anderson and Co., and undoubtedly if the letter of the 24th June 1872 is to be looked at as forming part of the contract, it shows very strongly that Moss and Mitchell were acting, not on their own behalf, but as brokers for the ship and shipowners; but, at the same time, we have no right to look at that letter if the document of the 26th June 1872 contained a complete contract for carriage; in that case we could only use the previous letter for the purpose of explaining some latent ambiguity in the agreement. However, I am of opinion that the agreement of the 26th June 1872 does not constitute a complete contract for carriage. It constitutes an arrangement under which Moss and Mitchell, dealing with the plaintiffs, provided for the goods being received on board the ship, with the intention which was common to both parties, and is to be collected from the language used, that when the goods were received on board the ship they should be carried in the ordinary way in which goods are carried under a bill of lading, which, although it is not absolutely the contract, is at all events evidence of a contract on the part of the shipowners under which the goods are carried. In my opinion it is immaterial whether this document, being signed absolutely by Moss and Mitchell, although in the body of the document they speak of themselves as acting for the shipowners, does or does not bind them, for if it does bind them it can bind them to nothing which happens after the goods have been received on board the ship, while, if it does not bind them, then *cadit quæstio*. It therefore comes to this, that the goods were not carried under any contract under which Moss and Mitchell, or Anderson and Co., were personally liable; but they were carried under a bill of lading signed by the captain in the ordinary way, and binding as between the plaintiffs and the shipowners, whose captain he was.

In my opinion it is clear that the captain of the ship in what he did at Monde Video was not acting on behalf of the defendants, and therefore did not render them responsible. For the reasons which I have given I am of opinion that the judgment of Denman, J. was right, and ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiffs, *Parker* and *Co.*

Solicitors for defendants, *Hollams, Son,* and *Coward.*

Monday, June 7, 1879.

(Before Bramwell, Baggallay, and Brett, L.JJ.)

Forwood *v.* The North Wales Mutual Marine Insurance Company.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Absolute damage caused by perils insured against — Abandonment — Constructive total loss.

A shipowner claimed against the insurance company, of which he was a member, upon a policy of insurance incorporating the bye-laws of the company. A constructive total loss of the ship was admitted, but the defendants disputed the claim on the strength of a bye-law, which provided that, in the event of any ship being stranded or damaged, and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents,

under or in pursuance of the power thereby reserved to the company, should be deemed or taken to be an acceptance or recognition of any abandonment of which the assured might have given notice to such company; and that the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which in no case was to exceed the sum insured.

Held (affirming the judyment of Lush, J.), that this bye-law was no answer to the action, and the plaintiff was entitled to recover for a constructive total loss.

Appeal by the defendants from the judgment of Lush, J. on further consideration (reported *ante*, p. 219; 41 L. T. Rep. N. S. 802), holding that the plaintiff was entitled to recover for a constructive total loss on a policy of marine insurance, the material clauses of which are referred to in the judgments in the court below and in the Court of Appeal.

It was admitted on the statement of defence that the plaintiff's vessel was, whilst the policy was in force, damaged by perils of the sea to such an extent that the costs of repairing would have amounted to more than the ship would have been worth when repaired; that a prudent uninsured owner would not have repaired her, but would have sold her unrepaired, and that the plaintiff, within a reasonable time, gave notice of abandonment—that in effect there was a constructive total loss.

The plaintiff was a member of the defendant company, and the contention on their behalf, both in the court below and in the Court of Appeal, was that the bye-laws of the company, which were indorsed upon and incorporated into the policy, had the effect of excluding a claim for a constructive total loss.

The 24th bye-law, on the construction of which the decision turned, was as follows:

Every loss by stranding or otherwise shall, without delay, be made known to the manager, and all protests, vouchers, surveys, and other statements relating thereto shall be sent to the manager and laid before the directors and be subject to the stipulations contained in these bye-laws. In the event of any ship being stranded or damaged, and not taken into a place of safety, it shall be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and any owner or his representative refusing the co-operation of the agents of this company for the safety of such ship, shall suffer a deduction of not less than 25 nor over 50 per cent., as the directors shall determine in the settlement of the claim. And it is hereby provided that no acts of the company or its agents, under or in pursuance of the power hereby reserved to the company, shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company; and the company, under any circumstances, shall only pay for the absolute damage caused by the perils insured against, which in no case is to exceed the sum insured.

Charles Russell, Q.C. and *Trevelyan* appeared for the defendants, and the *Solicitor-General* (Sir F. Herschell, Q.C.) and *Barnes* for the plaintiff.—The appeal was argued together with an appeal from the judgment of Lord Coleridge, C.J. in a case of *Forwood* v. *The Provincial A 1 Mutual Marine Insurance Company*, which raised the same point and in which *Cohen*, Q.C. and *Witt* appeared for the defendants, and *Butt*, Q.C. and *J. C. Mathew* for the plaintiff.

Stringer v. *The English Insurance Company*, 22 L. L. Rep. N. S. 802; L. Rep. 4 Q. B. 676; L. Rep. 5 Q. B. 599, 3 Mar. Law Cas. O. S. 440, was cited.

Bramwell, L.J.—I think this judgment should be affirmed. We cannot listen to statements of fact as to the intention of the parties when they made these rules, but we must construe the rules according to the language used. This is a valued policy, and would apply to a case of an actual total loss, and the question which we have to decide is whether it applies also to a case of a constructive total loss. The effect of the construction contended for on behalf of the defendants would be to put into the policy, after the proviso that the ship is valued at 3600*l.*, the words "if there is an actual total loss." The policy goes on to provide that the acts of the assurer or assured in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment. From this provision it is manifest that the parties contemplated that abandonment might be made and accepted. The bye-laws and the policy are one document, and the 24th bye-law contains these words, "And it is hereby provided that no acts of the company or its agents under or in pursuance of the power hereby reserved to the company shall be deemed or taken to be an acceptance or recognition of any abandonment of which the assured may have given notice to such company;" it is admitted that if that clause stood alone there could be an abandonment and a constructive total loss. Then these words come, "and the company under any circumstances shall only pay for the absolute damage caused by the perils insured against, which in no case is to exceed the sum insured;" it is said that these words show that there cannot be a constructive total loss and a right to abandon and claim for such a loss. If these words cannot be construed so, it seems to me that the defendants fail; they can only succeed by showing that the bye-law excludes a constructive total loss in every case. It is manifest that the words, "under any circumstances shall only pay for the absolute damage caused by the perils insured against," cannot have a literal acceptation, and that they are incorrect. The clause is in an improper place, being inserted at the bottom of the rule. It should be a separate rule. I am not sure that Mr. Butt's explanation is not right, when he says that after the word "abandonment" we must read into the rule the words "which the assured has a right to make." But, however that may be, I do think this is certain. This is a valued policy, and a power of abandonment is an ordinary incident to such a policy, and is not to be taken away except by express words.

Baggallay, L.J.—I agree that the judgment ought to be affirmed. The construction contended for by Mr. Cohen and Mr. Russell would exclude all cases of constructive total loss, or at least all cases of constructive total loss by stranding. This would be contrary to the provisions of the policy, by which acts of either party in recovering, saving, or preserving the property insured, "shall not be considered a waiver or acceptance of abandonment;" this clearly contemplates that abandonment may take place. The most material parts of the 24th bye-law are the second and third paragraphs; these provide for a particular class of cases, and give power in such cases to do all that is possible for the safety of the ship. It seems to me, therefore, that any construction which excludes a constructive total loss cannot be

applied, nor any construction which applies to all cases except the case of a constructive total loss by stranding. Then the burden is cast on the appellants to show that these words are cut down by the last clause of the bye-law. It seems to me that this is a valid claim on the part of the respondent to recover in respect of a constructive total loss. I cannot accept the construction contended for on behalf of the appellants, for it is inconsistent with the previous provisions contained in the 24th bye-law, and with the words of the policy.

BRETT, L.J.—The first question is whether, under the policy and the rules, which are to be taken as part of the policy, there can be a constructive total loss. I can understand the argument which says there cannot, and the grammatical construction would be so. But it seems to me impossible to say that the framers of the bye-laws had that construction in their contemplation. If we attempt to give that construction, we make the bye-law inconsistent with the policy and with itself. Mr. Cohen says that if the bye-laws are inconsistent with the policy they must overrule the policy; but the words which he relies on are inconsistent with what is contemplated by the sentence immediately before them in the same bye-laws. It seems to me that the words at the end of the bye-law do not apply to a constructive total loss, and that such a loss is within the policy. Can it mean that the insurers shall only pay the value of the ship? That is inconsistent with the notion of a valued policy. As to a partial loss, the percentage on the value insured may be more or less than the actual value of the loss. It does not apply to a constructive total loss. I do not know what it means, but I cannot, as at present advised, accept Mr. Justice Lush's, or Lord Coleridge's, or Mr. Butt's construction. For the reasons I have given I am of opinion that the judgment ought to be affirmed.

BRAMWELL, L.J.—The judgment in both the cases will be that the plaintiff is to recover for a total loss. *Judgment affirmed.*

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendants, *Forshaw* and *Hawkins.*

Dec. 16, 1879, *and April* 20, 1880.

(Before COCKBURN, L.C.J., BRAMWELL, BRETT, and COTTON, L.JJ.)

SCARAMANGA AND Co. *v.* STAMP AND GORDON.

Ship and shipping—Assisting ship in distress—Deviation from course—Not in order to save life—Loss of cargo—Liability of shipowner.

The owner of a ship who has contracted not to be liable to the freighters for loss of cargo by perils of the sea, is, nevertheless, liable to them for such loss, during a deviation of her course for the purpose of saving a ship in distress and her cargo, if such deviation was not (or was prolonged until it ceased to be) reasonably necessary in order to save life.

APPEAL of the defendants from the judgment of Lindley, J. upon further consideration. Cause was at the same time shown against a rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence which had been refused by the Common Pleas Division, but granted in the Court of Appeal.

This was an action tried before Lindley, J. and a special jury, at the Easter Sittings 1879. The action was brought on a charter-party, by the freighters of a cargo of wheat against the owners of the steamship *Olympias*, for the loss of the cargo. By the terms of the charter-party, the *Olympias* was to proceed with the wheat on board from Cronstadt to the Mediterranean. The excepted perils were the usual perils of the sea. The *Olympias* left Cronstadt on the 21st Nov. 1877; on the 30th, whilst in her proper course, she sighted and went to the assistance of another ship in distress, called the *Arion*; and on the same day the master of the *Olympias* entered into an agreement to tow the *Arion* to the Texel for a sum of 1000*l.* In pursuance of this agreement, the *Olympias* took the *Arion* in tow, and proceeded with her towards the Dutch coast, in so doing deviating from her direct course. During such deviation, on the night of the 22nd Dec. 1877, the *Olympias*, got ashore near the Terschelling Light, and she and her cargo were utimately lost by perils of the sea. The jury found that the loss of the ship and cargo was not attributable to the negligence of the master of the *Olympias*; that the deviation of the *Olympias* was not reasonably necessary in order to save the lives of those on board the *Arion*; and that such deviation was reasonably necessary in order to save the *Arion* and her cargo. After argument upon further consideration, Lindley, J. held that the deviation was unjustifiable, and that the plaintiffs were consequently entitled to recover against the owners the value of the cargo: (*ante*, page 161; 41 L. T. Rep. N. S. 191.)

Herschell, Q.C., *Benjamin*, Q.C. (*Cohen*, Q.C. and *F. O. Crump* with them), for the appellants.—The question here really is how far a deviation in order to save life is a deviation which makes the shipowner liable for a loss to the owner of cargo. [COCKBURN, C.J.—Do you admit that if there had been no lives on board to be saved this would have been such a deviation as to make the shipowner liable?] It is not necessary to deny it here: (*Bond* v. *The Brig Cora*, 2 Wash. C.C. 80.) The question that ought to have been left to the jury is whether, under the circumstances, the steps taken by the defendant were a reasonable mode of saving the lives that were in peril. It cannot surely be said that, although you may deviate to save life, you may only save the lives in peril by the one particular mode of taking them off the vessel. There is no English authority directly in point. *Davies* v. *Garrett* (6 Bing. 716) is the only case of an action like this. That was an action by a cargo owner against a shipowner for loss after deviation; but there the deviation was a wrongful act, so that it is not in point against us. In *Lawrence* v. *Sydebotham* (6 East, 45) Lord Ellenborough, C. J. says: "On the short point of the case my opinion is, that a liberty to chase, capture and man, cannot be extended beyond what is necessary for the performance of those acts, and that the conveying of the prize afterwards does not necessarily arise out of such a liberty. This does not affect the question how far slackening sail from motives of humanity, to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps when such a case does

arise, it may be found to be for the general benefit of all insurers (and amongst others consequently for the benefit of those who may raise such an objection) to allow such succour to be given without imputing deviation to the succouring ship. It is not however necessary now to give any opinion on that point. In this case the slackening sail for the purpose of conveying the prize was a deviation which annuls the policy." And in the same case Lawrence, J. says: "As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that was not the case here. The prize was in no distress so as to make it necessary to keep her company on that account: nor was that the motive of keeping with her." Again, in *The Waterloo* (2 Dodson 433), it is not treated as clear that a vessel will lose her insurance by deviating in order to succour a ship in distress. In *The Jane* (2 Hagg Adm. Rep. 338, 345) the court entertained some doubt as to the positive forfeiture of the insurance in all cases by deviation to assist vessels in distress. In *The Orbona* (1 Spinks 161) Dr. Lushington says: "It is said that the insurance of the *Poictiers* was void. That is not true in law; for it is not the law that if one vessel goes out of her way to assist another in distress the insurance is void. [Cockburn, C.J.—There the two men on board could not have navigated the vessel in distress, but with the assistance of four men from the *Poictiers*, they were able to do so; therefore, the *Poictiers* going out of her way was the means of saving the two men's lives. Brett, L.J.—Dr. Lushington's language shows that those on board the *Poictiers* did not know that life was in danger; can the forfeiture depend upon how that turns out?] The true rule is that any vessel seeing the signal of another in distress may go to succour her without deviation. That rule would not apply to the case of a derelict. The succouring vessel may give such succour as is reasonable. She is not restricted to taking the crew off the vessel in distress, and then continuing her course with the rescued crew on board. In Phillips on Insurance, 3rd ed., i., 581, the rule is stated as follows: "Delay or going out of the course to succour those who are in distress, has been invariably held not to be a deviation. . . . Delay or going off the course merely to save the property of others is considered to be a deviation." They also cited

The Beaver, 3 Chr. Rob. 292;
The Deveron, 1 W. Rob. 180.

Butt, Q.C. and *J. C. Mathew* for the respondents.—The decision in the court below is not an interdiction of assisting vessels in distress; there is still the salvage to be earned, which will act as a sufficient inducement. It is the shipowner, not the owner of the cargo, who gets the salvage. The vessel here was lost during and in consequence of the towage services. As to whether a ship can deviate to save property alone there is no English authority in point. As to *The Orbona* (*ubi sup.*), there was in that case danger to life, and further, Dr. Lushington afterwards took a different view. In *Papayanni* v. *Hocquard*, *The True Blue* (L. Rep. 1 P. C. 250), Dr. Lushington, in giving the judgment of the court, says: "It never has been directly decided by any court in this country what is the effect of a deviation, where the object of that deviation has been the performance of salvage service with reference either to life or to property. . . . . Now in these cases, their Lordships have been invited to solve that question. There Lordships beg leave to decline that invitation. . . . . We will only add that in all these cases where the judge considers in his own mind what he ought to do with respect to the amount of salvage to be given he can never forget that there was possibly a risk incurred by those on board the salving vessel in respect to the vacation of policies of insurance, and in regard to actions which might be brought against the owners of the vessel by owners of cargo." That case and *Carmichael* v. *Brodie* (L. Rep. 1 P.C. 454) show that *The Orbona* (*ubi sup.*) is no authority in favour of the appellants. In Kent's Commentaries, 12th edit,, iii., 313, 314, it is said that. "Stopping or going out of the way to relieve a vessel in distress, or to save lives or goods, may perhaps under certain circumstances not be considered as a deviation which discharges the insurer. Mr. Justice Lawrence intimates in one case (6 East 54) that it might be justifiable; but Judge Peters observed that such deviations were justified to the heart on principles of humanity, but not to the law. If, however, the object of the deviation was to save life, Judge Washington afterwards observed that he would not be the first judge to exclude such a case from the exception to the geueral rule, though he could not extend the exception to the case of saving property." *The Brig Cora* (*ubi sup.*) as far as it goes, is an authority in favour of the respondents. In Parsons on Marine Insurance ii., 33-35, the law in America on this subject is thus laid down: "It is quite certain that a delay or a departure from the course to save life on board another vessel, or even to give assistance to those in distress, is not a deviation. Always provided, however, that the change of course or the delay was no greater and no longer continued than the cause for it actually required. . . . . But it seems to be held that a delay or a departure for the purpose of saving property is, under all circumstances, a deviation; perhaps for the reason that, if the property be saved, the salvors may claim out of it a recompense by way of salvage, and in decreeing salvage an Admiralty Court may, and in practice always does, allow for the loss of insurance. A delay for the purpose of towing a vessel is certainly a deviation, unless there are persons on board the vessel towed who can be saved in no other way." In support of this, the author refers to *Crocker* v. *Jackson* (Sprague, 141). There, Sprague, J., in delivering his opinion, said: "As the sea and wind were such that the crew of the brig could not be transferred to the *La Grange*, and both vessels were fast drifting out of their course, the taking the brig in tow was the proper mode of relief. The only serious question is, whether the towing was continued too long. It is urged, in behalf of the respondents, that the object of the captain of the *La Grange* was pecuniary gain, by earning salvage. But the crew of the brig needed assistance, and it must be presumed that the master was also actuated by a desire to afford them relief. Now, there being a double motive—to relieve distress and to save property—does not render the delay a deviation, nor impair the merit of the act. The law, so far from discouraging the union of these motives,

enhances the amount of salvage compensation where the saving of property is accompanied by relief to passengers or crew. But if the towing was continued after it had ceased to be necessary to relieve the distress of the crew, and merely to save property, then it was a deviation; but I am not satisfied that it was so continued." Assuming that deviation to save life is no breach, then the question necessarily arises as to what is a reasonable mode of saving life. The proper question for this jury is, Was this deviation necessary in order to save life?

Cohen, Q.C. in reply.

Cur. adv. vult.

April 20.—The judgment of Cockburn, C.J., Brett, and Cotton, L.JJ., was delivered by

Cockburn, C.J.—This is an appeal from a judgment of Lindley, J. after a trial at Nisi Prius. The facts are not in dispute, and lie in a very narrow compass. The steamship *Olympias*, of which the defendants are owners, having been chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibralter, and having started on her voyage, when nine days out, sighted another steamship, the *Arion*, in distress, and, on nearing her, found that the machinery of the *Arion* had broken down, and that the vessel was in a helpless condition. The weather was fine and, the sea smooth, and there would have been no difficulty in taking off, and so saving the crew; but the master of the *Arion*, being desirous of saving his ship, as well as the lives of his crew agreed to pay 1000*l.* to the master of the *Olympias* to tow the ship into the Texel. Having taken the *Arion* in tow, the *Olympias* when off the Dutch coast, on her way to the Texel, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

Under these circumstances, the plaintiff claims the value of his goods, alleging that the goods were not lost by perils of the sea, so as to be within the exception in the charter-party, but were lost after the wrongful deviation of the defendants' vessel. The defendants plead that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo, and the lives of her captain and crew, the ship being in such a damaged condition that she could not be navigated. That there was here a twofold deviation, which, unless the circumstances were such as to justify it, would entitle the plaintiff to recover, cannot be disputed; in the first place, in the departure of the *Olympias* from her proper course in going to the Texel; secondly, her taking the *Arion* in tow, which, in the three American cases of *Herman* v. *Western Marine and Fire Insurance Company* (15 Louisiana Rep. 516), *Natches Insurance Company* v. *Stanton* (2 Smed. & M. 340), and *Stewart* v. *Tennessee Marine and Fire Insurance Company* (1 Humph. 242). has been held to be equivalent to a deviation and rightly so, seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel and thereby to prolong the risk of the voyage. It is unnecessary to consider how far, if the loss had not been the consequence of the deviation, the mere fact of deviation would render the shipowner liable to the goods owner for loss that ensued after it, as distinguished from its effect in a case of insurance, as there can be here no doubt that the loss not only occurred during the deviation, but was occasioned by its there being the express admission of the master to that effect; and the case therefore comes within the ruling of *Davis* v. *Garrett* (6 Bing. 716), the authority of which, so far as relates to a loss of goods occurring during the course of a deviation, never has been questioned.

It becomes therefore necessary to consider how far the grounds on which the defendants seek to justify the deviation can avail them in defence of the action. As regards that part of the plea which seeks to justify the deviation on the ground of its having been for the purpose of saving the lives of the crew of the *Arion* it is obvious that the defence fails on the finding of the jury, who have found, and beyond question rightly, that the deviation was not reasonably necessary in order to save the lives of those on board. On the other hand, the jury have found that the deviation was reasonably necessary for the purpose of saving the *Arion* and her cargo. The question for decision is, therefore, whether, when deviation has taken place with the object, not of saving life, but of saving property alone, the ship owner will be exempt from liability to a goods owner where goods have been lost through the deviation. Mr. Justice Lindley, before whom the case was tried at Nisi Prius, gave judgment in favour of the goods owner, the plaintiff, and the case comes before us on appeal from his decision. I am of opinion that his decision was right and ought not to be disturbed.

It is a remarkable fact that, while the commerce and the mercantile marine of Great Britain have been for so many years the largest in the world, the question as to how far a deviation for the purpose of saving life or property renders the shipowner liable to a goods owner, whose goods have been lost through the deviation, has never come before the tribunals of this country, so as to be authoritatively determined; while in the United States, both questions have on several occasions come before the courts, and the law may now be taken to be there settled by judicial decision, as well as by the consensus of jurists. In this country the question, with one exception, has only presented itself incidentally to that of salvage, and cannot be said even in that form to have been brought to the test of judicial decision. The exception in question is to be found in the case of *Lawrence* v. *Sydebotham* (6 East, 54), in which the question of deviation to assist a vessel in distress was incidentally touched upon, but was not the point for decision. In that case Lawrence, J. says: "As for deviation for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. But that," he continues, "was not the case here: the prize was in no distress." This observation, made to meet the argument of counsel was altogether *obiter dictum*, the question in the cause having no reference to deviation at all, but being whether under a policy authorising the taking of prizes in the course of a voyage, the shortening sail, in order to remain by and protect a captured prize, was within the terms of the policy. The learned judge, it is to be observed, in no way explains what he means by the terms "deviation," or the degree of assistance which is to be understood as to be given for what he terms

"the common advantage." That the question of deviation was not before the court is apparent from the language of Lord Ellenborough, who, after stating what the point really was, says: "This does not affect the question how far slackening sail, from motives of humanity, to succour another ship in distress is allowable; nor is it necessary to touch upon it. Perhaps, when such a case does arise, it may be found for the benefit of all insurers (and amongst others consequently for the benefit of those who may raise such objection) to allow such succour to be given without imputing deviation to a succouring ship. It is not, however, necessary now to give any opinion on that point."

The other cases in which the question has incidentally arisen are all cases of salvage. In the case of *The Beaver* (3 Chr. Rep. 292) there were conflicting claims, it being insisted on behalf of a king's ship that the ship saved had been a derelict, and had been saved entirely through the assistance of the king's ship. All that Sir William Scott says is, "With respect to the king's ship, I cannot admit the inflamed representation which has been made of their services. It is the duty of every king's ship, and indeed of every other ship, to give assistance, as well against the elements as against the enemy." How far that duty extended or how far it would protect a shipowner from the consequences of a deviation, the learned judge does not say, nor does it appear to have been present to his mind. In the latter case of *The Waterloo* (2 Dods. 433), in which salvage was claimed by the owners and crews of a ship chartered by the East Indian Company, for salvage services rendered to one of the company's own ships, and in which the claim was resisted on the ground that, by the terms of the charter-party and of the instructions under which the ships sailed, no salvage could be demanded, Sir William Scott, it is true, says: "As to the instructions, they extend no further than to enjoin the duty of assisting other ships belonging to the company; but they do not express that this duty, which it is very proper to enjoin, shall receive no remuneration, whatever be the active merit, whatever be the suffering incurred in performing it. It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it; but that does not discharge from liability to payment where assistance is substantially rendered." Here again the learned judge is dealing with the subject of duty only so far as it affected the claim to salvage; with its effect in respect of deviation he had nothing to do. Yet it appears to have occurred to him that the deviation might not be without serious consequences in respect of the ship's insurance; for in fixing the amount to be paid for salvage, after dwelling on the merits of the claim, he adds: "Nor can I altogether lose sight of the danger the ship thus incurred of vitiating her insurance, though that may be a questionable point." In the case of *The Jane* (2 Hagg. 338), where the master of a whaler with a boat's crew had gone, at the risk of their lives, to the assistance of a vessel dismasted and with the sea making a breach over her, and the crew of which had taken to the rigging as their last resource, it being urged on behalf of the owners that they had incurred the risk of forfeiting their insurance, the court (Sir Charles Robinson) is said to have "entertained some doubt as to the positive forfeiture of the insurance in all cases by deviation to assist vessels in distress," evidently looking upon the question as an unsettled and uncertain one. In the later case of *The Orbona* (1 Spinks 161), Dr. Lushington appears indeed, to have taken a more decided view Referring to the claim for additional salvage, on the ground of the fatal effects which the deviation might have had on the insurance, he says: "It is said that the insurance of the *Poictiers* was void. That is not true in law; for it is not the law that if one vessel goes out of her way to assist another in distress, the insurance is void." In support of which he refers to what was said by the judges in *Lawrence* v. *Sydebotham* (*ubi sup.*), but which as I have already shown, affords no sufficient authority for the position in question.

In two more recent cases the Judicial Committee of the Privy Council appear, however, to have taken a more doubtful view of the subject than appears to have been entertained by Dr. Lushington in the case just referred to. In delivering the judgment of the Judicial Committee in *Papayanni* v. *Hocquard* (L. Rep. 9 P. C. 250 (*ubi sup.*), the risk run of vitiating the insurance having been urged as a reason for increasing the amount to be allowed for salvage, Dr. Lushington says: "With reference to the uncertainty in which the subject is involved, their Lordships have been invited to solve the question. Their Lordships beg to decline that invitation." "We are of opinion," he continues, "that this question ought to be raised, not incidentally before this, but directly before another tribunal, as the great question at issue, and there receive the most careful deliberation, until at last it comes to a final solution and is set at rest." He adds, however, that in considering the amount of salvage to be given, "The judge can never forget that there was possibly a risk incurred in respect of the vacating of policies, and in regard to actions which might be brought by owners of cargo." In like manner, in the subsequent case of *Carmichael* v. *Brodie* (L. Rep. 9 P. C. 461), the Judicial Committee held that the claim of the owners of the ship should be considered with reference to "the doubt whether the insurance might not be vitiated, and whether the owners of the ship might not become responsible to the owners of the cargo for the acts of their servants in deviating from their course to render the assistance, and weakening the crew." thus treating the question of law as to the effect of a deviation for the purpose of rendering assistance as unsettled and uncertain.

The case before us presents itself, therefore, as far as our courts are concerned, as one of the first impression, in which we have to declare, practically I may say, to make the law. I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American courts, and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to our profound respect and confidence. It is unnecessary

to go through the American decisions in any detail. The effect of them is to be found in the well-known text writers, but is nowhere better stated than in the judgment of Mr. Justice Sprague, in the case of *Crocker* v. *Jackson* [Sprague (American) Rep. 141]. The result of the American authorities immediately bearing on the question which we have here to decide, may be briefly stated. Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance, nor liability to the goods owner in respect of loss which would otherwise be within the exception of "perils of the seas." And, as a necessary consequence of the foregoing, deviation, for the purpose of communicating with a ship in distress, is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the *bonâ fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost, because the purpose of saving property may have formed a second motive for deviating. If the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, any deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorised deviation.

In these propositions I entirely concur, as well as in the reasoning by which this view of the law is supported by Lindley, J. in his most able judgment. The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and is nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences which may result in respect of a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life by the fear lest any disaster to ship or cargo consequent on so doing should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk. Moreover, the uniform practice of the mariners of every nation, except such as are in the habit of making the unfortunate their prey, to succour others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken—at all events in the absence of any stipulations to the contrary—as acquiescing in the universal practice of the maritime world, prompted by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas. What would be the effect of such a stipulation, as I have just referred to, if it existed, it is unnecessary for the purpose of the present case to consider.

Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which though its fulfilment may have been attended with danger to life or property remains unrewarded. There would be much force, no doubt, in the argument that it is to the common interest of merchants and insurers, as well as of shipowners, that ships and cargoes when in danger of perishing should be saved; and consequently that, as matter of policy, the same latitude should be allowed in respect of the saving of property as of life, were it not that the law has provided another, and a very adequate, motive for the saving of property, by securing a liberal proportion of the property saved to the salvor—a proportion in which, not only the value of the property saved, but also the danger run by the salvor to life or property, is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the shipowner free from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust, if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss of the merchant or the insurer, neither of whom derive any benefit from the preservation of the property saved. This is strikingly exemplified in the present case, in which, not content with what would have been awarded to him by the proper court on account of salvage, the master made his own terms, and would have been paid a very large sum, had the attempt to bring the *Arion* into port proved successful. It is obviously one thing to accord a privilege to one who acts from a sense of duty, without expectation of reward, another to extend it to one who neither acts from a sense of moral duty nor in obedience to what may be thought to be the policy of the law, but solely with a view to his own individual profit.

In the result I am of opinion that, though the deviation of the *Olympias*, so far as relates to her proceeding to the *Arion* in the first instance, was justified, the taking the latter in tow, and departing from the proper course in order to take the ship to the Texel, this not being necessary in order to save the lives of the captain and crew, was an unauthorised deviation, and the loss of the plaintiff's cargo having been the direct consequence of the deviation, or, to use the language of Tindal, C.J. in *Davies* v. *Garrett* (*ubi sup.*), "The loss having actually happened whilst the wrongful act was in operation and force, and being attributable to the wrongful act," the defendants cannot avail themselves of the exception in the charter-party, and the plaintiff is, therefore, entitled to judgment. The appeal must, therefore, be dismissed.

I am authorised by my colleagues, Brett, L.J. and Cotton, L.J., to say that they concur in the judgment I have just delivered.

Bramwell, L.J.—I am of opinion that this judgment must be affirmed. The defendant has undertaken to the plaintiff to carry his goods from port to port without deviation, unless for cause justifying such deviation. The defendant has deviated, and so broken his contract, unless he can show such cause. Now, the cause that will

justify non-compliance with an undertaking may be express, or implied in the contract itself, or added to it by usage or by some positive law. The cause alleged in this case is, that the deviation was a reasonable one, to save a ship and its cargo from loss and destruction. It is certain that no law orders such a deviation. It is certain there is no usage which adds to the contract a power to deviate for such cause. On the contrary, every opinion is against it; and it is certain that ships which desire to have such a power, or one somewhat like it, expressly stipulate for it, as, for example, for the right to tow vessels. As it is not expressed in the contract between the plaintiff and defendant, the only remaining question is, can it be implied? Now, for my own part, I think it most objectionable to add to the contracts of parties that which they could have added themselves had they been minded. It is to suppose they would have made the contract we make for them, had they only thought of it, a supposition very likely to be wrong. Still, in some cases it is, and must be, done. It is said it must be in this case on the ground of public policy; that is to say, as I understand, that it is for the good of mankind in general, and so for Englishmen, that ships should, without liability to freighters, have power to deviate to save other ships and cargoes. Now, I am by no means sure that this is so. I am by no means certain that more might not be lost than gained by such a power and its exercise. I am certain of this, that the best way to manage the matter is to leave parties to make their own bargains about it. Let the shipowner charge less freight, where he reserves to himself the power, and more, where he does not. I am also certain of this that even if the good of mankind and of this country in particular would be augmented by such a power, and by implying it in a contract, unless expressly excluded, we cannot imply it on the ground of public policy.

If public policy required such power should exist, a charter-party which expressly denied such power would be illegal, and all its provisions void. Can that be maintained for a minute? Public policy requires the enforcement of certain rules as that contracts shall not be illegal nor immoral, that they shall not be in restraint of trade, nor of personal freedom; that they shall not invite to the commission of crime, as an undertaking with a man to pay money to his executors if he commits suicide. But public policy would no more imply such a matter as this and make its exclusion from a charter illegal than it would make an agricultural lease unlawful, because some of the covenants were inconsistent with the most profitable use of the land.

I am of opinion, then, that the defendant has broken his contract without any sufficient excuse or justification, and that this action is maintainable. It will be said that this is a very narrow ground on which to decide the case. It may be; but it is the only ground, and it is not my fault that that is narrow. After all, the question is, had the defendant sufficient justification for breaking his promise? I say no, and that the plaintiff must recover. The question whether a deviation to save life is justifiable is untouched by this opinion. That question depends on different considerations, and different authorities.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by A. H. Poyser, Esq., Barrister-at-Law.

May 16 *and* 27, 1870; *March* 18, 1880.

(Before Cockburn, C.J. and Lush, J.)

Greer *v.* Poole and others.

Ship and shipping—Marine insurance—Cargo undamaged—Payment by owner of cargo in discharge of bottomry bond—Loss by perils of the sea—English policy on goods in French ship—Construction.

The plaintiff, the owner of cargo, sought to recover, upon a policy of insurance for a sum paid by him in discharge of a bottomry bond in order to obtain possession of his goods. The bond had been given by the master of the vessel upon the ship, freight, and cargo in order to pay for repairs rendered necessary by a collision with another vessel at sea. The ship and freight proved insufficient to satisfy the bond, and the plaintiff had to pay the deficiency. The plaintiff also contended that, as the goods were on board a French ship, the policy must be construed according to French law.

Held, that the policy, in the absence of stipulation to the contrary, must be construed by English law, and that the plaintiff was not entitled to recover, as the loss upon the cargo was not proximately caused by perils of the sea.

This was an action upon a policy of marine insurance. The material facts are fully set out in the judgment of the Court.

Cohen, Q.C. (*J. C. Mathew* with him) for the plaintiff.—This was a loss by perils of the sea, for, though the goods were not actually damaged, still they were of necessity pledged to make good such losses, and the owner is entitled to recover just as he would for money paid for salvage:

Dent v. *Smith,* L. Rep. 4 Q.B. 414; 20 L. T. Rep. N. S. 868; 2 Mar. Law Cas. O. S. 251;
Rodocanachi v. *Elliott,* 2 Asp. Mar. Law Cas. 21, 339; L. Rep. 9 C. P. 518; 31 L. T. Rep. N. S. 239.

By French law the plaintiff would be entitled to recover, and as the goods were on board a French ship French law must prevail:

Lloyd v. *Guibert,* L. Rep. 1 Q. B. 115; 13 L. T. Rep. N.S. 602; 3 Mar. Law Cas. O. S. 26, 383;
Ionides v. *Universal Marine Insurance Company,* 14 C. B. N. S. 259; 1 Mar. Law Cas. O.S. 353.

English Harrison (*Watkin Williams,* Q.C. with him).—The policy was effected in England with English underwriters, and must be construed by English law. The point that this was not a loss by perils of the sea is concluded by authority:

Powell v. *Gudgeon,* 5 M. & S. 431;
Sarquy v. *Hobson,* 4 Bing. 131; 2 B. & C. 7;
Harris v. *Scaramanga,* 1 Asp. Mar. Law Cas. 339 L. Rep. 7 Ch. 481; 26 L. T. Rep. N. S. 797.

Cur. adv. vult.

The considered judgment of the court was delivered by

Lush, J.—This was an action on a marine policy on goods on a voyage from Lagos to Marseilles in

a French ship. By the terms of the policy general average was to be payable as per judicial foreign statement. The ship having come into collision with another ship put into Gibraltar for repairs. The cargo was undamaged. The master not having funds enough to do the necessary repairs, took up a loan on bottomry upon ship, freight, and cargo. On arrival at Marseilles the bondholder took proceedings to enforce his rights against ship, freight, and cargo, and ship and freight proving insufficient to satisfy the bond, the plaintiff had to pay the deficiency in order to release his goods. A judicial average statement was made out at Marseilles, which however did not comprise the sum paid to the bondholder as the payment had not then been made. The defendant paid into court a sum sufficient to satisfy the claim for particular charges and expenses and general average under the adjustment, and the only question submitted to us is whether the amount paid to release the goods is recoverable under the policy. On the argument Mr. Cohen, who appeared for the plaintiff, feeling that he could not sustain the claim as general average, contended that this was under particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled the owner of the vessel in question to abandon the ship and freight to the bondholders, and thus to release himself from further liability, the French law differing in this respect from English law. Whether this contention is well founded or not is not in our opinion material; for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss to which alone our law has regard was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar created on the cargo. The goods sustained no sea damage. It was further contended on behalf of the plaintiff that as the policy was upon goods in a French ship it must be construed as if it had been a French policy, and that under such a policy the loss would have been deemed a loss by perils of the sea. Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he thinks fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average; but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is therefore for the defendants.

Judgment for defendants.

Solicitors for plaintiff, *Gregory, Rowcliffe*, and *Co.*

Solicitors for defendants, *Parker* and *Co.*

COMMON PLEAS DIVISION.

Reported by J. A. FOOTE, Esq., Barrister-at-Law.

Tuesday, May 25, 1880.

(Before Lord COLERIDGE, C.J., GROVE and LOPES, JJ.)

BOLCKOW, VAUGHAN, AND CO. *v.* YOUNG.

Practice — Interrogatories — Irrelevancy — Order XXXI., r. 5.

The defendant, a shipowner, was sued by the owners of the cargo and charterers for non-delivery of cargo. The defendant alleged that the non-delivery was caused by perils of the sea excepted in the charter-party and bill of lading.

Held, that interrogatories asking the plaintiffs whether the cargo was insured, and if so, with whom, by whom, and to what amount, were irrelevant and therefore inadmissible.

SUMMONS adjourned from chambers by BOWEN, J.

The plaintiffs, Bolckow, Vaughan, and Co., were ironmasters at Hull, and the plaintiffs Houlder Brothers, shipbrokers in London; the defendant being the owner of the steam ship *Wolverton*. The statement of claim comprised a claim by Houlder, Brothers, as charterers and shippers for the non-delivery at Leghorn of a cargo of steel rails from Middlesborough; and an alternative claim by the plaintiffs Bolckow, Vaughan, and Co., as shippers of the same cargo under the bill of lading. The statement of defence alleged that the non-delivery arose from perils of the sea excepted by the terms of the charter-party and bill of lading; and further pleaded that before and at the time of the wreck and loss of the *Wolverton*, the plaintiffs respectively had parted with and transferred all interest in the said goods to other persons, and had not respectively any interest whatever therein. The defendants sought to administer interrogatories asking the plaintiffs whether the cargo was insured, and if so, with whom and by whom the insurance or insurances had been effected, and to what amount. On the plaintiffs objecting to answer, a summons for a further answer was taken out and adjourned by Bowen, J. to the court.

Clarkson for the defendant.—These interrogatories are relevant to the issues, and would be the first questions put upon cross-examination. We allege in the pleadings that the plaintiffs had, before the loss, transferred all their interest in the goods, and it is material with regard to this that the interrogatory asking by whom the insurances, if any, were effected should be answered. The action is really brought on behalf of the underwriters, but the court cannot go behind the pleadings to assume that.

J. C. Matthews for the plaintiffs.—The interrogatories objected to are wholly irrelevant. The underwriters are not the plaintiffs on the record; and it has never been the practice to answer interrogatories as to insurance such as this, which are only put for the purpose of creating prejudice.

Lord COLERIDGE, C.J.—I think these interrogatories are irrelevant. If, as Mr. Clarkson says, we are not to look behind the pleadings and see that the action is really on behalf of the underwriters, the case is even stronger against him. That

would be the only ground upon which it could be suggested that they were relevant.

Motion refused with costs.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendant, *W. A. Crump* and *Son.*

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

May 7, 10, 11, *and June* 7, 1880.

(Before the LORD CHANCELLOR (Selborne), Lords HATHERLEY and BLACKBURN.)

POSTLETHWAITE *v.* FREELAND.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Shipping—Demurrage—Construction of charter-party—Cargo "to be discharged with all despatch according to the custom of the port."

A charter-party in which there are stipulations as to the loading or discharging cargo in a port is always to be construed as made with reference to the custom of that port; therefore the words "cargo to be discharged with all despatch according to the custom of the port," do not affect the liability imposed on the charterer by the ordinary clause, "cargo to be taken from alongside at the merchant's risk and expense." "Custom" in such a case means a settled and established practice of the port.

In an action brought by a shipowner against the charterer for demurrage at the port of discharge it was proved that from the natural conditions and rules of the port ships must necessarily be discharged into lighters, and that only a limited number of lighters were available.

Held (affirming the judgment of the court below), that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying off the port when the plaintiff's ship arrived there, could not in the absence of any express stipulation as to time of discharge, be considered as an impediment to the due discharge of that ship collateral to or separable from the custom of the port, and that the charterer was not liable for demurrage.

Rodgers *v.* Forrester (2 *Camp.* 483) *and* Burmester *v.* Hodgson (2 *Camp.* 488) *followed.*

Ford *v.* Cotesworth (*L. Rep.* 5 *Q. B.* 544; 23 *L. T. Rep. N. S.* 165; 3 *Mar. Law Cas. O. S.* 190, 468) *explained.*

Wright *v.* New Zealand Shipping Company (*ante p.* 118; 4 *Ex. Div.* 165 *n.*, 40 *L. T. Rep. N. S.* 413) *distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Brett and Thesiger, L.JJ., Cotton, L.J. dissenting), affirming a judgment of the Exchequer Division (Kelly, C.B. and Hawkins, J.) in favour of the respondents.

The case is reported *ante*, p. 129; 4 Ex. Div. 155, and 40 L. T. Rep. N. S. 601.

The appellant, the plaintiff below, was a shipowner carrying on business at Milton, in Cumberland, and was the owner of a vessel called the *Cumberland Lassie*; and the respondents (the defendants below) were ship and insurance brokers and commission merchants, of Great St. Helen's, London. The action was brought in respect of a claim of the plaintiff for forty-three days' demurrage of his ship, or in the alternative damages for the detention of the ship beyond the time limited by the charter-party executed between the plaintiff and the defendants. The action was tried before Lord Coleridge, C.J., and a special jury in March 1878, when a verdict was found for the defendants. It appeared that on the 28th April 1875, the defendants chartered the *Cumberland Lassie* for the carriage of a cargo of about 370 tons of steel rails from Barrow-in-Furness to East London in South Africa. The charter-party provided that the cargo should be brought and taken from alongside the merchant's risk and expense, and it contained the following stipulation: "The cargo is to be discharged with all despatch, according to the custom of the port." It was for the breach of this stipulation that the action was brought. On the 2nd June 1875 the master of the ship signed and delivered to the defendants a bill of lading for the rails, which had been shipped under the charter-party, by which it appeared that the shipment had been made on behalf of the Crown agents for the colonies, and that the rails were consigned to the railway engineer at East London. East London is a "bar" harbour, and vessels of the size of the *Cumberland Lassie* are obliged to unload a considerable portion of their cargo before they can cross the bar. The discharge of cargo outside the bar is generally effected by means of lighters, which are propelled by manual labour along a rope or warp running from a quay inside the harbour across the bar, and thence to a buoy outside. These lighters are hauled from the main warp to the vessels by means of branch warps, or they are sometimes brought from the main warp alongside the vessel by means of a steam tug. In 1875 the port was unusually crowded with shipping, the Colonial Government having in that year begun to build a railway in the neighbourhood, which necessitated the importation of a large quantity of steel rails and other heavy material of a like kind, no such cargo having been imported into the place previously. In this state of things the *Cumberland Lassie* arrived at the port on the 31st Aug. 1875, and she was ready to discharge on the 1st Sept. Upon her arrival the agents of the charterer employed the company to whom the warp and lighters belonged to discharge the vessel, but the number of lighters possessed by the latter was wholly insufficient to enable the ships which had arrived to be discharged with expedition, and the result was that the discharge of the *Cumberland Lassie* was not commenced until the 6th Oct., and was not finished until the 23rd Nov. The plaintiff contended at the trial that the delay which occurred in the discharge of his ship was one for which the charterers were liable. On the verdict being given against him at the trial he applied for a new trial, on the ground that the learned judge had misdirected the jury by not telling them that the risk of not being able to discharge with despatch fell upon the charterers, that the consignees were bound to provide means for discharging the cargo, and upon the further grounds that the defendants did not show that they had used all reasonable or possible means for discharging the cargo, that there was no evidence that the usual number of lighters fit to discharge railway iron were in port, and that there could be no binding custom as to the number of lighters fit to discharge railway iron on account of the recency of the importation of such iron into the port.

The rule for a new trial having been discharged by the Exchequer Division, their judgment was affirmed by the Court of Appeal as above mentioned, and from this judgment the present appeal was brought.

Butt, Q.C., *Cohen*, Q.C., and *Bigham* appeared for the appellant, and argued that the main question was whether the number of lighters employed was to be considered part of the "custom of the port." The cargo was to be "discharged with all despatch according to the custom of the port," and the question is, what is a reasonable time under the circumstances. Lord Coleridge, C.J., in summing up, directed the jury that the number of lighters was part of the custom of the port, which we say was a misdirection, for the number of lighters cannot form part of the custom; the words refer only to the method of unloading, not to the time to be employed, otherwise what would be the position of affairs if all the lighters were out of repair? Apart from the custom (which we say only refers to the method of unloading) it would be the charterer's duty to have sufficient lighters to unload the ship in a reasonable time, and the evidence here shews that reasonable diligence was not used. They cited

Randall v. *Lynch*, 2 Camp. 352;
Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; L. Rep. 4 Q. B. 127; 19 L. T. Rep. N. S. 634; affirmed on appeal, L. Rep. 5 Q.B. 544; 23 L. T. Rep. N. S. 165;
Wright v. *New Zealand Shipping Company*, *ante*, p. 118; 4 Ex. Div. 165 n; 40 L. T. Rep. N. S. 413;
Ashcroft v. *Crow Orchard Colliery Company*, 2 Asp. Mar. Law. Cas. 397; L. Rep. 9 Q. B. 540; 31 L. T. Rep. N. S. 266;
Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46; 27 L. T. Rep. N. S. 710;
Adams v. *Royal Mail Steam Packet Company*, 5 C. B. N. S. 492;
Harris v. *Dreesman*, 23 L. J. 210, Ex;
Kearon v. *Pearson*, 7 H. & N. 386;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595; 3 C. P. Div. 443; 38 L. T. Rep. N. S. 631;
Barker v. *Hodgson*, 3 M. & S. 267.
Davies v. *M'Veagh*, *ante*, p. 149; L. Rep. 4 Ex. Div. 265; 41 L. T. Rep. N. S. 308;
Rodgers v. *Forrester*, 2 Camp. 483;
Burmester v. *Hodgson*, 2 Camp. 488;
Hill v. *Idle*, 4 Camp. 327;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 147; L. Rep. 1 Q. B. Div. 244; 34 L. T. Rep. N. S. 526.

Watkin Williams, Q.C. and *M'Leod*, for the respondents, supported the judgment of the majority of the Court of Appeal.

Cohen, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

June 7.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: The question in this case is, whether demurrage is payable for delay in discharging a cargo of steel rails at the port of East London in South Africa, under the following circumstances.

By the charter-party, the appellant's ship *Cumberland Lassie* was to take on board at Barrow-in-Furness and to deliver at East London "at any safe wharf where ships can always lie safely afloat, as ordered on arrival, or so near thereto as he," *i.e.*, the master, "can safely get," the cargo in question, which was "to be brought to, and taken from, alongside at merchant's risk and expense," and "to be discharged with all despatch according to the custom of the port." For the loading at Barrow a fixed number of days was agreed upon, with demurrage at a fixed rate, if that time was exceeded. East London is a port with a dangerous bar at its entrance, over which ships heavily laden (as this ship was) cannot pass till they are lightened by the discharge of a great part of their cargo. This is done by means of lighters propelled by manual labour along a main rope or warp, running from a quay inside the harbour across the bar to a buoy outside, from which they are hauled to the ship's side by means of branch warps. The main warp, and the whole supply of lighters at the port, were in the hands and under the management of the Colonial Government till 1873, when they were transferred by the Government to a company called the "East London Landing and Shipping Company." It is stated that "prior to 1873 the warp had been the property of the Colonial Government, but in that year it was taken over by the company." Mr. Jameson, a director of the company, gave evidence to the effect that in 1875, and for some time afterwards, they had a control over the use of the warp; and this is consistent with other parts of the evidence, viz., that when the company had once begun the discharge of a vessel, they "would not allow" any interference, even by the Government surf-boats; and that "when the Government" (which seems to have reserved to itself some sort of concurrent right with the company) "had commenced the discharge of a ship, they acted in the same way." The company in 1875 had nine lighters, of which only seven were in working order, and only four were fit to discharge such a cargo as that of the *Cumberland Lassie*, at the time when that ship arrived. The Government had usually two, and they appear to have brought in three more about that time, or soon afterwards, from Port Elizabeth in Algoa Bay, more than 150 miles off, which was the nearest port where any additional lighters could have been obtained. The rails on board the *Cumberland Lassie* were shipped on account of the Crown agents in the colony; but I do not find in the evidence any proof that, consistently with the usage of the port (as already described), any of the Government lighters were or could have been made available for the discharge of this particular cargo by any arrangement within the charterer's power. When (as happened on the arrival of this ship, and as seems to have usually happened at the same time of the year) there were more ships lying off the bar than the lighters in the port could simultaneously discharge, every ship was discharged in her turn, according to the order of her arrival, as reported at the port office; one lighter per diem being sent to her on every working day till she could cross the bar. If no lighter was ready, suitable for her particular cargo, she might lose her turn for the day; which, however, did not happen in this particular case. There were twenty-four working days during which the *Cumberland Lassie* lay idle off the bar at East London, from the 31st Aug. to the 6th Oct. 1875, ready (as far as her master was concerned) to discharge her cargo, but prevented from doing so by the priority in the use of the warp, and of the lighters then available at the port, allowed by the custom of the port to ships which had arrived before her. Her turn came on the 6th Oct., and

no complaint is now made of any subsequent delay. The question before your Lordships is, whether demurrage is payable for her detention there during those twenty-four working days?

At the trial before Lord Coleridge, C.J. a verdict was given for the defendants, the charterers, under the direction of that learned judge. A rule *nisi* was obtained for a new trial; but this, after argument, was discharged by Kelly, C.B. and Hawkins, J. sitting as a divisional court. Their judgment was affirmed by a majority (Brett and Thesiger, L.JJ.) in the Court of Appeal, Cotton, L.J. dissenting. The appeal of your Lordships is from that decision, and my opinion is that the judgment appealed from ought to be affirmed.

There is no doubt that the duty of providing and making proper use of sufficient means for the discharge of cargo, when a ship which has been chartered arrives at her destination and is ready to discharge, lies (generally) upon the charterer. If by the terms of the charter-party he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time, that is (as was said by Blackburn, J. in *Ford* v. *Cotesworth*, 3 Mar. Law Cas. O. S. 195, 468), "a reasonable time under the circumstances." Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or practically defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence ought (I think) to be taken into consideration. These distinctions are well illustrated by three cases, which were referred to in the arguments at your Lordships' bar. In *Randall* v. *Lynch* (2 Camp. 352) the charterer was held liable for demurrage, a particular time being fixed by the charter-party for the discharge of the cargo. In *Rodgers* v. *Forrester* (2 Camp. 483), where the contract was to discharge the ship "within the usual and customary time for unloading such a cargo," and in *Burmester* v. *Hodgson* (2 Camp. 488), where the court thought this to be the contract which the law ought to imply from the terms of the charter-party, the charterer was held not liable for demurrage. In all those three cases, the circumstances which caused the detention of the ships were the same—viz., the crowded state of the London Docks, in which the ships were, by Act of Parliament, obliged to unload. If your Lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers* v. *Forrester* and *Burmester* v. *Hodgson*, which do not appear to me to be in principle inconsistent with later authorities.

Two recent cases were much relied upon in the argument of the appellant's counsel at your Lordships' bar—*Ford* v. *Cotesworth* (3 Mar. Law Cas. O. S. 190, 468) and *Wright* v. *The New Zealand Shipping Company Limited* (*ante*, p. 118). *Ford* v. *Cotesworth* appears to me to be perfectly consistent with the earlier cases. The judgment of the court of error turned upon a *vis major*, which the court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by Cockburn, C.J. (in my opinion correctly, nor do I perceive that the court of error thought otherwise), that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port." In the other case (*Wright* v. *The New Zealand Shipping Company Limited, ubi sup.*), which is at first sight much more favourable to the appellant, there were special circumstances on which the decision might very well have been founded, but to these (as it does not appear to me to have been, in fact, founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be suported or not) are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to be implied, no custom or other circumstances existed which would have made it impossible for the charterer, by the use of any reasonable diligence, to have provided himself with lighters for the discharge of the cargo earlier than he did. What the Lords Justices in that case held was (in the words of Cotton, L.J.) that "an obligation was imposed upon the charterer of providing at the port of discharge sufficient appliances of the kind ordinarily used at the port;" and it was expressly added that he would not have been bound to provide appliances which were not in use there, but might be in use at other ports. In the present case it appears to me to be the true result of the evidence that the *Cumberland Lassie* was discharged with all despatch according to the custom of the port. In the construction of this contract I think that the words "according to the custom," &c., ought to be read in connection with the word "dispatch."

Looking at the natural conditions, and the rules of the port, its distance from any other port, the necessity for the use of the warp, and the control over the warp possessed by the East London Landing and Shipping Company, I do not think that the insufficiency of the number of lighters available to discharge simultaneously all the ships lying outside the bar of East London when the *Cumberland Lassie* arrived there can be regarded as an impediment to the due discharge of that ship, collateral to or separable from the custom and practice of the port, against which the charterers ought to have provided, or for which they ought (as between themselves and the shipowner) to be held responsible. I therefore propose to your Lordships to dismiss the present Appeal with costs.

Lord HATHERLEY.—[After going through the facts of the case, his Lordship continued]: Now it appears to me from the evidence and the cases cited at the bar, that the charterers (the respondents) have not been in any default in respect of the engagements entered into on their part in the charter-party, viz., "to discharge the ship with all despatch, according to the custom of the port."

The cases show that when a specific time is named, either in words or by necessary implication, the party who has contracted to unload a ship within the limit must bear the loss occasioned by any excess of time, although the delay was not occasioned by any default on his part; for, as was said by Lord Tenterden, in his work on shipping (in a passage quoted by my noble friend opposite) in delivering the judgment of the court in *Ford* v. *Cotesworth* (*ubi sup.*), "he has engaged that it shall be done." But all that is engaged to be done here is "to proceed with all dispatch according to the custom of the port." Such an engagement might not, perhaps, excuse the merchant from the consequence of any unusual accident arising to delay the discharge of the vessel beyond the customary time of discharge (see *Barker* v. *Hodgson*, *ubi sup.*, cited in *Ford* v. *Cotesworth*), because the merchant has contracted that the discharge shall take place within a given time, viz., that of the usual period for discharge of a like vessel in that particular port, and the shipowner is entitled to have his ship back at the expiration of that time or to be paid demurrage, whatever be the cause of delay. But when the contract merely engages that the merchant shall, with all despatch, according to the custom of the port, unload the vessel, he will be, as it appears to me, fulfilling his contract if he employ all the usual methods of despatch, and especially the warps and lighters usually so employed, and especially when, in fact, a despatch was obtained as great as in the case of any other ship of the same size and burthen. I do not think that the merchant has engaged that he will use any other means of despatch than those used habitually at the port. It is suggested that he should have taken care that the supply of lighters should be adequate without delay to attend to his ship. But this would be to adopt a course which there is no evidence that anybody frequenting the port ever adopted. So far is that from being the case, that no ship is shown ever to have adopted any other course than that which was taken by the defendants; nor has the argument suggested any usual course as having been omitted by the merchant, which will also be a course coinciding with the usage of the port. Any other course would be outside the contract, and if it failed, as it probably might when adopted for the first time, the consequent result would be a breach of the existing contract, to which the demurrage might be attributed. The course taken as to turns seems to me part of the usage.

I agree, therefore, with my noble and learned friend, the Lord Chancellor, that the appeal should be dismissed with costs.

Lord BLACKBURN.—My Lords: The question in this case, in my mind, depends on what is the true construction of the ordinary clause in a charter-party, "the cargo to be brought to and taken from alongside at merchant's risk and expense," and what is the extent of the implied undertaking on the part of the merchant to provide lighters or other appliances for taking the cargo from alongside. The parties to the charter-party may by any stipulation they please, alter the undertaking which would otherwise be implied; but in the charter-party now before this House I think they have not done so. The only other reference to the discharge of cargo is "the cargo is to be discharged with all despatch according to the custom of the port." I do not think that this alters the question, as the express reference to the custom of the port of discharge is no more than would be implied. For I take it that a charter-party, in which there are stipulations as to loading or discharging cargo in a port, is always to be construed as made with reference to the custom of the port of loading or discharge, as the case may be (see *Hudson* v. *Ede* (L. Rep. 2 Q. B. 566; 16 L. T. Rep. N. S. 698; affirmed (L. Rep. 3 Q. B. 412; 18 L. T. Rep. N. S. 764; 2 Mar. Law Cas. O. S. 521; 3 Id. 114), though it was expressly found in the case that the shipowner and his broker were not aware of the usage.

In the case of *Wright* v. *New Zealand Company* (*ante*, p. 118), the Court of Appeal were of opinion, as Bramwell, L.J. expressed it, that the merchants were bound "to have lighters ready to discharge her forthwith, and were not entitled to excuse the omission on the ground that, at the port of discharge, there was only a certain number of lighters, and when the plaintiff's vessel arrived, other ships belonging to other persons required those lighters, and the defendants got lighters for unloading the cargo as soon as they could." "To my mind," says he, "those circumstances afford no answer to the plaintiff's complaint; the defendants, having undertaken to unload the vessel, were bound to be ready to do it, and to finish it within a reasonable time." And the other members of the court express the same idea. I think that if the true construction of the clause, "cargo to be brought to and taken from alongside at merchant's risk and expense," is that the merchant undertakes to be ready with lighters to discharge the vessel, the subsequent clause inserted in this charter-party for the shipowner's benefit that, "the cargo is to be discharged with all despatch according to the custom of the port," could not have been intended to relieve him from that undertaking. But the question now to be decided, as I think, is whether there is an undertaking to that extent.

The facts which are sufficient to raise the question in the present case are few, and not in dispute. [His Lordship went through the facts of the case and continued:] The case came on for trial on the 13th March 1878, before Lord Coleridge, C.J. and a special jury. The jury were told, and I think quite correctly, that "custom" in the charter-party did not mean custom in the sense in which the word is sometimes used by lawyers, but meant a settled and established practice of the port, and the learned judge then left it to them to say whether there was such an established custom, and if the *Cumberland Lassie* was unloaded with all despatch under the circumstances. And in leaving this to the jury he told them in effect that they were to take into account the circumstances as they were, though the number of ships was unusually great, and the number of available lighters fewer than could have been worked by the warp. I should observe that it appears to be clear that no lighters could have been obtained from any other port in a less time than was occupied in discharging the ships that had arrived before the *Cumberland Lassie*; so that no question was raised as to whether, if there had been such, the merchant ought to have obtained them. The only question raised on the

facts was that on which Lord Coleridge thus directed the jury. It is not disputed that if the direction was right the verdict for the defendant was justified. It seems to me clear that if the view of the law afterwards laid down by Bramwell and Cotton, L.JJ., and, I incline to think (as reported), Thesiger, L.J. also, in *Wright* v. *New Zealand Company* (*ubi sup.*) is correct, this was a misdirection. The present cause was brought before the Court of Appeal, then consisting of Brett, Cotton, and Thesiger, L.JJ., shortly after that Court, then consisting of Bramwell, Cotton, and Thesiger, L.JJ., had given judgment in *Wright* v. *New Zealand Company*. Cotton, L.J., adhered to the view of the law he had taken in that case, and thought there should be a new trial. Thesiger, L.J. distinguished the two cases, not, to my mind, successfully, and thought the direction in the present case right; and, as Brett, L.J., agreed with him, judgment was given for the defendant. The appeal is against that judgment. As the two decisions, that in the present case and that in *Wright* v. *New Zealand Company* were almost contemporaneous, and were on applications for new trials in cases tried at the same Assizes, and almost contemporaneously, I think this must be treated as an appeal from both these cases. So that your Lordships have the opinion of Bramwell and Cotton, L.JJ. on the one side, and Brett and Thesiger, L.JJ. on the other, a balance of authority as nearly equal as could well be.

It is very singular, considering how long charter-parties having a clause in this form have been in use, that there should be no direct authority on the subject; but so it is. At least the counsel at your Lordships' bar were able to cite none, and I have not been able myself to discover any. It is almost as singular that the question should at last have been raised in two cases almost at the same time, and that the Court of Appeal should be equally divided in opinion. I think your Lordships must decide on analogy to other cases and on general principles of law; and though I have felt, and still feel, that there is a great deal to be said in favour of the view of the law taken by those judges who are in favour of the appellants, I have come to the conclusion that the ruling of Lord Coleridge and the judgment below were right, and that the appeal should be dismissed with costs.

As the merchant, if not himself resident at the port of discharge, at all events has a consignee and correspondent there resident, he presumably knows all about the means and appliances for discharging a ship there better than the shipowner. It therefore seems very reasonable that the shipowner, in making his bargain, should require the merchant to make an estimate of the probable time of discharging the ship, and take on himself the risk of that time being exceeded; and then the shipowner can fix the payment he is willing to take with reference to this; and this has long been done by providing lay days and demurrage for the discharge. In the last edition of Abbott on Shipping published in Lord Tenterden's life, (5th edit.), p. 180, it is said: "The usual clauses purporting that it is covenanted and agreed by and between the parties that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful to detain the vessel for those purposes a further specified time on payment of a daily sum, constitute a contract on the part of the freighter that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her he is liable to an action on the contract in the form adapted to the nature of the instrument. If a ship be so detained the daily rate of demurrage mentioned in the charter-party will in general be the measure of the damages to be paid; but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner, and the amount must be settled by a jury, if the parties cannot agree. And where the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time, although this may not be attributable to any fault or omission on his part, for he has engaged *that it shall be done*." These last words are put in italics by Lord Tenterden. It still remains the more usual form of charter-party to insert lay days and demurrage days. In many of the cases cited on the argument at the bar the charter-parties were of this nature, and the question only was whether the lay days had begun to run. *Tapscott* v. *Balfour* (1 Asp. Mar. Law Cas. 501) was of this nature; for though the charter-party did not name a specific number of days, it provided that the ship was "to be loaded by the defendants at the rate of 100 tons per working day," and as the burthen of the ship was known, and *id certum est quod certum reddi potest*, this was equivalent to naming a certain number of days. No question could have been made, if there had been lay days in the present charter-party, that they would have begun to run on the 1st Sept. Neither does *Thiis* v. *Byers* (3 Asp. Mar. Law Cas. 147) bear on the present case. The court there says: "We took time to look into the authorities, and are of opinion that where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that from the time when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days." Had there been lay days in this case, that would have had a bearing on the question, whether the days on which the weather prevented lighters from crossing the bar were to be reckoned as lay days or not. The parties can by express agreement prevent any dispute as to this, as was done in *Hudson* v. *Ede* (2 Mar. Law Cas. O. S. 521; 3 Id. 114), though, as that case shows, they may, unless they are cautious, produce results which they did not anticipate. But, for whatever reason, the parties who framed the charter-party in this case, and in that in the case of *Wright* v. *New Zealand Company* (*ante* p. 118) did not choose to have lay days for the discharge of the vessel, and, consequently, it is left to the court to say what is the contract implied by law, not qualified in any way in the charter-party in *Wright* v. *New Zealand Company*, and in the present case only qualified, if at all, by the provision that the cargo is to be discharged with all dispatch, according to the custom of the port.

The strongest argument in favour of the appellant is, I think, this: "The merchant," says Lord Ellenborough, C.J. in *Barker* v. *Hodgson* (3 M. & S. 217) "is the adven-

turer who chalks out the voyage, and is to furnish, at all events, the subject-matter out of which the freight is to accrue." And on this principle it was held in that case, and has been held in several others, that there is an absolute contract on his part to furnish a cargo, and that he is bound to pay damages if it becomes impracticable to do so; though it would be otherwise if it became illegal to do so. The cases of *Adams* v. *Royal Mail Steam Packet Company* (5 C. B. N. 492) and *Kearon* v. *Pearson* (*ubi sup.*) proceed on this principle. The parties may, and often do, provide, by express qualification, that strikes, quarantine, or other impediments, shall excuse the merchant. And perhaps the same effect may be produced if it appear that the contract was framed with reference to any particular state of things: (*Harris* v. *Dreesman*, 23 L. J. Ex. 210.) I am not aware of any case contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. And this seems to be the basis of the judgments of Bramwell and Cotton, L.JJ., and, as it rather seems to me, of Thesiger, L.J. also, as then expressed (though he does not adhere now to that opinion) in *Wright* v. *New Zealand Company*, and of Cotton, L.J. in the case now at the bar. But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo. There is no case in which it has been held so to do; and, as far as I can find, there is nothing in any of the text books in support of the doctrine that it does; and, as it seems to me, what authority there is (I agree it is not very direct), is against the position. In *Rodgers* v. *Forrester* (2 Camp. 483) the charter-party expressly stated that "the said freighter should be allowed the usual and customary time to unload the ship or vessel at her port of discharge." The facts appearing to be that the cargo (wines) was of such a nature that it was usual and customary to unload in a bonded warehouse, and that the delay in this particular case was owing to an unusual crowd of shipping in the docks, Lord Ellenborough's ruling was that the usual and customary time was that which would be taken to discharge into a bonded warehouse in the then state of the docks. In *Burmester* v. *Hodgson* (2 Camp. 488), which came on before Mansfield, C.J. three days afterwards, the point was still more clearly raised. There was no charter-party, the question arising on a bill of lading; but as the defendants were consignees of the whole cargo of brandies, that did not, I think, make any difference. The bill of lading was silent as to the period of discharge. It appeared that the ship entered the docks and did not complete her discharge for sixty-three days. "It appeared," says the report, "to be the invariable practice to bond cargoes of this sort. Even when the cargo is bonded, if the docks are not overcrowded twenty or twenty-three days are a sufficient space of time for unloading." Mansfield, C.J. said: "Here the law would only raise an implied promise to do what was in *Rodgers* v. *Forrester* stipulated for by an express covenant, viz., to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which such a cargo can be unloaded in her turn into the bonded warehouses. Such time has not been exceeded by the defendant. If the brandies were to be bonded they could not be unloaded sooner, and the defendant seems to have been as anxious to receive as the plaintiff was to deliver them." This was an express decision that the merchant was not responsible for the forty days' delay occasioned by the unusually crowded state of the docks. I cannot see on what principle the merchant can be responsible for the lighters being too few to unload the unusual number of ships, if he is not to be responsible for the dock being too small to unload the same unusual number. In *Ford* v. *Cotesworth* it was held that the contract implied by law was not, as Mansfield, C.J. held, a contract to discharge in the usual and customary time, but one that the merchant and shipowner should each use reasonable despatch in performing his part. But this does not in the least affect the point for which the ruling in *Burmester* v. *Hodgson* is in this case valuable—that in considering what is reasonable despatch under the circumstances, the number of ships there, though unusually large, is one of the circumstances to be taken into account. In *Taylor* v. *Great Northern Railway* (L. Rep. 1 C. P. 385) it was laid down that a "reasonable time" meant what was reasonable under the circumstances. Byles, J. there says: "My brother Hayes treats ordinary time and reasonable time as meaning the same thing; but I think reasonable time means a reasonable time looking at all the circumstances of the case. The delay in this case was an accident, as far as the defendants were concerned, entirely beyond their control, and therefore I think they are not liable." This is, I think, right and applicable to the present case. The only other case which it is necessary to notice is *Ashcroft* v. *Crow Colliery Company* (2 Asp. Mar. Law Cas. 397). There the regulations of the docks, which were known to both parties, were, amongst others, "No coal agent to be allowed to load more than two flats at the cranes at the same time, nor to have more than three vessels in the docks loading and to load at the cranes at one time." By the charter-party the vessel was to load in the docks: "To be loaded with the usual despatch of the port." The facts were that the defendants acted as their own coal agents, and had at the time thirteen ships which had priority over the plaintiffs'; and the ship was in consequence kept outside the dock for thirty days after she was at the disposal of the defendants before the dock company would admit her. The decision of the court was that the contract was to load with the usual despatch, and that this self-imposed liability on the part of the charterers to do so was no defence, even if the plaintiffs had known of it, which in fact they did not. I think this, which is probably right, has no bearing on the present case.

The result is, that I come to the conclusion that the ruling of Lord Coleridge was right, and that the appeal should be dismissed with costs. This is hard on the shipowner, who is in no default, and who probably never would have

entered into a charter-party in these terms if he had thought he thereby incurred such a risk of delay. All that a court of law can do is to construe the contract as the parties have made it, so as to make it as clear as can be what the legal effect of such a contract is. The parties can, by altering the terms of their contracts in future, avoid any inconvenience that arises from that construction. It is no doubt not an easy thing to introduce a new form of contract into mercantile use, but it can be done.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Parkers; Chester* and *Co.*

Solicitors for the respondents, *Allen* and *Greenop.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

April 6, 7, 8, 9, *and May* 6, 1880.

(Present: Sir JAMES COLVILE, Sir ROBERT PHILLIMORE, Sir BARNES PEACOCK, and Sir MONTAGUE SMITH.)

THE OVARENSE; REG. AND LOGGIE *v.* CASACA AND OTHERS.

Slave trade—Seizure—Portuguese ship in British port—Reasonable cause of suspicion—5 *Geo.* 4, *c.* 113, *ss.* 4, 9—6 *&* 7 *Vict. c.* 53—36 *&* 37 *Vict. c.* 88, *ss.* 3, 4, 5, 17—39 *&* 40 *Vict. c.* 36, *s.* 267 *—Treaties with Portugal of* 1842, *Arts.* 1, 2, 9, 10; *of* 1871, *Art.* 3.

The treaty with Portugal concerning the slave trade relates to seizures on the high seas and not in port or territorial waters.

Evidence which may justify a seizure on the high seas is not sufficient when the vessel is in harbour and there is an opportunity of examining her papers.

Sect. 4 *of the Slave Trade Act* 1873 *does not apply to Portuguese vessels seized in a British port.*

The presence of the articles enumerated in the treaty, and the Slave Trade Act 1873, *as primâ facie evidence of slave trading, do not prevent a seizor of a vessel in port being condemned in costs and damages, if with reasonable care he could have satisfied himself that the vessel's employment was lawful.*

The Ricardo Schmidt (*L. Rep.* 1 *P. C.* 268; 4 *Moore P. C.* 121) *approved.*

THIS was an appeal from the decision of the judge of the Vice-Admiralty Court at Sierra Leone, by which on 9th Nov. 1877 he had decreed the restoration of the Portuguese brig *Ovarense* to her owners, and condemned the seizor, who was inspector-general of police in Sierra Leone, in costs and damages for the seizure and detention.

The appeal was only against that portion of the decree which condemned the appellant in costs and damages.

The *Ovarense* had been seized by the appellant whilst at anchor in the harbour at Freetown, Sierra Leone, on the 5th Dec. 1876, on the following grounds—(1) For having on board a large quantity of water, and an extraordinary number of vessels for holding water, more than necessary for the use of the crew, fourteen men all told, no certificate having been produced to him (the seizor) showing that security had been given that the empty casks were for lawful trade. (2) For having on board three krooboys said to be slaves. (3) Also more mats than were necessary for the use of the crew. (4) A large quantity of rice, seventy bags.

The evidence was taken before the registrar of the Vice-Admiralty Court on the 17th Feb. 1877, and on several subsequent days up to the 20th June 1877, and various documents were put in on behalf of the claimant to prove that the trade in which the *Ovarense* was engaged was a legitimate trade of carrying free emigrants from various places on the coast of Africa to the Portugese island of St. Thomas. These documents consisted of: (1) a royal passport, setting out the dimensions of the ship and the names of her owners, Fernando de Olivera Bello and Manoel Roderigues Formigal, which was dated the 9th June 1870, and viseéd at the various ports she had visited between that date and the 25th Sept. 1876, the last *visé* being given at St. Thomas, to proceed to Sierra Leone and Liberia, in the course of which voyage she was seized; (2) The ship's articles, dated Lisbon, 14th June 1876, for a voyage to St. Thomas for ten months, and to return to Lisbon; (3) a charter-party dated at St. Thomas, 23rd Sept. 1876, by which the *Ovarense* was chartered to Francisco Ferreira de Moraes, for the purpose of being used by him in the conveyance of passengers and labourers; (4) a license by the Governor of St. Thomas to charter Moraes to engage labourers as agents for passengers in St. Thomas, dated the 21st Sept. 1876; (5) A licence to the captain of the *Ovarense* to carry labourers in the ship to the number of 368, or, if certain alterations were made, 400, dated the 21st Sept. 1876; (6) the ship's manifest, containing a statement of the cargo on board, dated the 25th Sept. 1876; (7) the bill of lading of the said cargo, dated the 25th Sept. 1876; (8) (*a*) a letter from the Governor of St. Thomas to the Portuguese consul at Sierra Leone, stating the nature of the voyage in which the *Ovarense* was engaged, and requesting him to afford her every protection. Evidence was also given of the law in force at St. Thomas at the time to show that slavery was not in existence, and that the importation of slaves was forbidden, but that a system was in force for the legal introduction of free labourers from the coast of Africa, and also of "An Act authorising the appointment of shipping masters of the several ports of entry in Liberia." enacted by the Senate and House of Representatives of the Republic of Liberia, to regulate the arrangements for the shipment of native African labourers, from the Republic to places beyond its limits, and also of certain contracts under which the three krooboys and other passengers were shipped on board the *Ovarense.*

On consideration of the verbal evidence and of those documents, and of the law on the subject, the learned judge of the Vice Admiralty came to the conclusion that the questions for his decision were: (1) Was Mr. Loggie duly authorised to visit, seize, and detain? (2) Had he reasonable grounds for suspicion? (3) Were any of the particulars mentioned in the schedule (to the Act of 1873) found on board or in the equipment? (4)

(*a*) Referred to in the judgment as (6).

Was the vessel fitted out for or engaged in the slave trade? (5) If not so fitted out or engaged, was there a "probable cause" for seizure or for proceeding to adjudication? (6) If so engaged or fitted out, had her owners a guilty knowledge thereof to justify condemnation of the vessel and of the goods; and had the charterer a guilty knowledge also to deprive him of the goods belonging to him?

As to (1), no question was raised, Mr. Loggie having a deputation or commission from the governor, as his deputy; and as to (6), there was no evidence to show a guilty knowledge—assuming the vessel to have been engaged in the slave trade—on the part of her owners, and therefore the vessel must be restored; as to (2), that Mr. Loggie had no "reasonable grounds of suspicion;" as to (3), that the particulars found on board mentioned in the schedule were accounted for; also (4), the vessel was engaged in the importation of free negroes; and as to (5), there was no "probable cause" for seizure or proceeding to adjudication, and therefore pronounced that the seizor had failed to support his libel, and that the claimants had established their plea, and that his decision must be according to the prayer in the plea—Restoration of the brig *Ovarense*, her tackle and apparel, and the goods and effects on board, and of the two surviving krooboys alleged to be slaves, with damages and expenses against the seizor, to be paid by him to the owners and also to the charterers of the vessel, with full costs of suit; and an interlocutory decree was drawn up to that effect on the 9th Nov. 1877.

From this decree an appeal was entered to the Privy Council on behalf of her Majesty the Queen and James Craig Loggie, to which appeal the captain and owners of the *Ovarense*, Manoel dos Santos Casaca, Manoel Roderigues Formigal, and Ferando de Olivera Bello, appeared as respondents. The charterers, Moraes, did not appear as a respondent.

The appellants' case asked for the decree to be set aside, so far as it awarded damages and costs against James Craig Loggie, for the following reasons:

(1) Because the brig was at the time of the seizure fitted out for purposes of and engaged in the slave trade within British jurisdiction.

(2) Because, even assuming that the brig was not in fact fitted out for the purposes of and engaged in the slave trade, the brig was a vessel on reasonable grounds suspected of being engaged in or fitted out for the slave trade, which it was, under the Slave Trade Act 1873, sect. 3, lawful for the seizor to visit, seize, and detain for adjudication.

(3) That under the whole circumstances of the case as appearing from the evidence, the seizor is by virtue of the slave Trade Act 1873, sect. 4, exempt from all claim for damages and costs in respect of the visitation, seizure, or detention of the brig or otherwise.

(4) Because the learned judge of the Vice-Admiralty Court has put a wrong construction on the Slave Trade Act 1873, sect. 4, and in consequence given a decree inconsistent with the provisions of that section.

(5) Because the decree is, in so far as it is appealed from, contrary to the weight of the evidence.

(6) Because it was the duty of the learned judge, under the Slave Trade Act 1873, sect. 17, and the Customs Laws Consolidation Act 1876, sect. 267, to certify that there was reasonable or probable cause for the seizure of the brig by the seizor.

The respondents' case claimed to have the appeal dismissed for the following reasons:

(1) Because it was proved that the *Ovarense* was an emigrant ship, duly licensed according to the regulations prescribed by the Government of Portugal.

(2) Because the *Ovarense* was not in fact engaged in the slave trade within British jurisdiction, and therefore there was no jurisdiction under the Slave Trade Acts to seize the *Ovarense*.

(3) Because the *Ovarense* was not a merchant vessel within the meaning of the 5th and 10th clauses of the first schedule to the Slave Trade Act 1873.

(4) Because the quantity of water other than that contained in the two tanks and nine casks entered in the manifest of the *Ovarense*, and the empty casks other than those above-mentioned, and those which had contained stores, were taken on board in the harbour of Freetown for lawful purposes, and it was not necessary that any certificate should be produced for the said casks until the said vessel cleared out from and was leaving the said port of Freetown.

(5) Because the said thirty-two mats were not more than sufficient for the use of the crew, and the seizor had no ground at the time of the seizure for supposing that they were more than sufficient.

(6) Because the case fell within the proviso to the 4th section of the Slave Trade Act 1873, and by virtue of that proviso the respondents were entitled to damages, expenses, and costs.

(7) Because, it was proved that the three kroomen on board the *Ovarense* were not slaves, and because the seizor at the time of the said seizure had no reasonable ground for believing them to be slaves.

(8) Because if the seizor, before seizing the said ship, had made due inquiry from the master of the said ship, he could and would have received information sufficient to account for the existence of the said three kroomen and the said rice, water, casks, and mats on board the said ship, and to have shown that the said kroomen and things were on board the said ship for lawful purposes, and that the said ship was not engaged in the slave trade.

(9) Because after the said seizure, and before the libel of the appellants was brought into the court below the appellant James Craig Loggie had or ought to have had from the claim of the respondents and the affidavits in support thereof, and from inquiries which he made or ought to have made thereon, full information as to the true character and employment of the said vessel.

(10) Because there was no reasonable ground and no probable cause for suspicion that the *Ovarense* was engaged in the slave trade, and it was in the power of the said James Loggie, and it was his duty by application to the governor or acting Portuguese consul at Sierra Leone, to have obtained all necessary information to have satisfied a reasonable mind that the *Ovarense* was not engaged in the slave trade.

(11) Because, even on the assumption, which is denied, that the original seizure was made under circumstances which entitled the captors to immunity from condemnation for damages and costs, there was no possible excuse for the subsequent proceedings of the captors, whereby the vessel was detained for more than eleven months from the date of the seizure on the 5th Dec. 1876, till her restoration under the decree of the 9th Nov. 1877, and on this ground alone the appellants are justly responsible for the damages and costs decreed against them.

(12) Because the said decree was and is right.

April 6.—The appeal came on for hearing. The enactments and treaties relied on on either side were as follows:

5 *Geo.* 4, *c.* 113, *An Act to amend and consolidate the Laws relating to the Abolition of the Slave Trade* 1824.

Sect. 4. And be it further enacted that (except such special cases or for such special purposes as are in and by this Act permitted) if any person shall fit out, man, navigate, equip, despatch, use, employ, let, or take to freight, or on hire, or contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight or on hire any ship, vessel, or boat, in order to accomplish any of the objects or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful, such ship, vessel, or boat, together with all her boats, guns, tackle, apparel and furniture, and together likewise with all property, goods, or effects found on board belonging to the owner or owners, part owner or part

owners of any such ship, vessel, or boat, shall become forfeited to and shall be seized and prosecuted as hereinafter is mentioned and provided.

Dealing in Slaves on the High Seas, &c., to be deemed Piracy.

Sect. 9. And be it further enacted, that if any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories, or territories now or hereafter belonging to His Majesty, or being in His Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading in the East Indies, shall except in such cases as are in and by this Act permitted after the 1st Jan. 1825, upon the high seas, or in any haven, river, creek, or place where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid or assist in carrying away, conveying and removing any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with as a slave or slaves, or shall after the said 1st Jan. 1825, except in such cases as are in and by this Act permitted upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, any person or persons for the purpose of his, her, or their being carried away, conveyed, or removed as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with as a slave or slaves, then and in every such case the person or persons so offending shall be deemed and adjudged guilty of piracy, felony, and robbery, and being convicted thereof shall suffer death without benefit of clergy, and loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer.

The Slave Trade Act 1873 (36 & 37 *Vict. c.* 88).—*Seizure of Slave Ships—Visitation and Seizure by Cruisers, &c., of suspected Slave Ships.*

Sect. 3. Where a vessel is on reasonable ground suspected of being engaged in or fitted out for the slave trade, it shall, subject in the case either of the vessel of a foreign State or of the commander or officer of a cruiser of a foreign State to the limitations, restrictions, and regulations, if any, applicable thereto, contained in any existing slave trade treaty made with such State, be lawful:

(*a*) If the vessel is a British vessel or is engaged in the slave trade within British jurisdiction, or is not a vessel of a foreign State, for any commander or officer of any of Her Majesty's ships, for any officer bearing Her Majesty's commission in the army or navy, for any officer of Her Majesty's Customs in the United Kingdom, Channel Islands, or the Isle of Man, for the governor of a British possession, or any person authorised by any such governor, and for any commander or officer of any cruiser of a foreign State authorised in pursuance of any existing slave trade treaty; and

(*b*) If the vessel is the vessel of a foreign State, for any commander or officer of any of Her Majesty's ships when duly authorised in that behalf in pursuance of any treaty with that State, and for any commander or officer of any cruiser of that foreign State,

to visit and seize and detain such vessel and to seize and detain any person found detained or reasonably suspected of having been detained as a slave for the purpose of the slave trade on board any such vessel, and to carry away such vessel and person together with the master and all persons, goods, and effects on board any such vessel for the purpose of bringing in such vessel, person, goods, and effects for adjudication.

All vessels, slaves, persons, goods and effects which may be forfeited under the enactments with which this Act is to be construed as one as hereinafter mentioned may be visited, seized, and detained by any commander, officer, governor, or person authorised by this section to seize a British vessel.

Vessels equipped for Traffic in Slaves to be deemed engaged in the Slave Trade.

Sect. 4. Where any of the particulars mentioned in the first schedule to this Act are found in the equipment or on board of any vessel, visited, seized, or detained in pursuance of this Act, such vessel shall, unless the contrary be proved, be deemed to be fitted out for the purposes of and engaged in the slave trade, and in such case, even though the vessel is restored, no damages shall be awarded against the seizor under this Act in respect of such visitation, seizure or detention, or otherwise upon such restoration.

Provided that this section shall not extend to the vessel of any foreign State except so far as may be consistent with the treaty made with such State.

Jurisdiction of Courts in regard to Slave vessels, Slaves' Goods and Effects.

Sect. 5. The High Court of Admiralty of England and every Vice-Admiralty Court in Her Majesty's dominions out of the United Kingdom, shall have jurisdiction to try and condemn or restore any vessel, slaves' goods and effects alleged to be seized, detained, or forfeited in pursuance of this Act, and on restoring the same to award such damages in respect of the visitation, seizure, and detention of such vessel, goods and effects, and of any person on board such vessel, and in respect of any act or thing done in relation to such visitation, seizure, or detention, or in respect of any such matters, and in any case to make such order as to costs as, subject to the provisions of this Act, and of any existing slave trade treaty, the court may think just.

Provided, that nothing in this section shall give to any court any jurisdiction inconsistent with any existing slave trade treaty over a vessel which is shown to such court to be the vessel of any foreign State, and which has not been engaged within British jurisdiction in the slave trade, but where any vessel of a foreign State is liable to be condemned by a British slave court, such court shall have the same jurisdiction as if she were a British vessel. Each of the said courts shall have the same jurisdiction in regard to any person who has been seized, either at sea or on land, on the ground that he has or is suspected to have been detained as a slave, for the purpose of the slave trade, as the court would have under this section if he had been so detained on board a vessel that was seized and brought in for adjudication.

Protection of Persons authorised to seize.

Sect. 17. All persons authorised to make seizures under this Act shall, in making and prosecuting any such seizure, have the benefit of all the protection granted to persons authorised to make seizures under any Act for the time being in force relating to Her Majesty's Customs in the United Kingdom, in like manner as if the enactments granting such protection were herein enacted and in terms made applicable thereto.

Sched. 1.—*Equipments which are prima facie Evidence of a Vessel being engaged in the Slave Trade.*

First. Hatches with open gratings instead of the close hatches which are usual in merchant vessels.

Secondly. Divisions or bulkheads in the hold or on deck more numerous than are necessary for vessels engaged in lawful trade.

Thirdly. Spare plank fitted for being laid down as a second or slave deck.

Fourthly. Shackles, bolts, or handcuffs.

Fifthly. A larger quantity of water in casks or in tanks than is requisite for the consumption of the crew of the vessel as a merchant vessel.

Sixthly. An extraordinary number of water casks or of other vessels for holding liquid, unless the master shall produce a certificate from the custom house at the place from which he cleared outwards, stating that a sufficient security had been given by the owners of such vessel that such extra quantity of casks or of other vessels should only be used for the reception of palm oil or for other purposes of lawful commerce.

Seventhly. A greater quantity of mess tubs or kids than requisite for the use of the crew of the vessel as a merchant vessel.

Eighthly. A boiler or other cooking apparatus of an unusual size and larger, or fitted for being or capable of

being made larger than requisite for the use of the crew of the vessel as a merchant vessel, or more than one boiler or other cooking apparatus of the ordinary size.

Ninthly. An extraordinary quantity either of rice or of the flour of Brazil manioc or cassada, commonly called farina or maize, or of Indian corn, or of any other article of food whatever beyond what might probably be requisite for the use of the crew, such rice, flour, maize, Indian corn, or other article of food not being entered on the manifest as part of the cargo for trade.

Tenthly. A quantity of mats or matting larger than is necessary for the use of the crew of the vessel as a merchant vessel.

Eleventhly. Any other equipment, article, or thing which is declared by any existing slave trade treaty to be *primâ facie* evidence of a vessel being engaged in the slave trade.

The second schedule repeals certain previous enactments relating to the slave trade, and (*inter alia*) 5 & 6 Will. 4, c. 60, and 5 Geo. 4, c. 113, except ss. 2, 11, part of s. 12, and ss. 39, 40, 47.

The Customs Consolidation Act 1876 (39 & 40 *Vict. c.* 36). *As to Claim by Owners of Goods seized.*

Probable cause may be certified in bar.

Sect 267. When in any information or suit relating to any seizure, a verdict or judgment shall be found for the claimant, if it shall appear to the judge or justice before whom the same was heard, that there was reasonable or probable cause of seizure, and such judge or justice shall so certify on the record or information, such certificate may be pleaded in bar to any action, indictment, or other proceeding against the seizor; and in case any action, indictment, or other proceeding shall be brought to trial against any person on account of any seizure (whether any information be brought to trial for the condemnation of the same or not) and a verdict shall be given for the plaintiff, if the judge or justice before whom such action, indictment, information, or other proceeding shall be tried or heard, shall certify in the record, information, or other written proceeding, that there was reasonable or probable cause for seizure, the plaintiffs shall not be entitled to more than twopence damages, nor to any costs; nor shall the defendant be fined more than one shilling; and the production of such certificate, or a copy thereof, verified by the signature of the officer of the court, shall be sufficient evidence of such certificate.

The Treaty between England and Portugal, 3rd July 1842. *Incorporated in an Act for carrying into effect the Treaty between Her Majesty and the Queen of Portugal for the Suppression of the Traffic in Slaves* (6 & 7 *Vict. c.* 53).

Art. 9. Any vessel, British or Portuguese, which shall be visited by virtue of the present treaty, may lawfully be detained, and may be sent or brought before one of the mixed commissions established in pursuance of the provisions thereof, if any of the things hereinafter mentioned shall be found in her outfit or equipment, or shall be proved to have been on board during the voyage in which the vessel was proceeding when captured, namely:

Then follows a list of articles identical with those enumerated in the first ten paragraphs of the first schedule to the Slave Trade Act (*ubi sup.*), and concludes:

Any one or more of these several things, if proved to have been found on board, or to have been on board during the voyage on which the vessel was proceeding when captured, shall be considered as *primâ facie* evidence of the actual employment of the vessel in the transport of negroes or others for the purpose of consigning them to slavery, and the vessel shall thereupon be condemned, and shall be declared lawful prize, unless clear and incontestably satisfactory evidence on the part of the master or owners shall establish to the satisfaction of the court that such vessel was at the time of her detention or capture employed in some legal pursuit, and that such of the several things above enumerated as were found on board of her at the time of her detention, or had been on board of her on the voyage on which she was proceeding when captured, were needed for legal purposes on that particular voyage.

Art. 10. If any of the things specified in the preceding article shall be found in any vessel which is detained under the stipulations of this treaty, or shall be proved to have been on board the vessel during the voyage on which the vessel was proceeding when captured, no compensation for losses, damages, or expenses consequent upon the detention of such vessel shall in any case be granted either to her master or to her owner, or to any other person interested in her equipment or lading, even though the mixed commission should not pronounce any sentence of condemnation in consequence of her detention.

Convention between Great Britain and Portugal 1871, *Additional to the Treaty of* 1842.

Art. 3. It is agreed that in the case of a British vessel visited by a Portuguese cruiser being detained as having been engaged in the traffic in slaves, or as having been fitted out for the purposes thereof, she shall be sent for adjudication to the nearest or most accessible British colony, or shall be handed over to a British cruiser if one should be available in the neighbourhood of the capture; and that in the corresponding case of a Portuguese vessel visited by a British cruiser being detained as having been engaged in the traffic in slaves, or as having being fitted out for the purposes thereof, she shall be sent for adjudication to the nearest or most accessible Portuguese colony, or shall be handed over to a Portuguese cruiser, if one should be available in the neighbourhood of the capture. All the witnesses and proofs necessary to establish the guilt of the master, crew, or other persons found on board of any such vessels, shall be sent and handed over with the vessel itself, in order to be produced to the court before which such vessel or persons may be brought to trial. All negroes or others (necessary witnesses excepted) who may be on board a British or Portuguese vessel for the purpose of being consigned to slavery, shall be handed over to the nearest authority of the Government whose cruiser has made the capture. They shall be immediately set at liberty and shall remain free, the Government to whose authority they may be delivered guaranteeing them their liberty. With regard to such of these negroes and others as may be sent in with the detained vessels as necessary witnesses, the Government to which they have been delivered shall set them at liberty as soon as their testimony shall no longer be required, and shall guarantee their liberty. When a detained vessel is handed over to a cruiser of her own nation, an officer in charge, and other necessary witnesses and proofs shall accompany the vessel.

Sir *J. Holker* (Attorney-General) and *Dicey* for appellants.—This vessel was engaged in the slave trade, or there was at all events reasonable and probable cause to suppose that she was so. [*Butt*, Q.C. takes the objection that, as the restoration of the vessel was not appealed against, it was not competent to the appellants to contend that the vessel was engaged in the slave trade, and therefore ought to have been condemned. The Committee overruled the objection.] The law applicable to the case is in the unrepealed portion of 5 Geo. 4, c. 113, and the Slave Trade Act 1873 (36 and 37 Vict. c. 88), and in the terms of the Treaty with Portugal of 1842, and the subsequent Convention of 1871. If the articles mentioned in the schedule to the Slave Trade Act 1873 are found on board, that in itself justifies a seizure and sending in for adjudication (Art. 9; and 36 & 37 Vict. c. 88, ss. 3 & 4); and even if the ship is released no damages are to be given (Art. 10; and 36 & 37 Vict. c. 88, s. 4). That these articles were found there can be no doubt on the evidence; but besides this, the trade carried on by this vessel was virtually, if not actually, the slave trade; the accommodation was altogether insufficient for the number of persons proposed to be carried, and the payments made for the krooboys' services were made not to the krooboys themselves, but to their parents or alleged parents, or to the head men of the tribe, and therefore

the krooboys were not free agents in the matter; and in any case the presence of the casks and other indicia of the employment of the vessel in the slave trade on board the *Ovarense* justifies the seizure, and should prevent the seizor being condemned in costs and damages:

The Winwick, 2 Moo. P. C. C. 19.

The reason why these indicia could not be held to justify such a seizure presumably was, because the Act at that time in force did not so speak of them except where the seizure was at sea; but that is no longer the case, and therefore the seizure was justified:

The Ricardo Schmidt, L. Rep. 1 P. C. 268.

This vessel being within British jurisdiction comes under the provisions of sects. 3 (*a*), 4, and 5 of the Slave Trade Act, 1873, and the provisions of the treaty with Portugal do not apply, since they only refer to the right of search and seizure on the high seas. No treaty is necessary to regulate the relations of this country with foreign ships when in our ports, but they are subject to such laws as we may choose to make; this principle is recognised in the preamble to the Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73), and that Act was passed without any treaty being made with the States whose ships and subjects are affected by it. The judge who tried the case was, under the circumstances, bound to certify under the Slave Trade Act 1873, sect. 17 (36 & 37 Vict. c. 88), and the Customs Consolidation Act 1876, s. 267 (39 & 40 Vict. c. 36), and therefore the claimant can only recover nominal damages and no costs.

Butt, Q.C., *E. C. Clarkson*, and *E. Law*, for the respondents.—The vessel was properly restored with costs and damages; she was engaged in a perfectly legitimate trade, and her papers were of such a nature as to satisfy the officer who seized her of the fact, had he taken the proper precaution of seeing them before seizing the vessel. This vessel, being a Portuguese vessel, does not come under clause (*a*) of sect. 3 of the Slave Trade Act 1873, unless actually engaged in the slave trade at the time; as the seizure was not made by a naval officer, it was not made under clause (*b*) of sect. 3 of the Slave Trade Act 1873; she must therefore have been seized under the final clause of sect. 3, that is, under the provisions of the former Slave Trade Acts; but there is no limitation of liability on the ground of the seizure being reasonable in that clause. If the vessel is forfeit by reason of her being engaged in the slave trade, she may be seized, but this vessel is not engaged in the slave trade, and is therefore not forfeit, and therefore ought not to have been seized; the seizure in such a case is made at the peril of the seizor, and rightly, for it is possible for an officer when the ship is in port to examine the circumstances of suspicion with care, whereas a naval officer boarding a vessel at sea cannot be expected to see more than those indicia which under the schedule to the Act, and by the Treaty of 1841, will constitute "reasonable cause." This is further shown by the fact that, when a naval officer makes the seizure of a foreign ship, the vessel has to be sent for adjudication to the port of her own country under the provisions of the supplemental convention with Portugal of 1871, by which the mixed commissions to try slave cases were abolished, subject to which sect. 3 of the Slave Trade Act 1873 is to be construed. There is nothing in clause (*a*) about reasonable grounds, and those words cannot be read into the Act of Parliament. The seizure, therefore, is not made under the Act of 1873 at all, and therefore sect. 4 of that Act does not apply. But even assuming that it does apply to such a seizure as this, it does not apply to us, for here the "contrary is proved;" that is, we have proved that she was not engaged in or fitted out for the slave trade; and, moreover, the proviso takes a foreign vessel out of its operation as it is not consistent with the terms of the treaty by which the vessel was to be sent to the port of her own country for adjudication. Even if the presence of the articles enumerated in Schedule 1 to the Act of 1873 constitute under that Act reasonable ground for a seizure, they only do so in case of the seizure of a foreign ship, when the seizure is made in the course of a voyage, that is at sea, and by a naval officer (Art. 9 of Treaty of 1841). The difference is pointed out by the judgment of the court in the case of *The Ricardo Schmidt* (L. Rep. 1 P. C. 268), where Lord Westbury says (p. 280): "I need not point out . . . . that there was a great necessity for laying down clear and definite rules, as they are laid down in the statute 5 & 6 Will. 4, c. 60, for the purpose of guiding captors at sea, for then the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature, therefore, defines certain things in that statute which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the captor from consequences even if the vessel be not condemned. But when you come to the case of a ship lying at anchor in a British harbour, and having been there for some time, not manifesting the smallest indication of anxiety to quit the harbour . . . . the obligation on a seizor to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which *per se* have not an overpowering weight on the mind at the time when the seizure was made." If the Act of 1873 goes further than 5 & 6 Will. 4, c. 60, for seizure when a vessel is in harbour (in making the presence of the articles in Schedule 1 a reasonable ground), it can only do so with reference to British vessels, as with reference to foreign vessels it is subject to the treaties, and the treaty with Portugal only allows the presence of these articles to be reasonable ground of seizure when found at sea, and as the sections of the Act are of a highly penal character they must be interpreted strictly. Besides, many of the articles mentioned in the schedule are such as would render an ordinary passenger steamer liable to seizure if their presence is in any case to be reasonable ground for such seizure. Such a vessel certainly carries more water than needed for her crew and has open hatches. The schedule only applies, in fact, to a vessel professing to carry cargo, not to one whose business was shown by her papers to be the carriage of emigrants. But even if the seizure in the first instance was justified, the subsequent detention was not; the seizor might have found out all about the ship immediately, and the nature of the trade she was engaged in, and did in fact become aware of it very shortly after seizing, and yet he detained the vessel for months awaiting the decision of the Vice-Admiralty Court, and the damages

have been caused by that detention for which there can be no excuse. The section of the Customs Consolidation Act does not apply, as it refers to seizures for alleged breach of customs regulations in the United Kingdom, and not to slave seizures in colonial ports.

Dicey in reply.

Cur. adv. vult.

May 6.—The judgment of the court was delivered by

SIR ROBERT PHILLIMORE.—This is an appeal from so much of a decree of the learned judge of the Vice-Admiralty Court of Sierra Leone as awarded damages, expenses, and costs to the respondents against the appellants. The decree was made in a cause brought by the appellants against the Portuguese vessel called the *Ovarense*, of which the respondent Manoel dos Santos Casaca was master, and the respondents Manoel Roderigues Formigal and Fernando de Olivera Bello, of Lisbon, merchants, were the sole owners, and against her tackle, apparel, and furniture, and the goods, wares, merchandise, and moneys on board the same, and against three alleged male slaves, Grando, Panik, and Yoroba, seized by James Craig Loggie, as liable to forfeiture under the provisions of the statutes 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the Slave Trade Act 1873).

The *Ovarense* was seized by James Craig Loggie on the 5th Dec. 1876, whilst lying at anchor in the harbour and port of Freetown in Sierra Leone. Mr. Loggie was duly authorised by the Governor of Sierra Leone, to seize, detain, and arrest all vessels which should or might be liable to be forfeited for any offence committed against the provisions of the said Acts of Parliament.

The Appellants proceeded by libel, and alleged that the brig *Ovarense* being in the harbour of Freetown, in British waters, was engaged in and fitted out for the slave trade, having on board three slaves and a larger quantity of water than was requisite for the consumption of the crew of the brig as a merchant vessel, and an extraordinary number of empty casks for which no certificate was produced that security had been given that these casks were for lawful traffic, and also seventy-three bags of rice and thirty-two mats; such rice and mats being as alleged more than necessary for the use of the crew; and that the brig had shackles concealed on board on her arrival, which were afterwards removed; that Manoel dos Santos Casaca and Francisco Ferreira de Moraes were not engaged in emigration according to law, but were engaged in the slave trade; that the aforesaid three slaves were carried away by Francisco Ferreira de Moraes, from Cape Palmas, to be dealt with as slaves; and they prayed that the said ship and slaves should be forfeited, and Manoel dos Santos Casaca condemned in costs.

In reply the Respondents filed their plea alleging that the said brig was not engaged in or fitted out for the slave trade, but was an emigrant vessel, duly licensed as such, and that the three persons on board were not slaves, but free immigrants, destined for the Portuguese island of St. Thomas where slavery did not exist; that the rice was in the brig's manifest; that the thirty-two mats were old mats which had been left in the said brig from the last voyage, having been used to line the said brig when laden with coffee, as is usual; that of the water two tanks and nine puncheons were in the manifest, and the remainder had been taken on board in the harbour of Freetown after the arrival of the said brig; that of the empty casks some had contained stores, and the remainder had been taken on board in the said harbour of Freetown after the arrival of the said brig, and that therefore the certificate mentioned in the libel was not required by law until the said brig cleared out of the said harbour; and that there never were any shackles on board; and the plea prayed that the suit should be dismissed, and the brig, tackle and goods, and the three alleged slaves should be restored, and the seizor condemned in costs, losses, damages, demurrage, and expenses.

It may be as well to dispose at once of a point which was raised on the argument, that the judge had not certified under the Customs Consolidation Act 1876 (39 & 40 Vict. c. 36), s. 267, that there was reasonable cause for the seizure of the brig. Their Lordships are clearly of opinion that the provisions of the Act in question do not in any way affect the present case.

A great many witnesses were examined both on behalf of the seizor and of the claimant. The evidence was generally of an unsatisfactory kind and resulted in a great conflict of testimony. But, after taking some time to consider the written depositions and documentary evidence, the learned judge of the Vice-Admiralty Court, on the 9th Nov. 1877, pronounced judgment in favour of the respondents (the then claimants) and "decreed the said brig, goods, wares, merchandise, and two of the said three boys, Grando and Yoroba, called slaves, surviving at the time of the passing of the said sentence to be restored to the claimant on behalf of himself and of Manoel Roderigues Formigal and Fernando de Olivera Bello for the brig, her tackle, apparel and furniture, and on behalf of the said Francisco Ferreira de Moraes for the goods, wares, merchandise, and moneys, and for two of the said three boys, called slaves, Grando and Yoroba, surviving at the time of the passing of the said sentence, and condemned the said seizor in costs and damages."

From this condemnation in costs and damages, though not from the release of the ship herself, the seizor has appealed. In arguing the case before the court, his council have maintained that there was evidence which would have justified the condemnation of the ship, though, in the absence of proof of the guilty knowledge of the owners, such a condemnation, according to the law laid down upon the subject could not be enforced. They have, nevertheless, used the evidence which, as it was alleged, ought to have enured to the condemnation of the ship, in support of his (the seizor's) claim to be relieved from that part of the sentence which condemned him in costs and damages.

There are two questions of mixed law and fact which their Lordships are called upon to decide. In order to arrive at this decision it becomes necessary to consider and construe some of the statutes relating to the slave trade, and the treaty as to this subject between England and Portugal; and first with regard to the statutes.

The learned judge of the court below rightly observed that "before the passing of the Act (36 & 37 Vict. c. 88), the statute 5 Geo. 4, c. 113, was the law by which we were to be guided in cases of slave-dealing within British

waters and jurisdiction, and under that law, and in accordance with decisions pronounced in cases coming under it, the captors were bound to prove, in order to condemn the vessel, not only that she was actually engaged in the slave trade, or fitted out for the purposes of the slave trade, but that the owners of the ship were cognisant of the fact or had a guilty knowledge thereof, and also that the owners of the cargo on board had a guilty knowledge of the fact, to justify a forfeiture of their goods, but that if there was probable cause for the seizure—that is, if from all the surrounding circumstances there was, to a reasonable mind, a fair and reasonable suspicion that the vessel was engaged in or fitting out for the purpose of the slave trade, then—although the vessel were restored, no damages could be awarded against the seizor."

The next statute which has to be considered is the 6 & 7 Vict. c. 53, which came into operation in Aug. 1843. That statute carried into effect a treaty between England and Portugal for the suppression of the traffic in slaves, which had been concluded the 3rd July 1842. The first and second articles of the treaty which is set forth in the schedule to the Act, are as follows: "(1.) The two high contracting parties mutually declare to each other that the infamous and piratical practice of transporting the natives of Africa by sea for the purpose of consigning them to slavery is, and shall for ever continue to be, a strictly prohibited and highly penal crime in every part of their respective dominions, and for all the subjects of their respective Crowns. (2.) The two high contracting parties mutually consent that those ships of their royal navies respectively which shall be provided with special instructions, as hereinafter mentioned, may visit and search such vessels of the two nations as may upon reasonable grounds be suspected of being engaged in transporting negroes for the purpose of consigning them to slavery, or of having been fitted out for that purpose, or of having been so employed during the voyage in which they are met by the said cruisers; and the said high contracting parties also consent that such cruisers may detain and send and carry away such vessels in order that they may be brought to trial in the manner hereinafter agreed upon; and in order to fix the reciprocal right of search in such a manner as shall be adapted to the attainment of the objects of this treaty, and shall at the same time prevent doubts, disputes, and complaints, it is agreed that the said right of search shall be exercised in the manner and according to the rules following. Certain articles are then described, which, if found on board of or in the equipment of any vessel visited in pursuance of the treaty, are declared to be *primâ facie* evidence that the vessel was actually engaged in the slave trade, and by Article 10 it is declared that "If any of the things specified in the preceding article shall be found in any vessel which is detained under the stipulations of this treaty, or shall be proved to be on board the vessel during the voyage on which the vessel was proceeding when captured, no compensation for losses, damages, or expenses consequent upon the detention of such vessel shall, in any case, be granted either to her master, or to her owner, or to any other person interested in her equipment or lading, even though the mixed commission should not pronounce any sentence of condemnation in consequence of her detention." Among these articles are mentioned, shackles, bolts, or handcuffs, an extraordinary number of empty casks, an extraordinary quantity of rice and mats. These are the articles specified in the libel.

They are also mentioned in the first schedule of 36 & 37 Vict. c. 88, as amongst the equipments which are *primâ facie* evidence of a vessel being engaged in the slave trade. This statute, entitled, "An Act for consolidating with amendments the Acts for carrying into effect treaties for the more effectual suppression of the slave trade, and for other purposes connected with the slave trade," was passed on the 5th Aug. 1873. It is a statute which is by no means perspicuously worded, and which has not as yet undergone any judicial construction. The 3rd section enacts that "where a vessel is on reasonable grounds suspected of being engaged in or fitted out for the slave trade, it shall," subject to certain restrictions, "be lawful" for certain authorised persons, among whom is, as in this case, the governor of a British possession, "to visit, and seize, and detain such vessel, and to seize and detain any person found detained, or reasonably suspected of having been detained, as a slave, for the purpose of the slave trade, on board any such vessel, &c.

The first and principal question is, whether the *Ovarense* was seized on reasonable grounds of suspicion of her being engaged in the slave trade. What were the facts relating to this vessel at the time when she was seized? The first and not the least important fact is, that she was seized in harbour and not upon the open seas; and here it may be well to cite the language of Lord Westbury delivering the judgment of the Privy Council in a similar case (*The Ricardo Schimdt*, 4 Moore's P. C. 136: L. Rep. 1 P. C. 268). The law at that time stood, it is true, under 5 Geo. 4. c. 113; but the reasoning is not inapplicable to the present case. "We have, therefore," his Lordship says, "no circumstances here to which any particular weight or force is to be given by law, as under 5 & 6 Will. 4, c. 60, would be the case, but we have a case, to be judged of under all the circumstances, whether any person going on board a ship lying in the harbour of Sierra Leone and examining her—going over her—could, from the mere circumstance of the number of water casks, be warranted in arriving at the conclusion that this ship was intended to be engaged in the slave trade. I need not point out, what was very well commented upon by one of the counsel for the appellant, that there may be great necessity for laying down clear and definite rules, as they are laid down in the statute 5 & 6 Will. c. 60, for the purpose of guiding captors at sea, for there the transaction is of necessity a hurried one, admitting of no very minute examination; and the Legislature, therefore defines certain things in that statute, which, if they are not plainly accounted for, shall constitute an amount of *probabilis causa* sufficient to exempt the captor from consequences, even if the vessel be not condemned. But, when you come to the case of a ship quietly lying at anchor in a British harbour, and, having been there for some time, not manifesting the smallest indication of anxiety to quit the harbour, but actually and plainly engaged in *bonâ fide* trade within the harbour, the obligation on a

seizor to justify what he has done is a very strict obligation, and one that cannot be discharged by a reference to circumstances which *per se* have not an overpowering weight on the mind at the time when the seizure was made." The *Ovarense* arrived in the port of Freetown without any apparent circumstance of guilt attaching to her conduct; she remained there quietly, there was no restraint as to persons leaving or coming on board her, she seemed to have been in no hurry to get away. It certainly was, on the face of it, a strange thing to select a British port for the visit of a slave-trading vessel, in order, among other things, to take in an excessive quantity of water, and, as alleged, with some slaves actually on board. The general defence on the part of the owners of the *Ovarense* is, that she was equipped with the object of facilitating the immigration of free labourers from the West coast of Africa into the Portuguese island of St. Thomas, and it must be borne in mind that many of the articles are *ancipitis usus*—that is, are equally necessary for the carrying on of the guilty slave trade and for the purpose of innocent immigration. Slavery, even in the modified form established by a decree having the force of law of the 25th Feb. 1869, had been abolished in St. Thomas by a law passed on the 29th April 1875, to come into operation a year after publication. An immigration ship would, of course, require a greater number of empty casks and a greater quantity of water than would be necessary for the crew, and the presence of some shackles on board would be no necessary indication of slave-trading. It appears that the *Ovarense*, a brig of 309 tons, was chartered in Sept. 1876, by one De Moraes, for the purpose of taking immigrants to St. Thomas, and, on the 26th Dec., cleared out for the port of Liberia and Sierra Leone—(the Governor of St. Thomas gave the captain a letter, addressed to the Portuguese consul at Sierra Leone, informing him that the *Ovarense* was licensed to carry 368 freemen, or 400 men, if a small half-deck could be added)—to take water at Sierra Leone for that number. She sailed from St. Thomas, with a list of passengers signed by the proper Portuguese authority. On the 2nd Dec. 1876 she arrived in the harbour of Freetown, Sierra Leone; she had taken in six kroomen at Cape Palmas, three of whom were alleged to be slaves. On the 4th Dec. the captain entered his vessel at the customs, and left with the acting Portuguese consul the ship's papers. Early on the 5th Dec. Mr. Loggie came on board the *Ovarense*. He paid three visits to the vessel on that day, and at the last visit seized the vessel, and brought the three kroomen on shore. The Portuguese consul swears that he received all the ship's papers soon after the arrival of the vessel in harbour. His evidence is as follows: "The captain came to me first on the 3rd Dec. in the morning. I never went on board the *Ovarense*. I heard on the 5th Dec. she had been seized. On hearing this I went to the Custom House, and from thence to the governor. I saw the collector before I went to the governor. I went alone to the governor officially as consul for Portugal; it was Governor Kortright. I saw him. I had some official conversation with the governor as to the *Ovarense*. I had seen the governor officially before this on the 30th Nov. and the 3rd Dec. 1876 respecting the *Ovarense*. After this I left his Excellency. On the 6th Dec. I wrote a letter to his Excellency on the subject of the *Ovarense*, and to that letter I received an answer. On the same day I wrote a second letter to his Excellency, to which I received no answer. Loggie came to me about the *Ovarense* first on the 7th or 8th Dec., but I am not certain on which day. He came alone. He applied to me for the papers of the *Ovarense*. He said he had come to the Portuguese consul, not to his friend Becaise, and wished to have the papers of the *Ovarense* shown to him. I told him I could not show them because he brought no authority. I told him the best thing he could do would be to apply to the governor, and on the governor saying he (Loggie) might see the papers, I would hand the papers to the governor. Nothing more passed, and Loggie went away. I never told Loggie, on that or any other occasion, "that there was no certificate as aforesaid from the Custom House at the place from which the said master cleared outwards, stating that a sufficient or any security had been given by the owners of such vessel that such extra quantity of casks and other vessels for holding liquid should only be used for the reception of palm oil, or for other purposes of lawful commerce." I never told him a word about this. I had no conversation with him about a certificate. Loggie came to me again about the *Ovarense*; this was about four or five days after the seizure, but I can't recollect the exact day. On this occasion he asked me to give him the ship's papers, because his proctor wanted to see them; and that he (Loggie) would give a receipt for them. This is what he told me at first. I refused to give the papers. Loggie then said that Mr. Lewis, his proctor, would give the receipt, and that I need not be afraid. I told him I was very sorry, but that all the papers he required were in the governor's hands; that I had handed them to the governor, and that even if I had them I could not hand them either to himself or his proctor. Loggie did not come to me again about the *Ovarense*. I am sure he never came to me before the 7th Dec. to ask any information about the *Ovarense*. I might have seen Loggie on the 3rd Dec., but not to speak to. I did not see him on the 4th Dec., and I had no conversation with him before the 7th Dec."

The papers lodged at the Consulate as before mentioned and produced in evidence were:—1. A royal passport dated Lisbon the 9th June 1870, with twenty-two *visés* thereon, showing a trading of the *Ovarense* between the ports of Lisbon and Rio de Janeiro, Pernambuco, Bahia, and the Portuguese island of St. Thomé, the last *visé* being St. Thomé the 25th Sept. 1876, for a voyage to the ports of Liberia and Sierra Leone. 2. The brig's articles. 3. The charter-party between the owners and Moraes, to take labourers to St. Thomas from the ports of Liberia and Sierra Leone, Moraes, the charterer, binding himself to furnish water casks and water, to make a half-deck for an additional number of labourers to make up 400, the *Ovarense* being computed to carry without such additional half-deck 368 persons; also to provide a person to take charge of these free labourers, and a doctor and medicine, and to pay monthly to the owners, as freight, one conto of reis equal to 222*l.* 4*s.* 6*d.* 4, 5. The licences to Moraes and the captain to import free labourers into St. Thomas already referred to. 6. The letter from the Governor of St. Thomas

to the Portuguese consul, also already referred to.

If Mr. Loggie, before resorting to the serious step of seizing the ship, had taken the ordinary precaution of consulting the ship's papers and communicating with reference to them with the consul and the captain, he could not have failed to see that she was licensed to import free labourers, which would account for the articles found in her, and that he would not be justified simply from the fact that such articles were on board her in seizing this foreign vessel "as being engaged in or fitted out for the slave trade within British jurisdiction." With regard to the allegation that the brig herself was constructed and furnished or fitted out to carry slaves, the ship's papers and the charter-party would have shown, and there seems to be no reasonable ground for disbelieving them, that she was chartered and intended to carry immigrants, and was not engaged in the slave trade. And even if the original seizure could be justified, the subsequent detention of the vessel was wholly inexcusable. Much stress was laid upon the presence on board the vessel of the three Kroomen alleged to be slaves, and the information concerning them which had been given to the seizor, as constituting reasonable grounds for the suspicion that she was a slaver. Their Lordships are of opinion that the appeal cannot be maintained on this ground. They have already observed that the seizor had the means, which he neglected, of informing himself of the true character of the vessel, and of the true condition of those Kroomen. Had he done so, and had even all the evidence which was afterwards given on his part touching those Kroomen been present to his mind (which it was not), all that he could reasonably have inferred was, that the men in question had been, in some sort, kidnapped on board, with the object of carrying them to St. Thomas (an island where slavery had ceased to exist) as free labourers imported under the immigration law then prevailing; but such an inference or belief would not have justified the seizure or detention of the vessel under the treaty or the Slave Trade Act 1873, such supposed kidnapping, however reprehensible, being for a purpose other than that "of consigning the men to slavery." It may be that the immigration law of St. Thomas may not be sufficiently stringent, or that its provisions may not be duly observed; but defects in the law, or breaches of its provisions by Portuguese subjects, however deplorable, though they might be properly made the subject of diplomatic remonstrance to the Portuguese Government, are not grounds for seizing a vessel under the Portuguese flag as a slaver within the meaning of the treaty and the statute. In saying this their Lordships are assuming that on this part of the case the evidence given for the seizor was more credible than that opposed to it. That, however, was not the conclusion of the judge below, and their Lordships are not prepared to say that he was wrong. The evidence taken altogether certainly affords grounds for the conclusion that the story of the kidnapping was a malicious fiction got up by one of the other kroomen who had been charged by Moraes with theft and put under confinement.

There remains for consideration the 4th section of the 36 & 37 Vict. c. 88. That section is as follows: "Where any of the particulars mentioned in the first schedule to this Act are found in the equipment or on board any vessel visited, seized, or detained in pursuance of this Act, such vessel shall, unless the contrary be proved, be deemed to be fitted out for the purposes of and engaged in the slave trade, and in such case, even though the vessel is restored, no damages shall be awarded against the seizor under this Act in respect of such visitation, seizure, or detention, or otherwise upon such restoration." Much argument was addressed to their Lordships as to the effect and meaning of the terms contained in the section, and the case for the appellants was mainly, though by no means entirely, rested upon it, it being contended that the words "no damages shall be awarded" contained an enactment of positive law, which, whether harsh or not, left no option to the court upon the matter, unless, indeed, the proviso at the close of the section rendered the enactment inapplicable to this foreign vessel. The words of that proviso have been most carefully considered by their Lordships. They are as follows: "Provided, that this section shall not extend to the vessel of any foreign State, except so far as may be consistent with the treaty made with such State." This provision contains a plain proposition of international law, with respect to the general effect of the law of one foreign State upon the vessel of another. It has been contended, however, that Portugal has, by treaty with England, consented that the particular articles mentioned in the first schedule of this Statute, when found on board a Portuguese vessel in port, shall be considered as *primâ facie* evidence of her being engaged in the slave trade. But, upon a careful examination of the Portuguese treaties, their Lordships are of opinion that the consent on the part of Portugal relates only to vessels upon the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. All the provisions in the treaties point to this conclusion. The visitation is to be conducted by a naval officer whose rank is carefully specified; and with a view, formerly, of bringing in the vessel for adjudication before a court of mixed commission, and now, of sending her to the nearest or most accessible Portuguese colony, or handing her over to a Portuguese cruiser, if one be available in the neighbourhood of the capture. Their Lordships are of opinion, therefore, that this 4th section cannot be extended to a Portuguese vessel lying in British waters, inasmuch as it is not consistent with the treaty made with that State.

Upon the whole, it appears to their Lordships that the learned judge of the court below came to a right conclusion, both as to the facts and the law applicable to them, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

Solicitor for the appellants, *The Solicitor to the Treasury.*

Solicitors for respondents, *Gregory, Rowcliffes, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqs., Barristers-at-Law.

Tuesday, April 20, 1880.

(Before James, Baggallay, and Bramwell, L.JJ.)

The Ganges.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY.)

County Courts Admiralty Jurisdiction Act (31 & 32 *Vict. c.* 71), *ss.* 25 *and* 26—*Appeal from Court of Passage of Liverpool exercising Admiralty jurisdiction—Security for costs.*

The appeal from the Court of Passage at Liverpool exercising Admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 26, *and security for costs must be given before the instrument of appeal is lodged.*

This was an appeal against an order made upon summons by the learned judge of the Admiralty Division of the High Court, dismissing with costs an appeal from the Court of Passage of the borough of Liverpool, on the ground that security had not been given for the costs of the appeal, as required by the 25th and 26th sections of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).

The original action was brought for wages by James Hagerty and three others against the steamship *Ganges* and the owners thereof, on the Admiralty side of the Court of Passage of the borough of Liverpool, and judgment was given in it on the 8th March 1879, in favour of the defendants, the owners of the *Ganges*.

On the 18th March 1879 the plaintiffs lodged an instrument or notice of appeal in the Admiralty Registry of the Probate, Divorce, and Admiralty Division of the High Court of Justice against the above-named judgment.

The respondents, the owners of the *Ganges*, appeared under protest, and on the 22nd April 1879 took out a summons calling upon the appellants to show cause why the said appeal should not be dismissed with costs, the appeal being bad in law by reason of security for costs of the appeal not having been given pursuant to sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71). It was a fact that no security for costs had been given.

On the 26th April 1879 the summons was heard by the registrar, who referred the matter to the judge, who on the 6th May 1879 dismissed the appeal with costs, with leave to appeal to the Court of Appeal, the appellants to be at liberty to appeal again from the Court of Passage on giving security for costs within ten days, and to elect which course they would pursue within ten days. The appellants adopted the former course, and on the 17th May 1880 gave notice that they would appeal to the Court of Appeal against the order of the learned judge of the Probate, Divorce, and Admiralty Division, dismissing the appeal from the Court of Passage.

The appeal came on for hearing on the 20th April 1880.

The words of the 25th and 26th sections of the County Court Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), on which the argument principally turned, are as follows:

25. The Court of Passage of the borough of Liverpool shall, upon an Order in Council being made, which shall appoint the County Court of Lancashire holden at Liverpool to have Admiralty jurisdiction, have the like jurisdiction, powers, and authorities as by that order are conferred on the said County Court; but nothing herein shall be deemed to enlarge the area over which the jurisdiction of the Court of Passage extends, or to alter the rules and regulations for holding the said court, or to take away or restrict any jurisdiction, power, or authority already vested in that court; and fees received in that court under this Act, shall be dealt with as fees received in that court under its ordinary jurisdiction.

26. An appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in an Admiralty cause, and by permission of the judge of the County Court from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct.

Dr. *W. Phillimore* for the appellants.—Although the Court of Passage has by sect 25 the like jurisdiction, powers, and authorities as were bestowed on the County Court of Lancashire holden at Liverpool, by the Order in Council conferring Admiralty jurisdiction on that court, yet there is nothing in either the 25th or 26th sections to show that it was intended that a different method of procedure was to be adopted by the Court of Passage exercising Admiralty jurisdiction from that adopted by it in other matters under the provisions of the special Act relating to the Court of Passage (the Court of Passage Procedure Act 1853). In fact, the following section, which regulates appeals from County Courts, is studiously silent as to appeals from the Court of Passage, although it cannot for a moment be contended that the Court of Passage was out of the mind of the framer of the section, seeing that the whole of the previous section relates to it alone. The 26th section speaks only of a County Court in an Admiralty cause, and neither mentions the Court of Passage nor "any court having a like jurisdiction as a County Court," and the logical meaning of the 26th section cannot possibly be extended to include the Court of Passage. An exactly analogous case is that of *Harper* v. *Pole* (L. Rep. 3 Eq. 752), in which Stuart, V.C. decided that, although the County Courts Equitable Jurisdiction Act (28 & 29 Vict. c. 99) gave the Sheriff's Court of the City of London a like jurisdiction to that given to the County Courts, yet there was no appeal from the judge of the Sheriff's Court to the Vice-Chancellor. Further, the words "on security for costs being first given," on which this case turns, only apply to appeals from interlocutory decrees in the case of County Courts, and not to appeals from final decrees. There is no provision again that the security shall be given before the instrument of appeal is lodged. It is quite sufficient if the security is given before the hearing comes on, and *The Forest Queen* (L. Rep. 3 Adm. 299; 3 Mar. Law Cas. O.S. 508), which was relied upon by the appellants in the court below, does not contradict this.

J. P. Aspinall, for the respondents, was not called upon.

James, L. J.—I do not think that there can be

any doubt as to the interpretation of the sections of the County Court Admiralty Jurisdiction Act now before us. The 25th section enacts that, on an Order in Council being made appointing the County Court of Lancashire holden at Liverpool to have Admiralty jurisdiction, the Court of Passage shall have the like jurisdiction, powers, and authorities as are conferred by that order on the said County Court. Now no one has disputed that such an order was made, and the Court of Passage now has the like jurisdiction with the County Court at Liverpool in Admiralty causes. But it has been contended that, whilst it has the jurisdiction, there is no provision in the Act for appeals from its decisions to the Admiralty Division of the High Court, and that such appeals can only be had under the provisions of the Act relating to the Court of Passage, and *Harper* v. *Pole* (L. Rep. 3 Eq. 752) has been cited in support of the contention. But it seems to me that the intention of the Act clearly is that appeals in Admiralty causes in the Court of Passage should be heard in the same manner as appeals in similar causes in the County Courts. Then it was contended that, if there was such an appeal, sect. 26 only requires security for costs to be given in appeals from interlocutory orders, but that construction of the words of the section does not accord with their plain meaning, which applies equally to appeals from final decrees. Then it is contended that under the words of the section security may be given at any time before the hearing of the appeal; in other words, that the word "appeal," in the 26th and 27th sections, means the hearing of the appeal and not the lodging of the instrument of appeal. Now I am of opinion that an appeal is commenced when the party takes the first step in the appeal, whether by lodging his instrument of appeal or by giving notice to the other side, as he may be required by the practice of the courts in which he is proceeding, and that such commencement of the appeal is what is meant by the word "appeal" in these sections. Hence security for costs must be given before the appeal is commenced, and I cannot attach any weight to the last contention of the learned counsel. The case he cited, that of *The Forest Queen* (3 Mar. Law Cas. 508; L. Rep. 3 Adm. 299), is against his contention. There I find the learned judge saying that "the words of the section rendered it imperative that security for costs should be given in the court below to found the jurisdiction of the High Court of Admiralty;" and I quite agree with the learned judge, and I do not see how any instrument of appeal can be allowed to be lodged before the jurisdiction of the court appealed to is founded. I think then that the order of the learned judge of the court below must be confirmed, and this appeal must be dismissed with costs.

Baggallay and Bramwell, L.JJ. concurred.

Solicitors for the appellants, *Mumford* and *Co.*
Solicitor for the respondents, *H. C. Coote.*

Jan. 14, 15, 16, 22, *July* 19 *and* 20, 1880.

(Before James, Brett, and Cotton, L.JJ.)

The Milanese.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damage—Collision—Fog—Duty of vessel when near a fog bank—Both to blame—Costs.

It is the duty of a vessel, when in the vicinity of a fog bank, to make the signals prescribed by Art. 10 *of the Regulations for Preventing Collisions at Sea, to warn vessels within it of her presence.*

When at night a masthead light is seen, but no side lights, it is an indication to an approaching vessel that the lights are those of a steamer whose side lights are obscured by fog.

Where the Court of Appeal varies the decision of the court below by finding both vessels to blame for a collision, there will be no order as to the costs, but each party must bear his own costs of the whole litigation.

Circumstances under which the Court of Appeal will overrule the decision of the court below on a question of fact considered and explained.

This was an appeal from a judgment of the Probate, Divorce, and Admiralty Division, by which the judge of the High Court of Admiralty had found the steamship *Milanese* alone to blame for a collision which took place between her and the sailing ship *Bokhara* off Folkestone about 6 p.m. on the 10th Nov. 1879.

The action was tried on the 14th, 15th, and 16th Jan. 1880.

Butt, Q.C., *Clarkson*, and *Stokes* for the plaintiffs, owners of the *Bokhara*.

Webster, Q.C., Dr. *W. G. F. Phillimore*, and *Stewart* for the defendants, owners of the *Milanese*,

The argument of counsel was principally directed to the state of the weather at the time of the collision, and as to the efficiency of the look-out in both ships.

The circumstances of the case, and the evidence adduced in respect of the weather, sufficiently appear from the judgment which was delivered by Sir Robert Phillimore, after consultation with the Trinity Masters and consideration.

Jan. 22.—Sir R. Phillimore.—In this case the vessels that came into collision were the *Bokhara*, a ship of 1143 tons, on a voyage from Antwerp to New York with a cargo of iron rails, and a steamship, the *Milanese*, on a voyage from Boston to London with a cargo of cattle. The place of collision was about five miles off Folkestone. The stem of the *Milanese* struck the starboard side of the *Bokhara* in the after part of the forerigging and she sank, but her crew were saved on board the *Milanese*. The ship complains that the steamer did not get out of the way and ported improperly. The steamer complains that the ship was going at too great a rate of speed, and that she did not sound her foghorn. The course of the ship was W.S.W.; her speed was five knots, and she was going down Channel. The steamer's course was S.E., the usual course up Channel, and she was going at a speed of between three and four knots an hour. The wind was N.W.

In this case there are certain admitted or proved facts which it is useful to bear in mind. The

Bokhara tacked about 4.30 p.m.; she afterwards kept her course; she carried proper lights; it was sunset at 4.17 p.m.; the collision happened as nearly as possible at 6 o'clock p.m. on the 10th Nov. 1879.

The *Bokhara* did not blow her fog horn; the night was one of unusual darkness, in that respect not bad for seeing lights; but the main contention is as to the amount and character of the special fog or mist apart from the general darkness. The evidence as to the fog is derived from lighthouses, from those on board each vessel, and from independent testimony.

It may be as well to dispose *in limine* of this question as to the lighthouses. We have carefully considered the lighthouse logs, and the evidence which they afford with respect to the distances of the lighthouses from the place of collision is as follows: South Sand light vessel distant eleven miles; South Foreland lights eight miles; Dover pier five and a half miles; Folkestone pier four and a half miles; Dungeness point eighteen miles; Varne light vessel five and a half miles. Then as to the weather described in the lighthouse logs. According to the log of the South Foreland high light, at six o'clock it was "overcast, misty, drizzling rain;" according to the South Foreland low light, at six o'clock it was "cloudy and misty;" according to the Dungeness light, at six o'clock it was "overcast, misty, drizzling;" according to the Varne light, at six o'clock it was "overcast, misty," and there is an entry which means "visibility of distant objects;" according to the South Sand Head lightship, "at 3.30 came on thick fog, sounded the horn, sunset," which was 4.17; "thick fog, sounded the horn, 5.45 fog cleared, discontinued the horn, 6 blue sky, cloudy misty." There is no doubt that during the course of the day and in the afternoon the weather had been foggy in the upper part of the Channel. It had shown itself in what one of the witnesses called "lumps," and another "patches."

The question is, what was the state of the weather a short time before six o'clock and at six o'clock in the place and in the immediate neighbourhood of the collision? The entries in the logs tend, though they are not conclusive on the point taken by themselves to disprove the existence of any such fog or mist as would require the sounding of a foghorn at or near the time and place of the collision.

The course of the ship was W.S.W. close-hauled on the starboard tack, on which she put herself when near the South Sand Head lightship, with a speed of five knots going down Channel, and when about four or five miles off and abreast of Folkestone the master, pilot, and look-out were on deck. The master says that at this time the look-out reported a bright light two or three miles off, and two points on the starboard bow. The look-out about two minutes after reported, "I can see her green light, she is a steamer." And he, the master, then walked to windward and shortly afterwards saw the red light about three-quarters of a mile off. The ship continued her course without any change. The steamer struck the ship on her starboard side a little abaft the fore-channel, about right angles, she cut four or five feet into her, causing her to sink within about five minutes afterwards, and the time of this collision it is admitted was about six o'clock. The master of the ship denies that there was any fog at this time, and also denies having heard any whistle before the collision.

It has been contended that the master has sworn falsely as to the report from the look-out; that a man named Frederiksen was on the look-out, and that he had made no such report. It appears that Bath, the chief mate, had taken the place of Frederiksen for a short time and made the report in question. I think that, according to the evidence in my notes, he reported the green light as well as the bright light, but at all events the master appears to have noticed all the lights. The pilot, Wieman, saw the bright light three or four miles off, and a minute or two afterwards heard the green light reported, and thought the steamer would pass starboard side to starboard side; he then saw her shut out her green light and show her red light, being distant then about three-quarters of a mile off. He said also that he could see all the lights on shore, which appeared to be an exaggerated statement. It is not unimportant to observe that the crew of the ship were employed in furling the mainsail shortly before the collision. Frederiksen, the look-out, who had been relieved by the mate, had been sent aft to assist in clewing up the sail; he heard the mate report the bright light. He resumed his look-out after the sail had been clewed up, and the mate had returned to the poop before the collision occurred: he never saw any other than the white light before the collision. Knudsen, the second mate, confirms generally this evidence. Jorgensen, who was on deck, says that he heard the mate report a light on the starboard bow, that he was employed in furling sail, and heard no other report. He says, "There was no fog at all. Clear weather, but much dark." Tonnsen, who was at the wheel, heard the report, "Light forward on the starboard bow," twelve or fourteen minutes before the collision. He was ordered to put the helm hard up, but there was no time to do so. He says there was no haze after 4.30. The master of the tug *Victoria*, Reader, says it was the darkest night he ever experienced. It is unnecessary to go through the evidence of the other witnesses, who confirm generally the evidence as to the state of the atmosphere being such as not to require the sounding of the fog-horn; but one witness, Hansen deserves notice. He was a Norwegian and pilot of the *Metcalfe*, which was bound down Channel in company with the *Bokhara*, and was about half a mile to leeward of her at about six o'clock, when he saw several bright lights, and the *Bokhara's* light. He also heard a steam whistle and the barking of a dog, which is proved to have been on board the *Bokhara*; he says there was no fog, but a little haze; he saw the Varne light at six o'clock, about six miles off, and the light on the Grisnez. I must here mention that Heywood, the master of the tug *Peabody*, a witness called on the part of the steamer, both in his evidence before the court and in a statement made to the opposite side, speaks of seeing an unusual cluster of lights S.S.E. of him at a mile and a half distance, and to his being surprised, as he thought fishermen could not be out on such a night. Williams, a witness also produced on the part of the steamer, and the mate of the *Peabody*, says that he saw a cluster of lights "all of a heap;" they were on the starboard beam, about a mile distant, and he thought it remarkable; and speaking of the state of the weather, he said it had been foggy in the daytime in patches, but he did not call it fog then, but misty or thickish haze.

This fact of the cluster of lights becomes important because it is in evidence that directly after the collision lights were hung over the bows of the steamer to assist the men in escaping from the sinking ship, and, as has been stated, the collision took place about six o'clock.

I now turn to the case of the defendants. Dewdney, the master of the steamer took a pilot about 4.30 p.m. off Dungeness. He went on at full speed at eight knots and a half an hour. At 4.30 it was hazy, but he kept full speed till 5.30, when he went half speed till a quarter to six, then he slowed. The weather became much thicker, and the pilot said he would go no further, and that he must bring her head round to tide and anchor. For that purpose the helm was put hard a-port, and orders given to prepare the anchor. This he says was about ten or twelve minutes before the collision. That brought her head S.E., at which time the green light of the *Bokhara* was seen eighty or ninety yards off, and the collision took place in less than a minute. He says he blew the whistle at twenty minutes to six, and at frequent intervals he heard the whistles of other steamers. At 6.20 the wind became more northerly, and it was "very, very clear." Walker, the pilot, confirmed in every material particular this statement. The same observation applies to Hambly, the mate. With regard to Mowatt, who was the only look-out on the upper deck, he says at four o'clock it was hazy, and as it got dark the weather thickened with fog or smoke; that their whistle was blown, and that he heard other whistles, and at 5.30 it lightened up, but shut down afterwards very thick; that he reported a green light on the port bow, judging it to be a hundred yards off; that he did not wait for an answer, but called out "Ship standing across our bows." In cross-eximanation this witness said that he had seen a white light on his starboard bow, and also a red light on his port bow, and that he reported them; these must have been seen before the *Bokhara's* lights were seen. It is to be observed that neither the master nor pilot have mentioned the circumstances of these lights. M'Gregor, the engineer, said that he received an order to go slow at 5.35, and to stop and go astern full speed at six. Conway, who was at the helm from four to six, said that he got an order to hard a-port when the light of the *Bokhara* was reported. Gibbs, the boatswain, who was getting the anchor ready, said there was a thick mist which he called "a Scotch mist," that he heard no other whistle but that of his own ship, and that only once or twice. Benjamin also says that he heard their own whistle, but no others. There are various independent witnesses who speak to the state of the weather, and who all agree that the weather was thicker in shore than it was in the offing. Camburn, a pilot in charge of the *Fanny*, refused to swear that it did not clear up at a quarter to six, having previously said that it cleared up about six, and that he had no recollection of having sounded his horn that evening. With respect to the other witnesses who were called, it is not necessary to specify their evidence in detail; they relate principally to the state of the weather, and show that the fog was of a partial character.

Upon the whole, a careful analysis of the evidence leads us to the conclusion that for a short time before the collision and at the collision the weather, though misty, was not so foggy as to prevent the lights of the *Bokhara* being seen by those on board the *Milanese*, and that if they were not so seen it was in consequence of the deficiency of the look-out on board the *Milanese*.

We are further of opinion, and indeed it is a necessary consequence, that the atmosphere was not such as to necessitate and render imperative the sounding of a foghorn by those on board the *Bokhara*, and we do not think that in the circumstances the speed at which the *Bokhara* was going about five knots, was excessive or unjustifiable.

I pronounce the *Milanese* alone to blame for this collision.

With regard to the plea of compulsory pilotage, as I have decided that there was a deficient look-out on board the *Milanese*, the pilot had not the assistance which he had a right to expect and receive, and therefore, according to the principles of decided cases, the plea of compulsory pilotage cannot prevail.

From this judgment the owners of the *Milanese* appealed, and the appeal came on for hearing on the 19th July, and was heard on that and the following day.

Webster, Q.C. and Dr. *W. G. F. Phillimore* for appellants.—The judgment of the court below is wrong, because there was under the circumstances conclusive evidence of a want of proper look-out on board the *Bokhara*; either the weather was clear as they say, in which case they ought to have seen our side lights; or it was foggy, as we say, in which case they ought to have blown their foghorn; the fact that they saw our masthead light and the general condition of the weather ought to have apprised them of the fact that our side lights were shrouded in fog. They were also guilty of negligence in carrying too much sail and going too fast, having regard to the weather. There was no negligence on the part of the *Milanese*; she was, notwithstanding the nature of her cargo and the importance of getting it into harbour as soon as possible proceeding with the utmost circumspection, and was going dead slow, and just about to anchor on account of the fog, and blowing her steam whistle to warn vessels of her presence; her look-out was proper, but it was not possible to see the *Bokhara* on account of the fog; the fact that the *Bokhara* could not see our side lights shows that a person on our deck, and therefore in the fog which shrouded them, could not see her.

Butt, Q.C. and *Stokes* (with them *Clarkson*) for the respondents.—There is a conflict of testimony as to the condition of the weather, but the preponderance of the evidence both from the shore and from independent persons on other ships is that there was no fog at the time of the collision: we had seen the lights of the *Milanese* nearly a quarter of an hour before the collision, and there was no such state of the weather as to require us to blow a foghorn. The *Milanese* may have come through a fog bank, and whilst in it thought of anchoring, but the manœuvre which she performed for the purpose of coming out from the shore for the purpose of anchoring brought her out of the fog bank; this manœuvre corresponds with the way in which we saw the lights. [James, L.J.—We cannot say that the fog was so thick that the *Milanese* was not in fault for not seeing you sooner, but the question remains whether you were not also in fault.] There is only

the evidence of one vessel signalling for fog, and that shows that there was no fog where we and the other vessels from whom witnesses have been called were. [Brett, L.J.—If the weather was not foggy, why did you shorten sail by furling your mainsail, and why did the *Milanese* propose to anchor?] Our furling the mainsail was a measure of ordinary prudence. On such an evening, no doubt, the weather was misty, and might become foggy during the night.

Webster, Q.C., in reply.

James, L.J.—The issue between the parties in the case is admitted on both sides to be purely one of fact. The learned judge of the court below decided that issue entirely in favour of the *Bokhara* and against the *Milanese*. This court has frequently expressed its opinion that when the decision of the court below of a question of fact depends on the credibility to be attached to the statements of witnesses, it will not disturb the finding, the court below having the opportunity of observing the demeanour of those witnesses which this court has not. But it has been well pointed out in this case by the counsel for the appellants, that the decision here did not rest or depend on the demeanour of witnesses, but was determined by inferences drawn from facts which have been stated, though with exaggerations, by both sides. There can be no doubt that the *Milanese* was manœuvring to come to an anchor on account of the fog, and so far the *Milanese* has made out a fair case, if the fog was so dense that she could not see the *Bokhara*. But it appears to us, and in that opinion the assessors coincide, that it was possible for the *Milanese* to have seen the *Bokhara* an appreciable, if not even a considerable time. We are satisfied that the cloud or fog in which the *Bokhara* was was not so dense as to altogether hide her, for she must have been sailing very close to the edge of the bank of fog. The *Bokhara* must have known that other vessels in it would be hidden from her. The *Bokhara*, moreover, admits that she did see a white light, and I do not believe she at any time saw the red or green light of the *Milanese*. That should have indicated to her the presence of a fog bank or something of the sort hanging low down in the water, and she ought to have used a foghorn to indicate her position to vessels in it, and from whose sight her side lights would be obscured by it. I therefore am of opinion that both vessels are to blame for this collision.

Brett, L.J.—I agree in the opinion that we should not overrule the decision of the court below on a question of fact, unless we find something clearly proved in the case which enables us to see that in the decision in which we cannot agree. In this case there are two governing facts: (1) that the *Milanese* was about to anchor on account of the fog; (2) the *Bokhara* was shortening sail. I cannot believe that the *Bokhara* saw everything which it is stated she did see; had she done so, it is not credible that she would have acted as she did. On these two points being proved, it is clear what the decision should be. There is a conflict of testimony as to the weather from other ships in the neighbourhood. But the fact remains that the steamer, for the purpose of anchoring, was about to throw herself across the navigable channel; therefore she should have taken more than ordinary precaution, and it does not appear that she did so; had she had a careful look-out she would have seen the *Bokhara* sooner. But the sailing ship had also under the circumstances a duty to perform. She must have known that there was a fog in front of her, from seeing the white light of a steamer over it without seeing the side lights, and that she did know it is proved by her shortening sail. She must have known therefore that her side lights were not visible to vessels in it, and it was therefore her duty to apprise them of her presence by blowing a foghorn, even if she was not herself actually in the fog, though in my opinion she had actually entered the fog at the time the collision took place.

Cotton, L.J.—I agree in the opinion that both of these vessels are to blame for the collision. As we differ from the court below, I think it right to add that I do not give entire credit to either set of witnesses. In all these cases witnesses do not come into court intending to speak untruthfully; but involuntarily they give a colour to circumstances in favour of their own side, and especially they make a confusion as to the precise time at which events occur. There is no doubt that at the time of the collision there was a fog on shore, but beyond a certain distance from the shore there was very little, from the evidence of vessels in the neighbourhood. It appears certain that the *Milanese* must have been in it, and that the collision took place at or just within the edge of the fog. The *Milanese* was in fault for not seeing the *Bokhara* sooner. But, I do not believe that the witnesses for the *Bokhara* are correct in stating that they could see the coloured lights of the *Milanese* at the time at which they state that they did see coloured lights, but that those they saw were on another occasion. I therefore think she was also to blame for not adopting the usual precautions in a fog.

In answer to an application as to the disposition of the costs.

James, L.J.—We are of opinion that wherever we vary the decision of the court below by finding both vessels to blame, the rule should be that no order is made as to costs either below or on appeal; that is, that each party should bear their own costs of the whole litigation.

Solicitors for appellants, owners of the *Milanese*, *Lowless* and *Co.*

Solicitors for respondents, owners of the *Bokhara*, *Stokes*, *Saunders*, and *Stokes*.

Tuesday, July 20, 1880.

(Before James, Brett, and Cotton, L.JJ.)

The Sir Robert Peel.

PROBATE, DIVORCE, AND ADMIRALTY APPEAL (ADMIRALTY).

Practice—Evidence—Experts—Nautical assessors.

Where the court is assisted by nautical assessors evidence of experts on questions of nautical science and skill may properly be rejected.

Semble, where an objection is taken to the exclusion of evidence by the judge of the Admiralty Court, the proper course is to apply to the Court of Appeal for a new trial on that ground, and not to tender the evidence afresh in the Court of Appeal.

This was an appeal from a judgment of Sir Robert

Phillimore, by which, on the 5th March 1880, he had found the *Sir Robert Peel* alone to blame for a collision which took place in the river Thames on the afternoon of the 17th Nov. 1877, between that vessel and the *Canada*.

The *Canada* was a screw steamer of 4276 tons register, and the *Sir Robert Peel* a screw steamer of 209 tons register. Both vessels were going down Woolwich Reach, and the collision occurred by the port bow of the *Sir Robert Peel* and the starboard quarter of the *Canada* coming into contact. The damage actually done by the collision was very small, but afterwards the *Canada* ran into vessels lying in the tiers, and into the Woolwich steamboat pier, doing very considerable damage. At the hearing in the court below the defendants tendered evidence of experts in the river navigation to show that there was a certain draught or suction between a large and small vessel, but the Court ruled the evidence to be inadmissible on the ground that it was an invasion of the province of the Trinity Masters assisting the court.

The judgment of the court below, after discussing the evidence, continued:—This collision, it appears to us, must have been caused either by the starboarding of the *Sir Robert Peel* or by the porting of the *Canada*. Looking to all the evidence we are of opinion that the *Canada* did not port her helm, and that the *Sir Robert Peel* did starboard. We are of opinion, in the circumstances, especially having regard to the clear state of the river, that the *Canada* was not going at reckless speed, and that the *Sir Robert Peel* is alone to blame for the collision.

July 20.—The appeal came on for argument.

Dr. *W. J. F. Phillimore* (*Benjamin*, Q.C. with him) for the appellants.—The evidence of experts was improperly rejected by the learned judge below; he finds, as a matter of fact, that we starboarded and so caused the collision. The evidence, if admitted, would have shown that the apparent starboarding, *i.e*, the canting of our head to port, was occasioned by the suction from the stern of the *Canada*. [Brett, L.J.—If such a suction is a known fact, you ought to have ported to counteract it and so keep your course.] Our duty is to keep our course, and that we do by making no alteration. [Brett, L.J.—You cannot now raise the question before us in this way. You appear to have submitted to the ruling of the judge, and not to have taken any formal objection.] We have given notice of our intention to call further evidence, and it is in the discretion of the court to receive it or not: (Order LVIII., r. 5.) [Brett, L.J.—But that applies to evidence which for some reason was not or could not be tendered below. Where evidence has been rejected without proper cause, the proper course would be to apply to us for a new trial: (Order XXXIX., r. 1 (Dec. 1876, r. 5) 1 a (March 1879, r. 4) 3.] This is not the usual case of the rejection of evidence; it could not be said that the evidence tendered was immaterial, but only that, owing to the peculiar constitution of the Court of Admiralty in trying these questions, it was inadmissible. No doubt the practice of the Trinity Masters is to inform the court on questions of nautical skill; but this is a question rather of physical science on which the Trinity Masters themselves should be informed before they can bring their minds to discuss the nautical skill necessary under the circumstances. [James, L.J.—It was not tendered as scientific evidence in the court below.] That the evidence is admissible in the Admiralty Court is shown by *The Ann and Mary* (2 W. Rob. 189), where Dr. Lushington says: "The opinions of . . . men of science on points of science generally when a clear statement of the whole of the facts has been laid before them, is admissible evidence in this as well as other courts;" though in that case, the question being purely nautical, he did not allow the evidence to be given, on the ground that it would only incumber the proceedings. He then proceeded to argue the case on the merits.

Butt, Q.C. and *Clarkson*, for the respondents, were not called on.

James, L.J.—This is an appeal from the decision of the Admiralty Court on a question of fact purely, and the court will not depart from the rule it has laid down that it will not overrule the decision of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression, and there is no such governing fact in this case. As to the alleged improper rejection of evidence, the evidence tendered was that of alleged experts on a matter of nautical skill. It is very important to adhere to the rule laid down by Dr. Lushington in the case of *The Ann and Mary* (2 W. Rob. 187), (*a*) where he says: "It would be most inconvenient and injurious to the ends of justice if, in cases where the court always has the benefit of, and derives the greatest assistance from, the opinions on nautical points of the Trinity Masters, the proceedings were allowed to be incumbered by any evidence by way of opinion on such points."

Brett, L.J.—The practice of the Court of Admiralty with respect to evidence on points of nautical science is different from that of other courts. In other courts questions of nautical skill and science as to the management and movement of ships may be proved by the evidence of experts. But that is not the way in which the Court of Admiralty is instructed in such matters. It has other means of instruction through the presence of nautical assessors. If the judge of that court were sitting by himself without the assistance of assessors, the case might be different; but when he is assisted by assessors he is instructed by them on such matters. The assessors are not part of the tribunal, it is true, but the judge acts on their opinion and advice with regard to technical questions of nautical skill. The evidence therefore tendered in this case was properly rejected. I wish, however, to limit my observations

(*a*) On this subject Dr. Lushington says in *The Gazelle* (2 Notes of Cases, 41), at a time when the evidence in the Admiralty Court was taken by affidavit: If it was intended . . . . to say that, with regard to matters of nautical practice and experience, you are to be guided by the affidavits in the case, I utterly deny the applicability of that argument. You are to decide this question with reference to your own knowledge of the science and experience you possess, and I hope it will never be contended that your judgment is to be influenced by affidavits from other nautical persons, swearing that, in their opinion, this or that was proper to be done. Sure I am that it would lead to the greatest confusion and uncertainty rather than to any satisfactory determination."

as to the evidence of experts to questions concerning the management of the manœuvres of ships. The Court of Admiralty would of course rightly receive evidence of experts on other subjects, such, for example, as the loading of ships, a matter not strictly within the provision of the nautical assessors. I concur with the judgment of James, L.J. on the merits of the case.

COTTON, L.J.—I concur; the presence of nautical assessors is intended to dispense with nautical evidence as to the management of ships.

Appeal dismissed with costs.

Solicitors for appellants, owners of *Sir Robert Peel*, *W. A. Crump* and *Son*.

Solicitors for respondents, owners of *Canada*, *Lowless* and *Co.*

SITTINGS AT WESTMINSTER.

Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

(Before BRAMWELL, BAGGALLAY, and THESIGER, L.JJ.)

BURNS *v.* NOWELL.

Pacific Islanders Protection Acts 1872 *and* 1875—*Carrying native labourers by sea without a licence—Seizure of vessel—Voyage commenced before Act passed—Reasonable grounds of suspicion—Protection afforded to persons acting in pursuance of Act*—35 & 36 *Vict. c.* 19, *ss.* 3, 6, 9, 16, 18, 19, 20—38 & 39 *Vict. c.* 51.

The defendant, an officer in command of one of Her Majesty's ships, bonâ fide believing that there was reasonable cause for suspecting that an offence under the Pacific Islanders Protection Act had been committed, seized and detained the plaintiff's vessel, as carrying native labourers on board without a licence. At the time of her seizure the plaintiff's vessel was not employed in the commission of any offence within the intent and meaning of the statute, she having taken the labourers on board before the Act making a licence necessary was passed.

Held, upon the construction of the Pacific Islanders Protection Acts 1872 *and* 1875, *that the plaintiff could not recover damages from the defendant, it being the defendant's duty to do as he did.*

THIS was an action brought to recover damages for the seizure and detention of the plaintiff's schooner *Aurora* by the defendant, a lieutenant in the navy. The *Aurora* started from Sydney in the year 1871, under the command of Capt. Bennett, on a trading and fishing expedition among the South Sea Islands. At Simbo, in the Solomon Islands, and at some other places in the same group, Capt. Bennett shipped certain natives, who were employed during the voyage, partly in working the vessel and partly on shore in trading, and partly in fishing and diving. These natives did not sign articles, but they were shipped with their own consent, and Capt. Bennett agreed to take them back at the end of their service to the islands from which they had embarked. Whilst the *Aurora* was absent on this voyage, the Kidnapping Act 1872 (*a*) (35 & 36 Vict. c. 19) was passed, and was proclaimed and came into force in the Australian colonies. Capt. Bennett did not hear of the Act until August 1873, when he was told of its having come into force by the captain of a vessel which he met with on his return voyage. The *Aurora* then proceeded on her return voyage, and when off Simbo she fell in with the *Sandfly*, which was commanded by the defendant, who, finding the natives who had been shipped at Simbo still on board, seized the *Aurora* and her cargo, on the ground that she was engaged in the commission of an offence against the Kidnapping Act. The *Aurora* was taken into Cleveland Bay, which is in the jurisdiction of the Brisbane Court of Queensland, and part of the cargo was transshipped and taken to Sydney. Proceedings were instituted in the Vice-Admiralty Court of Sydney, but the suit was dismissed on the ground that the court had not jurisdiction.

At the trial, Lord Coleridge, C.J., ruled that the only question for the jury was, whether at the time of the seizure and detention the defendant had reasonable grounds for suspecting that the *Aurora* was employed in contravention of either the 3rd or 9th sections of the 35 & 36 Vict. c. 19. The jury answered this question in the affirmative, and a verdict was directed to be entered for the defendant. Subsequently, the Queen's Bench Division granted a rule *nisi* for a new trial, on the ground of misdirection, and of the verdict being against the weight of evidence; but, after argument, the rule was discharged.

The plaintiff now appealed.

By 35 & 36 Vict. c. 19, s. 3:

It shall not be lawful for any British vessel to carry native labourers of the said islands, not being part of the crew of such vessel, unless the master thereof shall, with one sufficient surety to be approved by the governor of one of the said Australian colonies, or by a British consular officer appointed by Her Majesty to reside in any of the said islands, or by any person appointed by either of those officers, have entered into a joint and several bond in the sum of five hundred pounds, to Her Majesty, her heirs and successors, in the form contained in Schedule (A.) to this Act annexed, or in such other form as shall be prescribed by the Legislature of any of the Australian colonies in respect of vessels sailing from the ports of such colony, nor unless he shall receive a licence in the form contained in schedule (B.) to this Act annexed from any such governor or British consular officer.

Schedule (B.):

Licence for the carriage by sea of native labourers.—A.B., master of the vessel more particularly described below, having duly given to Her Majesty Queen Victoria the bond required by the Kidnapping Act 1872, for the prevention of kidnapping and the due observance of the requirements of the said Act, I do hereby, in exercise of the authority for that purpose conferred on me by the said Act, license the said vessel to carry not more than native labourers from to . Should this vessel be found to answer the subjoined description, and appear to be strictly engaged in the lawful pursuit of the above-mentioned object, it is the direction of Her Majesty's Government that she shall not be obstructed in the prosecution of her present voyage, nor in the shipment or loading of her native passengers. This licence shall not be transferable, and shall be available only for the voyage from to aforesaid, and for a period not exceeding days from the date hereof. Description of the vessel above referred to. Signature of the governor or consul, as the case may be. To the respective flag officers, captains, and commanding officers of Her Majesty's ships, and to all others whom it may concern.

By sect. 6:

All the provisions of this Act with respect to the detention, seizure, bringing in for adjudication before any Vice-Admiralty Court, trial, condemnation, or restoration of vessels suspected of being employed in the commission of any of the offences enumerated in the 9th

(*a*) By 38 & 39 Vict. c. 51, the title of this Act is changed to "The Pacific Islanders Protection Act 1872."

section of this Act shall, *mutatis mutandis*, apply to any British vessel which shall be found carrying such native labourers without a licence or in contravention of the terms of any licence which may have been granted to the master thereof.

By sect. 9:

If a British subject commits any of the following offences, that is to say:—1. Decoys a native of any of the aforesaid islands for the purpose of importing or removing such native into any island or place other than that in which he was at the time of the commission of such offence; or carries away, confines, or detains any such native for the purpose aforesaid, without his consent, proof of which consent shall lie on the party accused. 2. Ships, embarks, receives, detains, or confines, or assists in shipping, embarking, receiving, detaining, or confining, for the purpose aforesaid, a native of any of the aforesaid islands, on board any vessel either on the high seas or elsewhere, without the consent of such native, proof of which consent shall lie on the party accused . . . he shall for each offence be guilty of felony, and shall be liable to be tried and punished for such felony in any Supreme Court of Justice in any of the Australian colonies, &c.

By sect. 16:

Any British vessel which shall upon reasonable grounds be suspected of being employed in the commission of any of the above offences may be detained, seized, and brought in for adjudication upon the charge of being or having been so employed or fitted out as aforesaid, before any Vice-Admiralty Court in any of Her Majesty's dominions by any of the following officers; that is to say: . . . . (3) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer.

By sect. 18:

The Vice-Admiralty Court before which any vessel is so brought for adjudication shall have full power and authority to take cognisance of and try the charge upon which such vessel is brought in, and may on proof thereof condemn the vessel and cargo, or either, as the case may be, as forfeited to Her Majesty, or may order such vessel and cargo, or either of them, to be restored with or without costs and damages, as to the court shall seem fit; and in any such proceedings the said court shall have such powers to issue commissions for the examination of witnesses, and to give directions in respect thereof, as are herein-before vested in the Supreme Courts of the Australasian colonies; and the said court shall, in addition to any power given to it by this Act, have in respect of any vessel or other matter brought before it in pursuance of this Act, all powers which it has in the case of a vessel or matter brought before it in the exercise of its ordinary jurisdiction.

By sect. 19:

When any detention or seizure shall be made under this Act, and proceedings instituted in any Vice-Admiralty Court in respect of such detention or seizure, it shall be lawful for the Lords Commissioners of Her Majesty's Treasury, if to their discretion it shall seem meet, to direct payment to be made of the whole or any part of the costs, damages, and expenses which may be incurred in such proceedings.

By sect. 20:

Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a vessel by the Vice-Admiralty Court, no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any vessel in pursuance of this Act.

The Pacific Islanders Protection Act 1875 (38 & 30 Vict. c. 51) authorises the granting of a licence for the employment of natives at sea, and, in schedule B. gives the form of the licence:

A. B., master of the vessel more particularly described below, having shown to my satisfaction that he is engaged in a fishery, industry, or occupation in connection with such vessel, and having given the bond to Her Majesty required by the Pacific Islanders Protection Acts 1872 and 1875, I do hereby, in exercise of the authority for that purpose conferred on me by the said Acts, license the said vessel to employ in the said fishery not more than native labourers from the day of to the day of

The remainder of the licence is the same as that for the carriage by sea of native labourers, with the exception that "employment" is inserted between "shipment, or."

Wills, Q.C. and *Edwyn Jones*, for the plaintiff.—At the time the natives were taken on board in Jan. 1872, the Kidnapping Act had not been passed. At that time, therefore, it would have been impossible for the master to have obtained a licence to carry them in accordance with sect. 3. These natives were taken on board as part of the ship's crew; at all events, it was a question for the jury whether they were so or not. The defendant, to bring himself within the protection of the Act, must have *bonâ fide* believed in the existence of such a state of things, as, if it had existed, would have justified the seizure. That was not the case here. [Bramwell, L.J.—Sect. 20 provides that no damages shall be recovered, and no officer shall be responsible in respect of the seizure or detention of any vessel in pursuance of the Act. That must apply to a case where there was not a reasonable cause, but where the officer acted *bonâ fide*.] They cited

Roberts v. *Orchard*, 2 H. & C. 769; 33 L. J. 65, Ex; *Chamberlain* v. *King*, L. Rep. 6 C. P. 474.

Staveley Hill, Q.C. (with him *Bosanquet*) for the defendant.—This is the case of a public officer discharging a duty imposed upon him by the law. If he discharges the duty *bonâ fide*, no action will lie against him for a mistake. He cited

Smith v. *Hopper*, 9 Q. B. 1005;
Johnes v. *Judge*, L. Rep. 6 Q. B. 724;
Hardwick v. *Moss*, 7 H. & N. 136.

[He was stopped by the Court.]

Cur. adv. vult.

March 16.—The judgment of the court (Bramwell, Baggallay, and Thesiger, L.JJ.) was delivered by

Baggallay, L.J.—It is not, in our opinion, necessary for the decision of this appeal to determine whether the schooner *Aurora* was, at the time of her seizure by the defendant, employed in the commission of any of the acts which are made offences by the Kidnapping Act 1872; for it appears to us that, even upon the assumption that no such offence had been committed, the defendant cannot be held responsible to the plaintiff in respect of the seizure and detention of the vessel, and that this appeal must consequently be dismissed. We will presently express our opinion upon the question, whether any such offence had in fact been committed, as we deem it only fair to the plaintiff, as the owner of the *Aurora*, and to Capt. Bennett, her master, that we should do so; but we propose, in the first place, to consider the nature and extent of the protection afforded by the Act to those commanding officers of Her Majesty's ships, who, in the discharge of their duties, seize and detain vessels suspected of being employed in the commission of such offences.

Sect. 16 of the Act authorises any commissioned naval officer on full pay to detain, seize, and bring in for adjudication before a Vice-Admiralty Court any British vessel, which shall

upon reasonable grounds be suspected of being employed in the commission of any of the offences enumerated in section 9 of the Act; and by sect. 6 this provision is made applicable to any British vessel, which shall be found carrying native labourers in contravention of the provisions of sect. 3; and by sect. 20 it is provided that no officer shall be responsible either civilly or criminally in respect of the seizure or detention of any vessel in pursuance of the Act. The first question then, which we have to consider is what meaning should be attributed to the words "shall upon reasonable grounds be suspected," as used in sect. 16 of the Act, and "in pursuance of the Act," as used in sect. 20.

It has been contended by Mr. Wills, on behalf of the plaintiff, that an officer detaining or seizing a vessel, cannot properly be considered either as having reasonable grounds to suspect that an offence has been committed, or as acting in pursuance of the Act, unless he believes in the existence of facts, which, if they did actually exist, would be sufficient to establish the commission of the offence; and, in support of this contention, he has referred to decisions and dicta in cases in which notice of intended action having been required by law to be given to persons sought to be made responsible for having exceeded their powers, questions have arisen as to the circumstances under which such persons are entitled to notice. We are, however, unable to accede to the argument based upon the supposed authority of these cases. We do not doubt their value as guides for the decision of cases of a similar character, but the words which we have now to interpret are contained in a statute of a very special character, and their true meaning can only be arrived at by a consideration of the general scope of the statute, and of the circumstances under which, and the purposes for which, it was avowedly passed. To adopt the limited construction contended for by Mr. Wills, would render the Act almost a dead letter; the practical effect of so doing would be to make the justification of the officer depend, in almost every case, upon the offence having been in fact committed; and he would consequently have to discharge his duty at the risk of being held responsible in damages, should he make a mistake in applying a newly-made law to a state of facts believed or suspected by him to exist, but as to the existence of which he can, speaking generally, have but very slight means of informing himself. We cannot suppose that the Legislature intended to place an officer, upon whom it imposed duties of so important and so responsible a character, in a position of such risk and peril.

In our opinion an officer should be considered to have had reasonable grounds for suspicion, if at the time of the seizure he reasonably believed in the existence of a state of circumstances which, in his honestly formed opinion, amounted to the commission of an offence under the Act. And this view of the interpretation which should be adopted is supported, not only by the general terms in which sect. 20 is expressed, but also by the provisions contained in sects. 18 and 19 for making compensation to those who may suffer by reason of an improper seizure or detention; and though it may be urged, and perhaps with some justice, that the compensation so provided is not adequate to meet all the cases which may arise, in which justice would appear to require that compensation should be made, the fact that any such compensation is provided strongly supports the view that it was not intended by the Legislature that the officer should remain liable for the consequences flowing from an honestly intended discharge of his duty.

From the evidence in this case it is clear, and it is not disputed, that the defendant believed, and with good reason, in the existence of a state of circumstances which in his opinion not only authorised him to seize the *Aurora*, but imposed it upon him as a duty to do so, and such being the case he was, in our opinion, fully justified in seizing and detaining her.

It is, however, necessary to notice another point raised on behalf of the plaintiff, which was to this effect: That it was the duty of the defendant to have taken the *Aurora* and her cargo before a court of competent jurisdiction for adjudication; that, had this course been adopted, it would have been within the power of the court to have done justice to the plaintiff by restoring both ship and cargo, and by awarding him damages for the seizure and detention; that in consequence of the proceedings having been instituted in the Vice-Admiralty Court at Sydney, to which port the cargo had been forwarded, though the vessel had been left in Cleveland Bay, within the jurisdiction of the Brisbane Court of Queensland, the proceedings had been rendered nugatory, the judge having decided that the Court at Sydney had no jurisdiction in the matter, and that for this alleged neglect of duty, and the consequent loss to the plaintiff, the defendant was liable in damages. Now, with reference to this claim, we think it is sufficient to say that no such claim is put forward by the pleadings; but, apart from this omission, which perhaps might be removed by amendment, if the circumstances would justify an amendment, it is clear to us that the trans-shipment of the cargo and the sending it to Sydney, whilst the ship was left in Cleveland Bay, was an arrangement acquiesced in, if not suggested by the plaintiff or those who acted on his behalf. It is also to be observed that we have no evidence before us to show with whom the responsibility rested of instituting proceedings in a Vice-Admiralty Court, or as to whether the defendant had anything to do with it.

Being then of opinion, for the reasons which we have stated, that the defendant cannot be held responsible for the seizure of the *Aurora*, we proceed to consider whether at the time of her seizure she was employed in the commission of any offence within the meaning and intent of the Kidnapping Act 1872.

As regards the offence alleged to have been committed (by an acting in contravention of the provisions of sect. 3 of the Act 1872) we should have been prepared to express a confident opinion that no such offence had been committed if the answer to the question had depended upon the construction of that section alone apart from any considerations arising out of the provisions of the subsequent Act of 1875. The term of licence given in schedule B. to the earlier Act points to the carriage of native labourers, as passengers from one place to another, and is not, as is recognised in the Act 1875, applicable to such an employment of native

labourers as that in which the natives on board the *Aurora* were engaged, and there was, in our opinion, much force in the argument of Mr. Wills that the natives on board the *Aurora* were part of the crew of that vessel. But the Act of 1875 is to be construed as one with the earlier statute; and, reading the two together, we think that the reasonable conclusion is, that to carry native labourers without a licence for the purpose of their being employed in the manner in which the natives shipped on board the *Aurora* were in fact employed is constituted an offence within the meaning of sect. 3 of the Act of 1872, and that this must be considered to have been the true construction of the section, not only as from the time when the later Act was passed, but from the time when the earlier Act came into operation. But the question remains whether, having regard to the fact that all the natives who were on board the *Aurora* at the time of her seizure had been shipped some months before the Act of 1872 was passed, and to the other circumstances, which we shall presently mention, there was a carrying by that vessel within the meaning of sect. 3. The form of licence given in schedule B. to the Act of 1872 purports to license the vessel to carry a limited number of native passengers from one specified place to another within a limited space of time, and the form given in schedule B. to the Act of 1875 purports to license the vessel to employ a limited number of native labourers from one specific date to another, so that the carrying in the one case and the employment in the other has a specified commencement and a specified termination. Now, inasmuch as the carrying of the native labourers on board the *Aurora* commenced before the Act of 1872 was passed, a licence for the commencement of such carrying was not only not necessary, but could not have been obtained; and the subsequent carrying of the natives until they were removed from the *Aurora* upon her seizure by the defendant was a continuous proceeding, during which the vessel was never within the jurisdiction of the governor of any Australian colony or consular officer competent to grant a licence. Under these circumstances, we should be disposed to hold that the carrying of these natives on board the *Aurora*, inasmuch as it commenced before the Act came into operation, was not a carrying within the meaning of sect. 3, even when viewed with the additional light thrown upon it by the Act of 1875.

It may, however, be suggested that the carrying, though not unlawful in its commencement, became so when the Act came into operation, notwithstanding the ignorance of the master that any such Act was in force, and though it was then out of his power to obtain a licence. But before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, and when and how it was discontinued with a view to determine whether a reasonable time had elapsed without its being discontinued. Now the natives who were on board the *Aurora* had been shipped by Capt. Bennett under agreements, by which he was bound to take them back at the end of their service to the several islands from which they had embarked: and at the time when he first became aware that the Act of 1872 was in force, he had completed his voyage so far as its fishing and other trade purposes were concerned, and was on his way to land the natives in pursuance of his agreement with them, and then to proceed to Sydney; and to this it must be added that when the *Aurora* was seized, which was but a few days after Capt. Bennett had first heard of the Act being enforced, he had already landed some of the natives and was within a few miles of the island of Simba, at which and at other islands of the Solomon group he was about to land all that he had on board. It appears to us impossible to suggest any course more proper for Capt. Bennett to have adopted than that which he did adopt, though he probably adopted it as in accordance with his usual practice on such voyages, and not for the purpose of avoiding the commission of an illegal act, as he does not appear to have had any clear idea of the provisions of the Act of 1872 until informed of them by the defendant. Had he put the natives on shore at the island nearest to him at the time when he first heard of the Kidnapping Act, he would not only have broken his contract with them, but would have been guilty of an act of cruelty in all probability as great as any which it was the avowed object of the Act to prevent.

For these reasons we have come to the conclusion that the carrying of the native labourers on board the *Aurora* was not, under the circumstances to which we have referred, a carrying within the intent and meaning of the 3rd section of the Act of 1872, and consequently that the *Aurora* was not at the time of her seizure employed in the commission of any offence within such intent and meaning.

With reference to the suggested commissions of some one or more of the offences enumerated in sect. 9 we have but few remarks to make. It appears to us sufficient to refer to the several circumstances to which we have already drawn attention to negative the existence on the part of the plaintiff or Capt. Bennett, or of any other person for whose acts the plaintiff can be held responsible, of any such purpose as is contemplated by sect. 9, and is essential to the constitution of the several offences therein mentioned. Our judgment proceeds on this, that the defendant acted in pursuance of the statute, *bonâ fide* believing that there was reasonable cause of suspecting that an offence under it had been committed, and that it was his duty to do what he did.

Judgment affirmed.

Solicitors for the plaintiff, *John Mackrell* and *Co.*

Solicitors for the defendant, *Hare* and *Fell.*

Saturday, March 6, 1880.

(Before Bramwell, Baggallay, and Thesiger, L.JJ.)

Dixon *v.* Whitworth; Dixon *v.* Sea Insurance Company,

Marine insurance—Salvage expenses—Not within sue and labour clause in policy—Insurable interest—Description in policy.

D. entered into an agreement by which he was to receive 10,000l. if he succeeded in transporting from Egypt and erecting uninjured in London an obelisk belonging to the British nation. D. expended 4000l. in constructing a vessel or case for the obelisk, in properly stowing it therein, and in providing for its transport. He then insured the obelisk and the vessel it was in with one underwriter for 2000l., and with another for 1000l. The vessel and obelisk had to be cast off in a storm in the Bay of Biscay by the steamship that was towing them. Another steamer subsequently found them, and towed them into Ferrol, where they were refitted, and were afterwards towed to London. The salvors brought an action in the Admiralty Division of the High Court, and were awarded 2000l. salvage, the obelisk being estimated at 25,000l. D., having paid the sum awarded, brought actions to recover this payment from the underwriters. The policies, which were against total loss only, contained a provision that the vessel and obelisk, "for so much as concerns the assured," should by agreement be valued at 4000l., and a sue and labour clause in the ordinary form.

Held, on the authority of Aitchison *v.* Lohre, *in the House of Lords, that the underwriters were not liable to repay D. the 2000l. awarded as salvage, salvage expenses not being within the sue and labour clause.*

Appeal from the judgment of Lindley, J. on further consideration (40 L.T. Rep. N.S. 718; 4 Asp. Mar. Law Cas. 138.

These were actions brought by an assured against the underwriters of two marine policies, in respect of losses occasioned by the accident which befel the Cleopatra obelisk on her voyage from Alexandria to this country.

The facts are sufficiently set out in the head-note.

Lindley, J. gave judgment in both actions for the plaintiff: the defendants now appealed.

C. Russell, Q.C. (*J. C. Mathew* with him) for the appellants.—These policies are expressed to be "against the risk of total loss only." The sue and labour clause is in the ordinary form in both policies. "And in case of any loss or misfortune, it shall be lawful for the assured, their factors, servants and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." It was upon the construction of that clause that Lindley, J. gave judgment against the defendants. He had then some authority for doing so in the decision of the Court of Appeal, in *Lohre* v. *Aitchison* (3 Q. B. Div. 558; 38 L. T. Rep. N. S. 802; 4 Asp. Mar. Law Cas. 11); but that has been since overruled in the House of Lords (L. Rep. 4 App. Cas. 755; 41 L. T. Rep. N. S. 323; 4 Asp. Mar. Law Cas. 168). The learned judge based his judgment upon the ground that, although the services were rendered independently of the assured, and not by any agents of his, yet as they were services for the preservation of the *res*, they were recoverable. The contention on behalf of the defendants was that the onus lay on the plaintiff of making out either a total loss, or a liability under the sue and labour clause, and that the facts showed that there was neither. It was further contended that in no event were the defendants liable for the whole sum; that they could not be liable for more than two twenty-fifths. In Lowndes on General Average, 2nd edit., p. 298, the law is stated to be in accordance with this contention. "An underwriter's liability, whether for general average, or under the sue and labour clause, is a liability, not absolutely to pay the whole, but to contribute. If, therefore, that which is really saved by the sacrifice or expenditure is something more than the policy value of the thing insured, the expense must be divided rateably between the value saved to the insurer, and the value saved to the assured or to some third party. If, for example, a cargo which is valued in the policy at 5000*l.* is saved by this means, and if the real value of that cargo in the market is 6000*l.*, the insurer is only liable to pay five-sixths of the general average or expense." The judgment of Lindley, J. is not consistent with the judgments of the House of Lords in *Lohre* v. *Aitchison* (*ubi. sup.*). [He was stopped by the Court.]

Butt, Q.C. for the respondents.—The decision in *Aitchison* v. *Lohre*, in the House of Lords, is that salvage expenses do not come within the suing and labouring clause of a policy of marine insurance. The contention for the respondents is now that this is not an insurance of the iron case and obelisk, but of the chance of earning 10,000*l.*, under the plaintiff's agreement with Mr. Wilson, by its safe arrival. Then *Aitchison* v. *Lohre* would, it is submitted, not apply. This is like an insurance on freight. *Kidston* v. *The Empire Marine Insurance Company* (15 L. T. Rep. N.S. 12; 16 L. T. Rep. N.S. 119 & 286; L. Rep. 2 C.P. 357; 3 Mar. Law Cas. O.S. 400 & 468) would be relied on by the respondents. [Bramwell, L.J.—Is not this like an insurance on profits? And is not that an insurance on the *res*?] It has been so held. If the terms of the description in the policy are relied on, the case cannot be argued; but it was said in the court below that the description in the policy would not be insisted upon by the underwriters if the real insurable interest was something different.

J. C. Mathew, for the appellants, states that the description in the policy will not be waived.

Judgment for the appellant with costs.

Solicitors for plaintiff, *Argles* and *Argles*.

Solicitors for Sea Insurance Company, *Bowcliffes*, for *Stone* and *Fletcher*, Liverpool.

Solicitors for Whitworth, *Robinson* and *Hodding*, for *Bateson* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

COMMON PLEAS DIVISION.

Reported by H. D. BONSEY, Esq., Barrister-at-Law.

June 9 and 14, 1880.

(Before Lord COLERIDGE, C.J., and GROVE, J.)

HALL *v.* JUPE.

Marine insurance—Constructive total loss—Whether sufficient evidence to be left to the jury—Stringent necessity for sale by the master—Order XXXIX., r. 3.

A ship, while coming out of harbour, struck on a reef on the morning of the 6th of October 1876, *and in order to get her off it was necessary to discharge a portion of the cargo. The master agreed with G., who was the only person at the harbour who had the requisite number of men, to lighten the vessel and get her off. Under this agreement about eight men worked for two hours without succeeding. G. then persuaded the master to call a survey of the vessel and sell her, and, in pursuance of the report of the survey which was made by G., the master sold the ship and cargo to G., at 6 p.m. on the same day on which the ship struck, for a very small sum. At the time of the sale the weather was fine, and the vessel was in no more danger than she had been in from the time she struck; but if the wind veered round to the south or west, the vessel would have broken up in a short time. As soon as G. purchased the ship he sent a sufficient number of men to discharge the cargo, and on the second high tide after the vessel struck she was floated. She was subsequently repaired and made seaworthy for about* 20*l*. *In an action against the underwriter on a policy of insurance on the vessel, the plaintiff claimed for a constructive total loss.*

The learned judge at the trial ruled that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the ship at the time of the sale, which alone could justify the sale, that is, that at the time there was no reasonable evidence of a total loss, and he withdrew the case from the jury, and ordered the verdict and judgment to be entered for the defendant.

Held, by Lord Coleridge, C.J., that the ruling was right, and that the only question was whether the ship was at the time she was sold constructively lost, and there was no evidence from which a jury could reasonably find this. The evidence must be limited to the stringent necessity of the sale, not to the question whether the sale was made under circumstances under which a prudent uninsured owner would have made it.

Held, by Grove, J., that the sole question was, not whether the circumstances were such as to justify the sale, but whether the circumstances detailed in the evidence were such as to afford sufficient evidence to be laid before a jury that the sale was justifiable, and that it was not a case which should have been withdrawn from a jury. There was reasonable evidence upon which, in the absence of any answer, the jury might find a verdict.

Quœre, whether the word "misdirection" in Order XXXIX., r. 3, applies to a nonsuit.

THIS was an action on a time policy, which had been effected by the plaintiff with the defendant, amongst other underwriters, on a vessel called the *Highflyer*, valued at 2800*l*., and the plaintiff claimed for a constructive total loss. The case was tried before Lord Coleridge, C.J., at the previous London Michaelmas sittings, and the facts are as follows:

On the 5th of Oct. 1876, while the *Highflyer* was going out of Tub Harbour, on the coast of Labrador, she struck upon a rock or reef close to the shore. She was going out on the top of high tide, but the tides were rising tides, and in order to get her off it was necessary to lighten her by discharging a portion of the cargo. Tub Harbour is quite a small place, and practically only inhabited during certain seasons of the year, when fish are cured and loaded there. At the time the vessel struck there was a person named Green at the harbour, with about thirty or forty men under him, engaged in the fishing business. He had loaded the *Highflyer*, and was the only person who had a sufficient number of men to render effectual assistance in lightening the vessel and getting her off the reef, and there was no magistrate or person of authority in the place. On the same day that the vessel struck the master entered into negotiations with Green for the purpose of lightening the vessel and getting her off, and ultimately Green agreed for the sum of 200*l*. to give all the assistance he could get. Green sent eight men, who continued to work for about two hours, but very slowly and unfairly, and subsequently the master was persuaded by Green to cancel the agreement and call a survey of the vessel. When the vessel struck there was a strong breeze blowing, and it was stated by some of the witnesses that the mainmast had started out of the keelson, got loose, and was raised about an inch; that the combings of the main hatch had broken, and that they were afraid the vessel would break in halves. The second mate stated that half an hour before the survey he examined the vessel, and found the butts on the outside, abreast of the mainmast, open, so that he could put his fingers in; that the covering board and water ways were the same, and the mast partners opening, and the wedges coming up; that the vessel was making more water, and that in his opinion she might be broken up in the morning, and be worth nothing then. The survey was made about three-quarters of an hour before low water, and the weather was then fine. The captain and some of the men said that if the wind veered round to the south or west the sea would have heaved in, and the vessel would have broken up in a short time. Green made the survey, together with some men whom he brought with him, and it was drawn up in the following terms:

> We find the mainmast raised one inch, and the main combings parted, and the deck plank opening. Pronounce the vessel unseaworthy, and advise to sell, for the benefit of all concerned, both ship and cargo.

At six o'clock on the evening of the same day on which the vessel struck, the master sold both ship and cargo to Green. At that time the weather was fine, and the ship was in no greater danger than she had been. The ship was sold for 140*l*., and the cargo for 400*l*. The cargo alone was stated to be worth 2000*l*., and part of it was at the time of sale safe on shore. As soon as Green had purchased the ship and cargo, he sent a sufficient number of men to discharge the cargo, and on the second high tide after she had struck he succeeded

in floating the vessel. She was subsequently repaired for about 20*l.*, and made seaworthy, but she was said to be misshaped. At the end of the plaintiff's case the learned judge ruled that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury, and directed the verdict and judgment to be entered for the defendant.

Watkin Williams, Q.C., for the plaintiff, subsequently obtained a rule *nisi* to set aside the verdict and judgment and for a new trial, on the ground that the learned judge ought to have left the case to the jury upon the evidence as to whether the master had done everything he could to prevent the necessity of selling the ship.

Charles Russell, Q.C. and *Myburgh* showed cause against the rule.

Butt, Q.C. and *J. C. Matthew* argued in support of the rule.

Cur. adv. vult.

GROVE, J.—This was a case which was tried before Lord Coleridge. It was an action upon a marine policy of insurance upon ship. The ship, in coming out of a port on the coast of Labrador, struck upon what has been called a rock in some parts of the evidence, and in other parts a reef.

The case for the plaintiff was, that the ship was very much damaged and was likely to go to pieces, if not actually going to pieces, when she was sold, and sold by the master at an extremely reduced value, to a Mr. Green; and the sole question in the case, as it was argued before us, was not whether the circumstances were such as to justify the sale, but whether the circumstances detailed in the evidence were such as to afford sufficient evidence to be laid before a jury that the sale was justifiable.

I have in this case the misfortune to differ in opinion from my Lord but, upon the view I have been compelled to take of it, I cannot say it was a case that should have been withdrawn from a jury. It may be that I am prejudiced by my early education in these matters, and that I take a different view from that of judges younger than myself who have taken part in the more recent practice of the law; but I am bound to give my opinion to the best of my power, and it does seem to me that there was evidence to be laid before the jury. It was not a case within the principle on which the cases, of which *Ryder* v. *Wombwell* (17 L. T. Rep. N. S. 609: 37 L. Rep. 3 Ex. 90; 37 L. J. 47, Ex.; 16 W. R. 515) is the principal, were decided; and I cannot agree with my Lord's view of a nonsuit being directed.

Now, the facts detailed in evidence (I am only taking the plaintiff's evidence) are that the vessel struck upon a reef; that she was fixed there; that she was on the reef amidships; that her butts parted so that, according to the evidence of more than one witness, you could put your hand between them; that the mast was loosened and raised, according to one witness, an inch, according to two others, I think, two inches out of its place, and that the partners of the mast were damaged. (I understand the partners to be the wedges which are put round the mast, and that, as they had become separated from the mast, the mast was to some extent detached and loose in the ship, but that in their belief, and according to the best judgment they could form, the ship was likely to go to pieces in a very short time.) Barr, the mate, says in respect to the position of the ship, the vessel could not be got off, as she was breaking up. He says he examined the vessel, and found the butts on the outside abreast the mainmast open so that he could put his fingers in. The covering board and water-ways the same, and the mast partners opening and the wedges coming up. Then he says: "By the mast partners I mean thick and stronger decking round the mast. The vessel was making a little more water. We tried the pumps." Then he says: "The vessel was hanging on a rock amidship, and he thinks the captain did all in his power. It was too much risk to wait for the next high tide." There is a good deal more to that effect, both by this witness and three others, including the captain of the vessel. Reading that evidence through, and viewing what were the probabilities at the time or soon after the time of this vessel striking, or stranding, as they call it, upon the reef (and it may be fairly called stranding) what could be well done, and what would be the best thing to be done at the time? Now, I do not wish at all to exaggerate or to say the case for the plaintiff was a strong one, that is to say, in one sense of the word, which I shall presently explain, but I cannot help thinking there was some *primâ facie* case to go to the jury. There are witnesses who say there was no alternative but to sell her, and they all express that opinion and give their reasons for it. Now, it appears a Mr. Green came on board, and the master entered into an agreement with him that for 200*l.* he, Green, would bring assistance and help to get the vessel off. He did not bring the assistance which after events proved he might have done. He brought a few men. They are differently numbered by different witnesses; but I do not think the maximum goes to eight. Subsequent events show they could have done more, and I am almost satisfied Green was not honest in the matter. I have not enough evidence to satisfy me that the master was party to anything wrong, but he seems, as far as I can judge, to have been taken in by Green. He could not get much assistance. His own men were said to be drunk, and Green brought a few who worked languidly. Under these circumstances he sold the vessel and cargo for 600*l.*, a very small portion of the value; and the question is whether there was anything to go to the jury that such a sale was right under the circumstances or could be justified. One of the witnesses says the vessel was perfectly broken in two, and other expressions are used, and it is said that the weather came on very hard for an hour or two, and they could not get her off. The weather subsequently calmed, and about the time the ship was actually cleared the weather was much calmer. I will not go into what subsequently happened, because first of all I wish to comment upon the evidence as it stood at the trial as to the acts done at the time. This agreement with Green to supply men to assist was certainly not properly complied with, and it was subsequently cancelled apparently by the persuasion of Green.

It is said in favour of the nonsuit that the captain should have insisted upon his agreement. It is very doubtful whether upon his agreement, if he had insisted, Green would have done much to assist him, and the probable

thing is, Green was looking for a bargain for himself. I do not see anything to satisfy me the captain knew of that, and I do not see any evidence to show anything like a corrupt bargain between the master and Green. I have given a very short outline of that of which there was a great body of evidence, and I now come to the counter matters disclosed upon the plaintiff's evidence. There were spring tides, and the tides were rising; therefore there was a better chance of floating the vessel on each tide, but, as we know when a vessel is stranded the increase of tide drives her in further, particularly if there is any wind, and it is not anything like a certainty she will be got off. In this case at the next high tide but one she stranded nearly at the full of the tide, having been actively cleared, every possible appliance being put to her. Now she was repaired by Green, and the repairs cost only about £20. That is certainly very strong evidence to show that these men exaggerated the state of the vessel. After the vessel was repaired it is said she never was the same vessel as she was before. She was hogged and misshaped, she was not put into the same form as she was before, but showed a substantial defect after the repairs were effected. That is pretty nearly an outline of the case. It may have been only a speculation, but I am inclined to think it was something more than a speculation on the part of Green that he knew he could bring assistance to bear which the captain did not know of or could not get, and as soon as he made this bargain he brought all this labour to bear upon the vessel, and at the second high tide got her off.

The question then is whether there was sufficient to say that there was no evidence to go to the jury. Now a case which goes very far indeed, and in its facts is very similar to the present case, is a case in the Privy Council of the *Cobequid Marine Insurance Company* v. *Barteaux* (32 L. T. Rep. N. S. 510; L. Rep. 6 P. C. 319; 23 W. R. 392, 2 Asp. Mar. Law Cas. 536). In that case the facts were in many respects similar, but there there was no evidence that the ship was making water, or that she was considerably logged, or that she was badly strained; indeed, the reverse was the case. I should have said that in the present case a survey was held upon this vessel by four people, Green being one of them; they condemned the vessel as being unseaworthy, which in itself would not be sufficient, because a vessel being merely unseaworthy would not justify a sale, and they recommended the vessel should be sold for the benefit of all concerned. One of the differences between this case and that of the *Cobequid Marine Insurance Company* v. *Barteaux* is, that ample assistance there could have been procured. Although this case of the *Cobequid Marine Insurance Company* v. *Barteaux* would be very much more in point if we were deciding the question of the verdict being against the evidence (and I may say this is a second trial in this case, and that after the first trial, the court granted a rule on that point), it has still an important bearing upon the question we have now to decide. Sir Henry Keating in giving judgment says: "Now their Lordships entirely agree with the learned judge in their inability to discover on the evidence for the plaintiff himself why those efforts were not made and inasmuch as, to justify the sale, those efforts ought to have been made, there seems to be strong reason for ascertaining how far another jury would agree in the very sound and sensible opinions expressed by the majority of the court themselves"—that is the court from which the appeal came—"or whether they would coincide in the view taken by the former jury. Of course their Lordships would be slow to advise a new trial where there was substantial conflict of evidence. In the present case the record does not disclose the fact whether the Chief Justice expressed himself dissatisfied with the verdict. It does not state the fact either way that he expressed himself to be satisfied or dissatisfied. That he was not perfectly satisfied with the verdict their Lordships can perhaps collect from the passage just read, and which must be taken to be the expression of the opinion of the Chief Justice himself. But in an ordinary case, although the non-expression of the dissatisfaction upon the part of the judge is generally looked upon as forming a serious obstacle to ordering a new trial yet at the same time it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them; there is no reason whatever why a new trial in the interest of justice should not be directed." Now this is the part that appears to me to be important upon the point I am addressing myself to. "In this case," says Sir Henry Keating, "it would be too much to say that there was no evidence of the stringent necessity that would have justified a sale. Had there been no evidence there would have been a misdirection, but their Lordships are of opinion, having regard to the evidence given of the absence of those efforts upon the part of the master, which efforts would alone justify a valid sale—that is a sale that should be valid against the insurers—that the verdict of the jury as given was undoubtedly against the weight of the evidence." So that in this case the judges say by the mouth of Sir Henry Keating, it would be too much to say there was no evidence of the stringent necessity which justified the sale. I may say this court, instead of granting a new trial in this case on the ground of misdirection, if there had been no evidence in support of the plaintiff's case, would have entered judgment for the defendant. They would not have sent the case down for a new trial unless they considered there was some evidence for the consideration of the jury.

Now in the present case two points were suggested: one was that, if a verdict was wholly unsatisfactory to a judge and the court, a judge would be entitled on a second trial to nonsuit. That was not pressed, and I must say I do not agree with that. If that was so, the whole course of our legal procedure would be changed; because in such cases as that, instead of sending it down for a new trial, they would at once enter judgment for the defendant. Therefore it does not appear to me that the argument can be sustained, namely, that a mere decision of the court that the verdict was unsatisfactory and against the weight of evidence would be sufficient to ground a nonsuit upon.

Then another point that was urged was, that Order XXXIX., r. 3, of the Judicature Act applied, and that, if the court thought that

no substantial wrong or miscarriage had occurred, they could uphold the nonsuit. This is the first time this point has occurred, and upon this I give my opinion with very sincere diffidence, because it is a matter entirely new, but I cannot bring my mind to that construction of Order XXXIX., r. 3. The words of the order are these: [The learned Judge here read the rule of the order.] No doubt, in one sense of the word, perhaps in a fair sense, nonsuiting where the judge ought not to nonsuit is a misdirection, but I cannot help looking to the object of this Act. The object of this Act, as I have always understood, was to prevent that which frequently occurred before, and that which really was a matter of serious injury to litigants, when, because a judge might have misdirected in some particular which might be comparatively small with regard to the actual substantial merits and justice of the case, yet, as the court could not say absolutely as a matter of certainty that it might not have influenced the jury's mind in giving their verdict, a new trial was ordered. I have no doubt that was what this was intended to vary, and the word "misdirection" here does not mean misdirection in the sense of withdrawing a case from the jury altogether, and the judge deciding it himself; but misdirecting the jury in the direction which the judge gives; and that opinion is confirmed in my mind by sect. 22 of the Judicature Act. It seems to me, that in the contemplation of the Act, a judge is not to withdraw a case from a jury if there is anything that can be called a case to go to the jury. That helps my view, that the word "misdirection" in this rule does not apply to a nonsuit. The consequences if it did would be very extraordinary; that is to say, they would to my mind change nearly the whole of our procedure, because it would come to this, that, if a judge was dissatisfied with a verdict, and at all events if the court agreed with him, the case would be wholly removed from the jury. If the court are dissatisfied with the verdict, and think it decidedly wrong, and if the judge nonsuits and withdraws the case from the jury, and the court say no substantial wrong can have occurred because they are of opinion the verdict would have been entirely unsatisfactory, they place themselves in the position of the jury, and therefore, unless there were affidavits of fresh evidence, the court could avoid a second trial, and possibly even in the first trial, if the judge thought the verdict would be wrong if given for the plaintiff, he might nonsuit the plaintiff. I do not think that was contemplated by the Act, and, if it had been contemplated that judges should have absolute control over the verdicts of juries, I think it would have been more clearly expressed.

Now, as to what is called reasonable evidence, nothing is more difficult to decide, We have repeated instances of judges differing as to whether there is reasonable evidence. Since the time I have been on the bench there have been differences of opinion both in this court and in the Court of Appeal on that question. I can only say in this case, it seems to me there was, within the meaning of *Ryder* v. *Wombwell* (17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90; 37 L. J. 47, Ex.), not a mere scintilla of evidence, but reasonable evidence upon which, in the absence of any answer, the jury might find a verdict. If the evidence of the witnesses stood alone, I should say distinctly there was reasonable evidence for the jury, but there are things that conflict with that evidence. That the vessel was repaired for a small sum, for instance, is a very strong fact. Still there was a conflict of evidence. We must look at *Ryder* v. *Wombwell*, which is the leading case upon the subject. There the evidence, which the judges held in the Exchequer Chamber was not fit to be submitted to a jury, was to my mind absolutely ridiculous; it was a case for the supply of necessaries, as they were called, to a minor. The necessaries were a handsome goblet of gold and silver to be presented to a marquis, and which the jury held to be a necessary, and certain diamond and ruby studs for a shirt. It was said there that the evidence must be reasonable, that is something that would affect the minds of reasonable men that it was not an extravagance; and they held that the jury could not come to any rational conclusion in supposing that such things as this goblet and these jewelled shirt studs could be necessaries. They might as well have supposed a coach and four or a yacht were necessaries for a young man. I do not say that is conclusive, but I think it tends to show the ground upon which the court went, and that the court would not remove from the jury a case where there was evidence upon which, if uncontradicted, whether by the opposite side or the conflict of the evidence in itself, the jury might act. There is a great disadvantage in some cases with regard to trial by jury, especially where there are complicated questions. In this case I cannot bring my mind to the conviction that there should have been a nonsuit. I am better satisfied in coming to this opinion, as it will make no difference, my Lord being of a different opinion, and the rule will drop, and if the Court of Appeal should decide that a nonsuit can be directed in such a case as this, I shall be by no means dissatisfied.

I should like to add, that there is one expression which is used in the case of *Cobequid Marine Insurance Company* v. *Barteaux*, that I intended to allude to. It is an expression used in quoting from Parsons, that even exceeding peril would not justify a sale. I apprehend that the court must have meant by that, peril in the shape of prospective danger, because, if not, supposing this vessel actually going to pieces, there could be no sale until the vessel was actually destroyed. I do not think they meant to go that length. No doubt a sale should not be effected except upon stringent necessity; still it cannot be a necessity which does not arise until the vessel is practically destroyed. A sale is a very dangerous thing to encourage on the one hand; but, on the other hand, if there is no sale it may be the underwriters or the owners of the vessel may very much suffer.

Lord Coleridge, C.J.—For the reasons I will state as clearly as I can, I am still obliged to adhere to the opinion I expressed at the trial. If I had thought the point to be decided was that to which my brother Grove has directed attention, I am not at all sure I should not have come to his conclusion; but I venture to think the point is not that to which my learned brother has directed his judgment, and that as to the point upon which I did decide I was right, and that it was the true point to decide.

Now this was an action for the purpose of fixing the insurers to pay their proportions on

a total loss of a ship not totally lost in fact, but said to be totally lost to the owners by reason of a sale. The sale therefore could only be justified, in my apprehension of the law, if at the time it took place there was at least a constructive total loss of the ship. It is not a question of whether a total loss was imminent, it is not a question of whether the person who sold *bonâ fide* thought there would be a total loss, but whether there was a total loss, and the question I have to consider is whether there was evidence on that point. To that point alone was my ruling directed, and on that point alone did I consider, and do I now consider, whether there was evidence or not. I find I ruled in these precise terms: "I think there is no evidence upon which the jury could reasonably find the urgent necessity for the sale of the *Highflyer* at six o'clock on the 6th Oct., the time of the sale, which alone could justify the sale; that is, that at that time there is no reasonable evidence of a total loss." Now that is the point of law I decided, and that is the point only, as it appears to me, as to which the existence or non-existence of evidence is to be considered.

It is not for me to define the law upon that subject. I apprehend the law to be established. Formerly there was great doubt, and if the old cases and old books be looked at, it will be found I am by no means exagerating the statement when I say there was great doubt whether under any circumstances the master had a right to sell. It was a right obviously capable of great abuse, it was a right for which there was in former times no distinct authority, and indeed in some of the cases it will be found that in the earlier books it had been laid down the other way, that there was no authority to the master under any circumstances to sell the ship so as to fix the insurers. As between himself and his owners it is a totally different matter. That state of the law was modified by subsequent decisions, and I suppose by the general feeling, convenience and reason, that affected the great judges who have in fact created our mercantile law. But the point always to be decided, as I apprehend, is not, as I have said, the imminence of peril, not the *bonâ fides* of the person who sells believing the peril is imminent, but the existence of a state of facts which at the time of the sale makes the ship constructively totally lost, and unless there is evidence given of that state of facts the owners, whatever they may do between themselves and their captain, cannot sue the insurers as for a total loss when the ship has been sold.

The question here therefore is, where there was a sale of a ship under circumstances which I will presently very shortly express, whether it can be said there was any evidence, subject to the observations I will make upon *Ryder* v. *Wombwell* (17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90; 37 L. J. 7, Ex.), of that fact to be left to the jury.

I put aside, with all respect, as having nothing to do with that point, the opinions of persons given with regard to the state of the ship earlier in the day. The question is, whether at six o'clock on the night of the 6th Oct. the ship was constructively totally lost. Now at that time she was not making water, there had been no jettison; as a matter of fact within five or six hours she was got off the rock, and she was repaired for 20*l*. Those are undisputed and indisputable facts in the case, and it appears to me to be wholly unnecessary to consider what was the true effect of the evidence of the mate and other people as to the parting of the timbers, and as to the starting of the masts and soon. They referred to another part of the day, if true—I mean if given honestly; and whether given honestly or not, are proved by the indisputable facts of the case to have been pure mistakes, because the ship was got off; the ship was not totally or constructively totally lost, and was repaired for a trifle. Now it appears to me that, if I am right in saying that the question is, whether the ship was constructively lost when she was sold, there was no evidence in this case from which a jury could reasonably find such a matter as that. If the question had been whether the master acted *bonâ fide*, and thought that there was a total loss at that time, I admit that this evidence, though it is to my mind exceedingly unsatisfactory, might properly have been submitted to the jury, and ought not to have been withheld from them; but in my view, for the reasons I have given, that is not the point to be considered.

Now am I right in so limiting the point that was for me to consider? I find in this case that has been referred to a judgment delivered, as I took the liberty to say in the argument, not only by a great, but by a very cautious lawyer, a person whose statements are always to be taken with the greatest possible confidence, and I find him stating this: "With reference to the law upon the subject, there seems now to be no doubt whatever, and it cannot be questioned that the master under circumstances of stringent necessity may effect a sale of a vessel, so as thereby to affect the insurers. That he can only do so in cases of such stringent necessity has been laid down in a great variety of cases unnecessary more particularly to be referred to, as they are well summarised in the work of Mr. Parsons, at page 147, where he also takes the distinction between the rule, that a sale is justified by stringent necessity only and what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it." I apprehend therefore, that the evidence must be limited to that which is the point ascertained by the true rule, the fact of stringent necessity, not to the question of whether the sale was made under circumstances that a prudent uninsured owner would have made it. "He distinguishes," says Sir Henry Keating, "between the two, and establishes upon satisfactory authority that whilst what a prudent owner would have done under the circumstances, if uninsured, may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity." That is, it must exist, as I understand it, at the time of the sale, and to that point only is evidence admissible in a case of this kind. "In Arnould on Insurance, the circumstances that will justify the master in selling seem to be well and clearly put, and to be quite borne out by the authorities that are cited in support." Then he says afterwards (the facts in this case are not the same as the facts in the Privy Council): "In judging of the questions how far the sale was justified by stringent necessity, of course the state of the vessel, that is not the reported state, but the true state of the vessel, becomes an important element for consideration."

What was the true state of the vessel here upon the uncontradicted evidence? That she was not totally lost, and that she was repaired for 20*l.* How can it be possibly said there was any evidence in the face of those admitted facts, if I am right in saying that was the only point to be considered? How can it be said there was any evidence to go to the jury, that this ship, which was never constructively totally lost, and which was repaired for 20*l.*, was constructively totally lost at the time of the sale? If I am right in saying the true point is what I contend it to be, there was no evidence in this case. The greater part of the evidence to which my learned brother has referred (and his comments upon that evidence are such as I should make and in which I agree) is apart from the question which alone has to be considered in this case, and is really irrelevant to the question for decision by us.

Now, that being so, what is it that ought to guide a judge in refusing to submit a case to a jury? I quite admit not only his mere opinion, because it is not the law it should be so. As long as juries sit where there is evidence which by law is fit for their consideration, whatever conclusions a judge may draw from it, he must allow a jury to draw theirs; and if their conclusion, in the opinion of the court, is thought wrong, it must be set aside, and if that conclusion is very wrong, and very prejudiced, it will be set aside, as I have heard great judges in earlier days say, *toties quoties*. The court will not have a verdict forced upon them by perversity or prejudice; but I quite agree, where there is evidence fit for consideration of the jury, it must be submitted to them. I am not at all prepared to differ from the principle my learned brother has laid down, which, for the reasons I have given, I do not think applicable to this case. Now, in the case of *Ryder* v. *Wombwell* (17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90; 37 L. J. 47, Ex.), to which he has referred, I find a very sensible observation, if I may so say, made by a court not only of a co-ordinate authority, but by a court of appeal, which is binding upon us, and I submit, and submit cheerfully *ex animo*, to the law as laid down in that case. The first question was, whether there was any evidence to go to the jury that either of the articles were necessaries for an infant in the state of life in which the young man was. "Such a question," the court says, "is one of mixed law and fact. In so far as it is a question of fact it must be determined by a jury, subject, no doubt, to the control of the court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence upon which the jury could properly find the question for the party on whom the onus of proof lies. If there is not"—here I myself will interpose words which are not in the report, but to make it more clear—"if there is no evidence upon which the jury could properly find, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiffs or direct a verdict for the plaintiff if the onus is on the defendant." It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge, subject, of course, to review, is, as is stated by Maule J. in *Jewell* v. *Parr* (13 C. B. 909; 22 L. J. 253, C. P.), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey* v *London and Brighton Railway Company* (3 C. B. N. S. 146; 27 L. J. 39, C. P.) Williams J. expresses the same idea thus: "It is not enough to say that there was some evidence. A scintilla of evidence clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence." In *Wheelton* v. *Hardisty* (29 L. T. 385; 8 E. & B. 262; 26 L. J. 265, C. B.), in the considered judgment of the majority of the court, it is said: "The question is whether the proof was such that the jury would reasonably come to the conclusion that the issue was proved." This, they say, is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there were what had been termed a "scintilla of evidence." Therefore, in this case, in the Exchequer Chamber, adopting the dicta of Maule and Williams, JJ., and adopting the judgment of the Court of Queen's Bench in *Wheelton* v. *Hardisty*, they say the true question is, whether the proof was such that the jury would reasonably come to the conclusion that the issue was proved. I adopt that rule in the fullest sense. On that I say no more.

Supposing then the point I decided to be right—If I am wrong upon the point I decided the whole judgment of course falls—but supposing the point I decided to be the right point to be decided, namely, was there in fact urgent necessity at six o'clock on the 6th of October for the sale, which alone could fix the insurers, I confess I am wholly unable to see what evidence there was in this case from which a jury could reasonably, without perversity, have come to any such conclusion. I therefore think, upon the authority of this case, upon the authority of the case in the Privy Council, upon the authority of the case in the Exchequer Chamber, and founding my judgment also upon the older cases, as showing the great importance of maintaining the rule that these sales are not to take place unless the stringent necessity arises, I am of opinion that the ruling in this case was right, because the ruling I adhere to is the ruling I wrote down at the time, considering the words of it, and to those words I now upon deliberation adhere.

Other questions have been raised in this case which I do not know, from the point of view I take, if it is at all necessary to consider. It is suggested something may turn upon the third rule of Order XXXIX. of the Judicature Act of 1875. Certainly, if I was to decide the case upon that question, I should desire time to consider whether the court were of opinion that any "substantial wrong" had been done. I confess I should desire time to consider whether this rule was not in its terms pointed to cases such as this. The rule is that the new trial should not be granted on the ground not only of the improper admission or rejection of evidence, but also on the ground of misdirection; and this clearly means misdirection other than improperly admitting or receiving evidence—It refers to something

done by the judge beside or apart from the evidence in the case, and I should rather suppose that the rule was pointed at those instances which, if I may say so, were, I will not say a discredit, but which gave occasion to non-professional comments, and sometimes professional comments, upon the administration of justice when there was some small evidence to go to a jury, and when a judge had withheld it on the ground that if they had believed such trumpery evidence he and everybody else who heard the case would have been dissatisfied, and yet it was necessary to grant a new trial. I apprehend it is to prevent such a case as that that the word "misdirection" was put in as well as improper rejection or reception of evidence. But, for the reasons I have given, I do not think it necessary to decide that point.

I take my stand upon the direction I gave at the trial upon the point which I say I conceive it was necessary to make out, that is, the existence of a constructive total loss at six o'clock on the 6th of October, of which not only does it appear to me there was no evidence, but against which, and disproving which, there was conclusive evidence. I am therefore of opinion that this direction was right, and that the rule should be discharged.

As the Court was divided, the rule dropped.

Solicitors for the plaintiff, *Parker* and *Co.*

Solicitors for the defendant, *Waltons, Bubb*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

July 13, 14, 15, *and* 27, 1880.

(Before Sir R. PHILLIMORE.)

THE ALHAMBRA.

Breach of charter-party—"To a safe port, or as near thereunto as she can safely get and always lie and discharge afloat"—Carriage of goods—Delivery—Lightening outside port—Port of Lowestoft.

By the terms of a charter-party a ship was to take in a full cargo at Baltimore, and proceed to Falmouth for orders, thence to a safe port in the United Kingdom, or as near thereunto as she could safely get and always lie and discharge afloat. The ship drew 16ft. 6in., and was ordered to Lowestoft, a harbour where the average low water is 11ft., but, according to the general custom of the port, vessels drawing more than 11ft. can be and commonly are lightened in Lowestoft Roads. The master, without going to Lowestoft Roads, put into Harwich, and declined to proceed further. The consignee gave the master notice that he was willing to lighten the ship in the Lowestoft Roads so as to enable her to enter and lie always afloat, but the master declined to proceed, and the consignee accepted delivery at Harwich under protest, and was put to expense in forwarding the cargo.

Held, that the ship committed a breach of the charter-party, as it would have been both reasonable and safe for the ship to have allowed herself to be lightened in the roads.

THIS was an action by Wm. Everitt and Sons, of Lowestoft, the consignees of a cargo of grain on board the barque *Alhambra*, against the owners of the *Alhambra*, for damages for breach of charter-party.

The *Alhambra* was a Norwegian barque, with no owner, or part owner, in England or Wales, and the proceedings were *in rem.*

According to the allegations of the statement of claim, the master of the *Alhambra* agreed by a charter-party, dated 8th Nov. 1879, to charter the *Alhambra* to Messrs. James Knox and Co. as agents for Messrs. Borrowman and Co., of London, for a voyage from Baltimore to Queenstown or Falmouth for orders, thence to a safe port in the United Kingdom, or as near thereunto as she could safely get and always lie and discharge afloat; lighterage, if any, always at the risk and expense of the cargo. The charterers, in pursuance of the said charter-party, shipped 3015 quarters of Indian corn, for which the master signed bills of lading. The ship arrived at Falmouth on 27th Dec. 1879; on 5th Jan. 1880 the plaintiffs, Wm. Everitt and Sons, of Lowestoft, purchased the cargo from Messrs. Borrowman and Co., who were then the owners of the cargo, and Messrs. Borrowman and Co. indorsed the bill of lading to the plaintiffs, who thereby became the owners of the cargo, and the assignees of the bill of lading within the meaning of the Admiralty Court Act 1861 (24 Vict. c. 10), s. 6; on the same day the master of the *Alhambra* received orders to proceed to Lowestoft but refused to do so, and proceeded to Harwich, where the plaintiffs accepted delivery under protest, being put to great expense in procuring other vessels to convey the cargo from Harwich to Lowestoft.

The statement of defence alleged that Lowestoft was not a safe port within the true intent and meaning of the charter-party, and was not a safe port where the *Alhambra* could always lie and discharge afloat, and was not a port into which the *Alhambra* could safely get, and proceeded:

5. Before the master of the *Alhambra* proceeded with the *Alhambra* and her cargo to Harwich, he offered the plaintiffs to proceed therewith to Lowestoft Roads, which are outside of Lowestoft, upon the plaintiffs giving him a guarantee against consequent disasters, or to go to any safe discharging place other than and more convenient to the plaintiffs than Harwich to be selected by the plaintiffs, but the plaintiffs refused to give such guarantee and to select any such other discharging place, and the said master after such refusal proceeded with the *Alhambra* and her cargo to Harwich and there discharged it, and the plaintiffs there accepted delivery of it under protest as alleged. Lowestoft Roads would not have been a safe place of discharge for the *Alhambra*. Harwich was as near to Lowestoft as the *Alhambra* could safely get and always lie and discharge afloat.

The reply of the plaintiffs after joining issue was as follows:

2. The plaintiffs further say that the ordinary and customary mode of delivery and discharge at Lowestoft, for vessels of the size and draught of water of the *Alhambra*, carrying grain cargoes, is, that such vessels discharge into lighters in Lowestoft Roads a part of their respective cargoes sufficient to lighten such vessels and enable the same to enter the said port, and thereupon enter the said port and there discharge the remainder of their said cargoes, always afloat, and that for all such vessels delivering and discharging in manner aforesaid the port of Lowestoft is a safe port, and a port within which they can always lie and discharge afloat, and into which they can safely get, and the plaintiffs say they they were always ready and willing, and in fact offered to the master of the *Alhambra*, to take delivery in such ordinary and customary mode as aforesaid, and to

lighten the *Alhambra* at the expense of the plaintiffs; and the plaintiffs say that, under the circumstances aforesaid, the port of Lowestoft was within the true intent and meaning of the said charter-party a safe port and a port where the *Alhambra* could always lie and discharge afloat, and a port into which she could safely get, and that the *Alhambra* could have safely delivered her said cargo at Lowestoft in such customary mode as aforesaid, and that the said master was bound to proceed to the said port of Lowestoft, and there discharge without any such guarantee as that in the 5th paragraph of the statement of defence mentioned.

3. The plaintiffs further say that if the *Alhambra* could not safely enter the port of Lowestoft and there lie and discharge always afloat within the meaning of the said charter-party, and as alleged in the last preceding paragraph (which the plaintiffs aver she could), she could safely get to Lowestoft Roads, and there lie and discharge always afloat, and such roads were and are a safe place of discharge for the *Alhambra* within the true intent and meaning of the said charter-party, and the *Alhambra* was by the said charter-party bound to proceed to such roads as being as near to the said port of Lowestoft as she could safely get and there discharge without any such guarantee as that in the said 5th paragraph of the statement of defence mentioned.

The further facts of the case sufficiently appear in the judgment save as follows:

The plaintiffs proved that they had eight or ten lighters waiting ready to lighten the *Alhambra* as soon as she arrived, holding from thirty to thirty-two tons each, and that inside the harbour they had all the modern appliances for unloading vessels coming in on a flood tide, and requiring lightening before low water, and that they had removed as much as 200 tons of grain from a vessel in six hours. The master of the *Alhambra* said that when he had discharged 220 tons at Harwich the whole cargo being 640 tons, his vessel drew twelve feet. It was also given in evidence that timber vessels had been lightened in the roads by discharging through the port holes only a few inches out of the water.

Milward, Q.C. and *J. P. Aspinall* appeared for the plaintiffs, and *Butt*, Q.C. and *E. C. Clarkson* for the defendants.

Butt, Q.C. for the defendants, objected to evidence of the custom of the port to lighten vessels in the roads on the ground that "a safe port" is a port in which a fully loaded vessel can always lie afloat, and evidence of custom was therefore wholly irrelevant.

The learned judge decided to receive the evidence subject to the objection.

Milward, Q.C. for the plaintiffs.—A safe port is not necessarily a port in which a vessel can always lie afloat when fully laden. On the contrary, a vessel is bound to wait for an opportunity of getting to the place of discharge:

Schilizzi v. *Derry*, 4 E. & B. 873; 24 L. J. 193, Q.B.;
Bastifell v. *Lloyd*, H. & C. 388; 31 L. J. 413, Ex.;
Parker v. *Winlo*, 7 E. & B. 942.

A vessel is also bound to allow herself to be lightened, even if there is no custom of lightening:

Hillstrom v. *Gibson*, 8 Scotch Sess. Cas. (1870), p. 463; 3 Mar. Law Cas. O. S. 362; and
Capper v. *Wallace*, L. Rep. 5 Q.B. Div. 163; 42 L. T. Rep. N. S. 130; 4 Asp. Mar. Law Cas. 223.

Butt, Q.C. for the defendants.—A safe port where a vessel can always lie afloat, is a port in which a fully laden vessel can lie afloat at all times of the tide. In all the cases cited for the plaintiffs, the port is mentioned in the charter-party by name, and the charter-party is not, as in this case "for orders for safe port." *Hillstrom* v. *Gibson* (*ubi sup.*) is an exception, and is a Scotch case. The judge in *Capper* v. *Wallace*, in the Queen's Bench, looked on it with great suspicion, and their judgment was in opposition to it, the facts being somewhat distinguishable. It is also distinguishable because the port was accepted in that case, and the plaintiffs thus estopped themselves from denying that it was a safe port. In *Hillstrom* v. *Gibson* (3 Mar. Law Cas. O. S. 302 and 362) the Court of Session was not unanimous, and the balance of authority is nearly equal. If *Hillstrom* v. *Gibson* is admitted as an authority for the plaintiffs, it is only an authority for lightening a vessel to the extent of one-fifth. while *Capper* v. *Wallace* (*ubi sup.*) decided that to lighten to the extent of one-third was unreasonable. In this case the facts are conclusive, that it was unreasonable to expect the *Alhambra* to lighten in the roads. It would have been necessary to take out much more than one-third. If the plaintiffs wished it, they ought to have given a guarantee. The master was certainly not bound to place himself in a position in the harbour where, if the plaintiffs had failed to take out a certain quantity between high and low water, the *Alhambra* would have taken the ground.

Milward, Q.C. in reply.—As to the contention that there is a distinction between the cases in which a port is inserted by name in the charter-party and those in which a port is afterwards named by the charterers when a port is named at the port of call, the bill of lading is to be read as if it had originally contained the name of that port. The master was guilty of negligence in not going to see or taking measures to ascertain whether Lowestoft was a safe port. He acted on information received from a pilot whom the defendants have not called. The plaintiffs could not be expected to give any guarantee when they had clear rights under the charter-party.

Cur. adv. vult.

July 27.—Sir R. PHILLIMORE.—As this is the first case of the kind which has come before this court, I have taken a few days to consider my judgment upon it. The *Alhambra*, a Norwegian barque of the burden of about 469 tons, was chartered at Baltimore in the United States of America to go from that place to Queenstown or Falmouth for orders, and thence to a safe port in the United Kingdom or certain ports on the continent, or as near thereunto as she could safely get and always lie and discharge afloat. It was provided also among other things that lighterage, if any, should be always at the risk and expense of the cargo. The cargo consisted of Indian corn in bulk and in ship's bags. The ship sailed to Falmouth, at which port she arrived on the 5th Jan. 1880. At the same date the cargo was sold by Borrowman and Co., who had bought it, to Messrs. Everitt and Sons, to whom the bill of lading was duly indorsed. No port was mentioned in the charter-party, but Messrs. Everitt and Sons gave orders to the master of the *Alhambra* to proceed to Lowestoft, and there discharge the cargo. On the 5th Jan. 1880 the following letter was addressed to Capt. Corneliussen, the master of the *Alhambra*, at Falmouth: "Sir,—We have just received a communication by telegraph, of which the following is a copy: 'From Borrowman, Phillips, and Co., London, to G. L. Fox and Co., Falmouth. Please order

Alhambra with maize from Baltimore to proceed to Lowestoft.' We report *Alhambra* to Lowestoft for discharge. Yours respectfully, for G. L. Fox and Co., Anderson C. Wilson." This was followed by a letter of the next day: "Falmouth, 6th Jan. 1880. To Capt. Cornliussen, of the *Alhambra*, Falmouth. Sir—We have just received a communication by telegraph, of which the following is a copy: 'From Borrowman, Phillips and Co., London, to G. L. Fox and Co., Falmouth. Insist upon *Alhambra* proceeding to Lowestoft for discharge. Give captain notice owners of cargo will hold him responsible for any and all losses incurred by his delay.' Yours respectfully, for G. L. Fox and Co., Anderson C. Wilson." On the same day the captain telegraphed to the harbour master at Lowestoft: "What draught water can safely always afloat discharge?" and he received the answer from Capt. Massingham, the harbour master at Lowestoft: "16ft. average high water, eleven low; soft muddy bottom; never known vessel to take harm Lowestoft harbour." On the 6th Jan. also the captain telegraphed to Borrowman and Co. as follows: "If you will give solid guarantee against all consequences will proceed to Lowestoft Roads; if not I will protest against your order and proceed Harwich, if you cannot give me another safe discharging place more convenient for you to receive my cargo according to charter-party. Telegraph reply." Of the proposal for a guarantee I think no notice was taken by Borrowman and Co., who were quite justified in refusing to enter into a new contract, which this would have been, and in abiding by the contract already made. On the 30th Jan. the plaintiffs Everitt and Co. sent the following letter to the captain of the *Alhambra*: "Sir,—Take notice that, as I am the consignee of the cargo of maize now laden on board your vessel, I require you forthwith to proceed to Lowestoft, and deliver such cargo to me there according to the terms of the charter-party and bill of lading; and take further notice that I am prepared to pay freight as provided by the charter-party, and at my own expense to lighten your vessel in Lowestoft Roads sufficiently to enable her to lie always afloat in Lowestoft harbour, if necessary, should her draught of water so require." The captain went on to Harwich and there discharged his cargo. The plaintiff Everitt wrote as follows: "Sir,—Take notice that I receive the cargo laden on board your vessel, and consigned to me at Lowestoft under protest in Harwich harbour, reserving my right to proceed against you to recover the damage which I have sustained and may sustain in consequence of your refusing to proceed to Lowestoft, and there deliver your cargo according to the terms of your charter-party."

Upon this state of facts the plaintiffs claim damages for the breach of contract. The defendants maintain that there was no breach of contract incurred at all, and that Lowestoft harbour was not a safe port in which the cargo could be discharged. It appears that the *Alhambra* drew 16ft. 6in. of water when laden, 8ft. or 9in. without a cargo, and 11½ft. in ballast. Lowestoft Roads afford a safe and good anchorage, sheltered from all winds but a S.E. wind. Tansley, a pilot residing at Lowestoft, said he had seen 200 sail in the roads. The discharge in the roads appears to be usual. On Monday, the 19th, the day on which the *Alhambra* arrived off Lowestoft, the morning high water was 17ft., the evening high water 15¼ft., and the low water 11½ft. On 20th Jan., at high water in the morning tide, there were 16ft. 9in., and in the evening tide 16ft 3in., and at low water 12ft. 9in. in the morning and 13ft. 3in. in the evening. On Wednesday, the 21st Jan., there were 17ft. 6in. at high water in the morning, so that it would appear that on the morning tide of the 19th and 21st the *Alhambra* could have entered, if not wholly without lightening, with but very little. In the evening of the 21st the high tide was 15ft. 6in., and the low tide 13ft. 6in., so that by a lightening of the cargo by 3ft., the *Alhambra* could have entered at low tide on that day. The vessels that entered which required a depth of 16ft. of water did usually take the ground, but there was a soft bottom. The evidence is that no injury was ever done to vessels so entering. The general custom certainly is for vessels to lighten in the roads and then go into port. It appears that the *Alhambra* sailed for Lowestoft on 15th Jan., and on the 19th sighted the place and took a pilot on board when abreast of Lowestoft about five or six miles off. The captain never went nearer to Lowestoft, or ascertained by personal inspection the state of the port, and his pilot has not been examined, but it would seem that the captain sailed with him some distance, and then took a Harwich pilot on board and went to Harwich. It is contended by the defendants, first, that Lowestoft is not a safe port within the meaning of the charter-party, where a ship can lie and discharge always afloat; and, secondly, that the *Alhambra* was not bound to discharge in the roadstead in order to enable her to enter the port to the extent the evidence shows she must have done in this case.

Various cases were cited by counsel, but the law as applicable to the case now before me appears to be laid down in the following judgments.

In *Schilizzi* v. *Derry* (4 E. & B. 873) the defendant had agreed by a charter-party that the ship then in London should proceed to Galatz or Ibrail, or so near thereunto as she might safely get, and there load a cargo for the plaintiff's factors and therewith proceed to a port in the United Kingdom, unless prevented by causes usually excepted. The ship arrived at the mouth of the Danube on Nov. 5, and found that there was not enough water for her to cross the bar. It was not safe for her to remain off the mouth later than Dec. 11, and on that day she proceeded to Odessa, and took in a cargo from other parties. After the 7th of the following January there was enough water to enable the ship to cross the bar and sail to Galatz. Campbell, C.J. said in that case: "I am really unable to entertain any doubt of the plaintiff being able to recover. As to the first plea, the meaning of the charter-party must be that the vessel is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardanelles, had completed her voyage to Galatz? There can therefore be no doubt as to the first issue. Then as to the second issue, were the defendants prevented by dangers and accidents from completing their voyage? Clearly not. For though from the 5th Nov. to the 7th Jan. the vessel could not cross the bar at

the Sulina mouth of the Danube, yet she might have done so after the 7th Jan., and would have then reached her port of destination." Crompton, J. said: "I cannot see any doubt. There is a positive contract to proceed to a port unless prevented by dangers and accidents of the sea; that must mean prevented from doing so at all. It would be most dangerous to hold that a temporary obstruction put an end to the obligation."

The case of *Bastifel* v. *Lloyd* (1 H. and C. 393), in 1862, was an action on a charter-party by which the plaintiff and defendant agreed that the plaintiff's ship *Bebec* should proceed to Llanelly and take on board a cargo of culm, and being so loaded should therewith proceed with all convenient speed to Cole's Wharf, Rochester, or so near thereto as she might safely get, and deliver the same on being paid freight. The ship arrived with her cargo at Rochester on the 24th Oct., and was moored to the buoys about 500 yards from and opposite to Cole's Wharf. On the 25th Oct. the master gave the defendant's agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water to enable the vessel to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th Nov., and on the following day she commenced discharging her cargo. In an action for demurrage it was held that the master was bound to take the vessel alongside Cole's Wharf. Bramwell, B. said: "I cannot help thinking that the defendant is right when he says that the vessel was bound to go alongside the wharf. As pointed out by the Lord Chief Baron, the object of the charterer was to save the expense of lighterage. Suppose the shipowner found that he could not get alongside the wharf for two or three days he would clearly have been bound to wait until he could then safely get there. He has undertaken to go alongside Cole's Wharf, unless the want of safety renders it necessary that he should stop short of that place. It is admitted that by waiting a short time he not only could but did get there. It might be different if there were only one or more tides in the year which would enable a vessel to reach the wharf, but it is not necessary to say what the master might do in that case. As it is, convenience and common sense are in favour of the defendant."

In the Scotch case of *Hillstrom* v. *Gibson* (*ubi sup.*), which is, I believe, considered the leading case on the subject, and which was decided in Feb. 1870, the master had become bound, under his charter-party, to proceed to Glasgow, "or as near thereunto as the ship might safely get and lie afloat at all times of the tide." On arriving at a point off Greenock, known as the Tail of the Bank, it was found that she could not, with her full cargo, lie afloat in Glasgow harbour at all times of the tide. The consignee, who was at hand, requested the master to discharge what was necessary to lighten the ship—that is, one-fifth of the cargo—and to proceed with the residue to Glasgow. The majority of the court held that this was a reasonable request; that it was in the course of the master's duty to proceed with the residue to Glasgow, and that he could not claim demurrage for the time taken in reaching that port. Lord Kinloch, in delivering judgment, says: "I think the words 'as she may safely get' are reasonably to be construed to mean 'as it is possible to take her with safety,' and this possibility must be construed with reference to the usual mode of accomplishing such safety. If the obstacle to her proceeding was a bar at the mouth of the harbour, I cannot think that the master would be entitled to refuse the lightening, and to insist on delivering the whole cargo in the open sea, and the proceeding at the Tail of the Bank was not in any sound sense a delivery of the cargo; it was a lightening for the purposes of navigation. Had the proposal been to take out four-fifths of the cargo at the Tail of the Bank, and to go on with the remaining fifth, the shipmaster's argument would have had a great deal more of plausibility, for in such a case a great deal may depend on the difference of more and less; it may draw that very distinction between lightening and discharging which is all important in the case."

In the case of *Nelson* v. *Dahl* (L. Rep. 12 Ch. Div. 568; 4 Asp. Mar. Law Cases 172), where there was a provision in the charter-party that the ship should be brought to a particular place or "as near thereto as she may safely get," it was laid down that in such a contract it must be considered whether the obstruction to the ship entering the dock was of a temporary or permanent nature, so that an obstruction must be considered a permanent one which cannot be removed in a time which is reasonable having regard to the interests of the ship or of the consignee, and this doctrine as to a temporary obstruction not being a sufficient impediment to the execution of the contract was applied to the case of overdraught of a vessel in the following case.

In *Capper* v. *Wallace* (L. Rep. 5 Q. B. Div. 163; 4 Asp. Mar. Law Cas. 223) it was agreed by the charter-party that the ship was to take in a full cargo and proceed therewith to a safe port on the Continent between Havre and Hamburg as ordered, or as near thereunto as she might safely get; the cargo was to be brought to and taken from alongside at the merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder, in Holland. Koogerpolder was some way up a canal, and the ship, with a full cargo, drew too much water to proceed up the canal. No arrangement had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. It seems that one-third of the cargo had to be unloaded in order to enable the ship to proceed up the canal. As this was done the plaintiffs first claimed pilotage, harbour dues, and other expenses of going into port as well as demurrage, but afterwards limited their claim to what it would have cost to lighter the whole. Lush, J. (with Manisty, J.), in delivering the judgment, said: "It cannot we think be laid down as an inflexible rule that, when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under all circumstances entitled to consider the voyage at an end; he is bound to use all reasonable means to reach the port. The words 'as near thereto as she can safely get' must receive a reasonable and not a literal application. The overdraught may be such, and the cargo so easily dealt with that the surplus may be removed, and the ship sufficiently lightened without exposing

her to extra risk or to any prejudice, and without substantially breaking the continuity of the voyage; and in such a case, if the consignee is at hand to receive the surplus cargo, and so relieve the overdraught," as he was in the case before us, "we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port. This is the principle laid down by the court in the case of *Hillstrom* v. *Gibson* (*ubi sup.*)." Applying the principles of law enunciated in these decisions to the facts and circumstances of the case before me, I am of opinion that the breach of contract alleged by the plaintiffs is established, and the defendants must pay the damages consequent upon such breach. I give judgment for the plaintiffs with costs.

Solicitor for the plaintiffs, *H. C. Coote*, for *Charles Diver*, Yarmouth.

Solicitors for the defendants, *Hughes, Hooker* and *Co.*

Tuesday, April 13, 1880.

(Before Sir R. PHILLIMORE.)

THE RADNORSHIRE.

Practice — Interrogatories — Preliminary Acts — R. S. C. Order XIX., r. 30—*Order XXXI., r.* 5 (*Nov.* 1878, *r.* 3.)

Interrogatories may be administered under Order XXXI., r. 5 (*Nov.* 1878, *r.* 3) *concerning matters on which information is obtained by Preliminary Acts, Order XIX., r.* 30.

A general interrogatory will be struck out as vexatious if too vague in its character to admit of a precise answer.

THIS was a motion by the plaintiffs, owners of the ship or vessel *Paria*, to strike out interrogatories delivered to them by the defendants, owners of the *Radnorshire*.

The interrogatories related to the circumstances of the collision which was the cause of the action, and the first thirteen were as to matters on which information would ultimately be supplied by the Preliminary Acts (Order XIX., r. 30) of the plaintiff when that document was opened.

The fourteenth interrogatory was in the following terms:

Is there any act, command, fact, matter, or thing not disclosed in your answers to the above interrogatories which it is material for the defendants to know for the purpose of defeating your claim in this action, or for the purpose of rendering you liable for all or such of the damage resulting from the collision mentioned in the statement of claim? If yea, set it forth, state where it happened and who can depose to the same.

April 13.—*E. C. Clarkson*, for plaintiffs in support of the motion.—These interrogatories are contrary to the practice of the court. The Preliminary Acts were specially arranged to get one party's statement of the facts of a collision free from the other party's statements, so as not to enable either to build up a case on that stated by his opponent; and this practice has been persevered in since the passing of the Judicature Acts:

The Biola, 34 L. T. Rep. N. S. 185; 3 Asp. Mar. Law Cas. 125.

The plaintiffs can only interrogate a party to the action who, not having been on board, probably knows nothing about the circumstances of the collision except by report.

Milward, Q.C. and *Hilbery*, for defendants, in opposition to the motion.—*The Biola* (*ubi sup.*) is not now in point. The order in that case was made under the original rules under the Judicature Act, but those rules were repealed, and the present rule (rule 3, Nov. 1878) substituted. It cannot be alleged that these interrogatories are exhibited "unreasonably or vexatiously," or that any one of them is "scandalous," and therefore we are entitled to administer them, and the court has no power to set them aside or strike them out. The object of discovery is to enable us to see what the plaintiffs' case really is, and therefore whether we have or have not a case. The information supplied by the Preliminary Act will come to us too late, and moreover we prefer to have our opponent's case stated on oath.

Sir R. PHILLIMORE.—It is true that these interrogatories are of a nature quite novel in the practice of this court, but, as the spirit of Judicature Acts is to assimilate the practice of the different divisions as far as possible, and as the first thirteen interrogatories are such as would be allowed elsewhere, I do not see how I can grant the application to strike them out. They have not been exhibited unreasonably or vexatiously, and they certainly cannot be considered scandalous. I think, however, the fourteenth interrogatory is too vague in its tenor, and I shall order it to be struck out.

Solicitors for plaintiffs, *T. Cooper* and *Co.*

Solicitors for defendants, *F. W.* and *H. Hilbery*.

June 23, 24 *and* 29, 1880.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE SILESIA.

Salvage—Agreement—Setting aside—Exorbitancy—Costs—Evidence.

The court will set aside an agreement for salvage which is obviously unreasonable and exorbitant, even if made bonâ fide and not under compulsion.

Where an agreement is set aside, and an award of salvage made, each party will pay their own costs.

Instructions from an owner or his agent to his ship's master not to salve property is evidence as affecting the risk run by the salvor.

Semble, the fact that the plaintiffs have claimed in the alternative of the agreement being set aside, an award of salvage remuneration, does not entitle them to the costs when such an award is made.

Semble also, if the defendants made a tender, which tender was pronounced for, and the agreement set aside, they would be entitled to costs subsequent to tender.

THIS was an action for salvage instituted by the Société Anonyme de Navigation Belge-Americaine, the owners, and the crew of the Belgian mail steamer *Vaderland*, against the German screw steamer *Silesia*, for salvage services rendered to that vessel on the 26th March 1880 and following days.

The *Vaderland* was a screw steamer of 2748 tons register, with engines working up to 1800 horse power, and manned by a crew of seventy-six hands. At the time these services were rendered she was on a voyage from Antwerp to Philadelphia, laden with a general cargo and 274 passengers. She was besides carrying mails for

the Belgian Government under a subsidy, by the terms of which she incurred penalties for delay and deviation. She was of the value of 50,000*l.*, and her cargo 20,000*l.*

The *Silesia* was a screw steamer of 3156 tons gross register, and manned by a crew of ninety-five hands. At the time the services were rendered she was on a voyage from New York to Hamburg, laden with a general cargo, and carrying besides mails, specie, and sixty-two passengers. The ship was valued at 49,000*l.*, the cargo at 56,000*l.*, specie 958*l.*, and passage money and freight about 2640*l.*

On the 21st March the *Silesia* had broken her main shaft, and on the 26th March 1880, at 8 a.m., being then about three hundred miles from Queenstown, was observed by those on board the *Vaderland* flying a signal for assistance. The *Vaderland* steamed towards her, and the captain of the *Silesia* came on board the *Vaderland*, and, after some discussion an agreement was drawn up in German and witnessed by the chief officer of the *Vaderland* and was signed by both captains, of which the following is the translation referred to in court at the trial:

At sea 26—3—80, on board the steamer *Vaderland*. We, Carl Berthold Richard Ludvig, captain of the German steamer *Silesia*; H. E. Nickels, captain of the Belgian steamer *Vaderland*, have this day made agreement as follows:—Capt. Nickels engages to assist the *Silesia* with broken shaft, disabled, and tow her to Queenstown to anchorage. For this service Capt. Ludvig makes his company responsible for the above-named service for the sum of 15,000*l.*

Afterwards the *Vaderland* took the *Silesia* in tow and towed her to an anchorage outside Queenstown, and then went inside the harbour and sent out tugs, who brought the *Silesia* into harbour.

The statement of claim, after setting out the facts briefly set out above, concluded with the following claim:

The plaintiffs claim (1) the sum of 15,000*l.* salvage pursuant to the said agreement and the condemnation of the defendants and their bail in such sum and in costs. (2) In the alternative such an amount of salvage as the court may think fit to award and the condemnation of the defendants therein and in costs. (3) Such other and further relief as the case may require.

The statement of defence admitted that salvage services had been rendered, but, as to the agreement, said so far as is material.

(3) The agreement . . . was, as the defendants say and submit, an inequitable one, and was only signed by the master of the *Silesia* under compulsion and because the master of the *Vaderland* threatened to leave the *Silesia* and proceed upon his voyage unless the said agreement was signed by the master of the *Silesia*. The master of the *Silesia* at the time when the said agreement was being discussed repeatedly stated that the sum demanded was, in his opinion, much too large, and proposed to the master of the *Vaderland* that the amount to be paid for services to be rendered should be left to be settled between the owners of the two vessels.

(6) . . . They deny that the plaintiffs have any claim under the agreement, but they submit to pay such an amount of salvage as the court, upon consideration of all circumstances, may deem just.

No tender was made by the defendants.

June 23.—The case came on for hearing.

Butt, Q.C. and *Clarkson* for the plaintiffs.

Webster, Q.C. and Dr. *W. G. F. Phillimore* for the defendants.—In the course of the examination of the captain of the *Vaderland*, he stated that he informed the captain of the *Silesia* that he had instructions from his owners not to deviate except to save life. On being asked whether in fact he had such instructions and how they were given, the question was objected to by the defendants on the ground that instructions from the owners of the *Vaderland* to their master could not be evidence against the *Silesia*, but the objection was overruled, and it appeared that the instructions were contained in a letter of instructions from the agents of the plaintiffs' company in Philadelphia, and is as follows:

Philadelphia, July 25, 1879.

Capt. H. E. Nickels, s.s. *Vaderland*, Philadelphia.

Dear Sir,—A recent legal decision has confirmed the views heretofore entertained by many that a steamship that deviates from its voyage to save property did so at its peril. You will therefore consider that your orders now are to make no deviation except to save life. This you are expected to try to accomplish under all circumstances which you may consider justifiable, having in view a proper regard for the safety of your own steamer, her passengers and crew. You will, of course, understand that the order is not intended to apply to deviations which in your judgment are advisable for the safety of your own steamer, her passengers or cargo, or for the safety of any other of the steamers of our line.—Yours truly, PETER WRIGHT and SON, general agents.

Butt, Q.C.—There is nothing in the nature of this agreement to induce the court to set it aside. There was no extortion as in the case of *The Medina* (L. Rep. 1 P. D. 272; 2 P. D. 5; 34 L. T. Rep. N. S. 918; 35 L. T. Rep. N. S. 779; (3 Asp. Mar. Law Cas. 219, 305); both masters were aware of the circumstances of the case, and it was doubtless a most valuable service. As it turned out, the service was rendered more easily than was probably in the contemplation of the parties when they made the agreement, but that is no reason for setting it aside. There is no doubt that it was a valuable service efficiently rendered, and the court will not set aside the agreement merely because it is a large sum. The values are large and the risks great, especially to a vessel having passengers and mails on board:

The Helen and George, Sw. 386.

Webster, Q.C. and *Clarkson*.—The court will not uphold an agreement which, for want of equity, shocks its conscience, and where there is besides practically compulsion. The master of the *Vaderland* in effect says if you won't agree for so much, I will leave you. He refuses to leave the matter to be settled by the owners or by the court. Under the circumstances the captain of the *Silesia*, being in charge of so valuable a ship, and with the responsibility of so many lives on him, was bound to sign any agreement and trust to the court to do justice. The case is in fact though not so bad a one perhaps, as *The Medina* (*ubi sup.*), yet of the same description and to be decided by the same principles.

In the course of the argument it was agreed by the parties that, in the event of the agreement being set aside, and an independent award of salvage made, the defendants would, in addition to such award, pay to the plaintiffs any sum not exceeding 1150*l.* which the Belgian Government might exact from them then under the provision for penalties for delay in carrying the mails.

Sir ROBERT PHILLIMORE.—This is a case of salvage service of very considerable merit, and upon that point there is no dispute whatever. The only question for the court to decide is whether, having regard to all the principles on which

salvage remuneration is awarded, the sum of 15,000*l.*, the sum agreed upon between the two captains, is so exorbitant as to induce the court to set the agreement aside.

The short history of the case is this. The *Vaderland*, a screw steamship of 2748 tons register, with engines of 300 horse power working up to 1800, was on a voyage from Antwerp to Philadelphia, laden with a general cargo, and carrying mails and 274 passengers. That there were these passengers on board is a most important element in this case. The mails were carried under a subsidy with the Belgian Government, and the owners of the *Vaderland* were under penalties not to deviate or delay; the *Vaderland* had a crew of seventy-six hands, and her value, added to the value of her cargo and freight was 72,000*l.* The vessel to which the salvage services were rendered was the *Silesia*, and she had sixty-two passengers on board, with a crew of ninety-five hands, and was of 3156 tons gross register, and, with her cargo and freight, was of the value of about 108,000*l.*, and was going from New York to Hamburg, and at the time when the accident happened she had got within 340 miles, or thereabouts, of Queenstown. On the morning of the 21st March in this year the *Silesia* broke her propeller or screw shaft in the stern tube, and the consequence was that she became utterly inefficient, so far as her steam power was concerned. The weather was fine and the sea was smooth, but, after tossing about for four or five days, and only about seven miles off the place at which the accident happened, she hoisted signals of distress. On the 26th March the *Vaderland* bore down upon her. What passed between the two captains it is better to state in their own words, both having regard to the importance of the principles involved, and the great value of the salved ship herself. The statement of Capt. Nickells, of the *Vaderland*, is as follows: "Ludvig, the captain of the *Silesia*, asked me to tow him into a safe port. I said I could not do it, because I had instructions from my owners. Then he said, 'What am I to do? I cannot steer the ship.' After a little while I said, 'I will break my instructions for 20,000*l.*' He said that was rather too much, and mentioned 12,000*l.*" That is a statement denied by the other captain. "I said I would not run the risk for that money, then he made an offer of 15,000*l.*, and I said yes." Capt. Ludvig's account is this: "Capt. Nickells took me into his room, and I said I had been trying to sail for five days, but, having the wind against me, I could make no way. I thought I had better not try any longer, and I requested him to tow me. Nickells said he had instructions not to tow any ship, as they had been taken in before, except for a certain sum of money, and then to give him a written agreement. I asked what he wanted. I said we had a case a couple of years ago, and we had to pay 4000*l.* for it, and 5000*l.* would be about the money. He said "No, 20,000*l.*" I said I was astonished, as it was an enormous sum, and they would never pay so much. I insisted on 5000*l.*, and he insisted on 15,000*l.* I thought it was a great sum, and he threatened to leave me unless I signed for 15,000*l.* The agreement was in these words. [His Lordship then read the agreement set out above and continued:] The *Vaderland* took the *Silesia* in tow, and in about three days they accomplished the 340 miles to Queenstown, and at the end of six days the *Vaderland* had again reached the vicinity of the spot where she had fallen in with the *Silesia*. That was the time she lost, and it was very strongly contended on her behalf that she had rendered herself liable to penalties under her mail contract for the deviation she had made from the course of her voyage. On that I may observe that the question as to these penalties has been disposed of by an arrangement made in court between the parties and which is in these words. [His Lordship then read the agreement between the parties, referred to above, and proceeded:] So far, therefore, this question is disposed of.

The captain of the *Silesia* in his evidence referred to instructions given him not to deviate from his voyage or delay the ship to render any assistance to vessels other than those belonging to his own company, except for the purpose of saving life; on the other hand, the bills of lading and policies of insurance provide for liberty to the *Vaderland* to "assist all vessels in all situations." I do not think that these instructions to the master of the *Vaderland* can be pressed as affording any guide to the court in ascertaining the amount of salvage remuneration to be awarded for the services rendered.

There is a large sum mentioned as the estimated loss on the charter of the screw steamer *Helvetius*, which was employed in consequence of the derangement of the service in which the *Vaderland* was employed. The loss on this head I do not estimate at more than 500*l.*

The question the court has to consider is whether the agreement made between the captains is one which is so exorbitant that in accordance with the decided cases and the principles on which they are founded, the court ought to set it aside. I should say that, in order to assist the court in arriving at a conclusion upon the subject, it is necessary to consider, and I have considered carefully with the assistance of the elder brethren of the Trinity House, whether the owners of the *Silesia* would or would not have been justified in calling for the assistance of the *Vaderland* and in accepting the terms which the captain of the *Vaderland* asked. After the best consideration of the case, and considering the principles of other analogous cases, I have come to the conclusion—and the elder brethren agree with me—that the sum specified in the agreement is so exorbitant that the court ought to exercise its equitable jurisdiction and not to assist in the carrying of it out. Looking to all the circumstances of the case, I have come to the conclusion that the proper sum to award as salvage remuneration will be 7000*l.* to cover everything but the penalties. The question of costs must stand over for argument.

June 29.—The question of costs came on for argument.

E. C. Clarkson for plaintiffs.—There is no reason why the ordinary rule that a successful plaintiff gets costs should be departed from. Our claim is not merely on the agreement, but in the alternative for such sum as the court may think right, and we have been awarded 7000*l.* If the defendants had made a tender which the court had upheld of that sum, we should not be entitled, but they have refused to pay anything till forced

to do so by the judgment of the court. In the case of *The Cargo ex Woosung* (35 L. T. Rep. N.S. 8; L. Rep. 1 P. D. 260; 3 Asp. Mar. Law Cas. 50, 239), where the Court of Appeal set aside an agreement as excessive and inequitable, it nevertheless gave the costs in this court to the plaintiffs, whose agreement was set aside, but in whose favour an award was made, and that is precisely the case here. In the case of *The Medina* (34 L. T. Rep. N.S. 918; 35 L. T. Rep. N.S. 779; 1 P. D. 275; 2 P. D. 5; 3 Asp. Mar. Law Cas. 219, 305), it is true that no costs were given, but that was an exercise of discretion on the part of the court varying the general rule, because of the peculiar circumstances of the case. The agreement was extorted from the captain of the salved vessel, as if he did not agree he would have seen 500 people drowned before his eyes; and the court stigmatises the conduct of the salvor as little better than that of a pirate. Here there is no attempt at extortion. The salved ship was in no immediate danger, and there is no *mala fides* or misconduct on the part of the salvor. If we had not set up the agreement at all, but only claimed for the salvage in the ordinary way, there being no tender, we should have had to call our witnesses to prove the services and the loss sustained by us in rendering them.

Dr. *W. G. F. Phillimore* for defendants.—The court will follow the judgment of the Court of Appeal in the case of *The Medina* (*ubi. sup.*). It is incorrect to say that the costs were not allowed in that case on account of the conduct of the salvor. The principle is laid down for all cases by James, L.J. He says: "On one side there was salvage to be paid, and on the other side there was an attempt to set up an agreement, and it was right that there should be no costs on either side." In the case of *The Cargo ex Woosung* (*ubi. sup.*) costs were given because the defendants alleged misconduct on the part of the salvors and failed to prove it; and besides, it appears to have been the result of agreement between the parties, and not the decision of the court, that the plaintiffs should have costs below and defendants costs of the appeal. In *The City of Manchester* (42 L. T. Rep. N.S. 521; 4 Asp. Mar. Law Cas. 106) the Court of Appeal decided that there should be no costs where, the case being divisible into two issues, the plaintiff succeeds on one and fails on the other, and that is in accordance with the decision of the same court in the case of *The Medina* (*ubi. sup.*).

Sir ROBERT PHILLIMORE.—I am of opinion that on the principle on which *The Medina* (*ubi. sup.*) was decided by me and affirmed by the Court of Appeal, each party must pay his own costs.

The following is the form of the decree:

The judge being assisted by Capt. John Sydney Webb and Capt. W. Woolcott, and having heard counsel on both sides, and the defendants having undertaken, in the event of the court deciding against the agreement pleaded by the plaintiffs, to pay, in addition to the salvage awarded by the court, any fines not exceeding the sum of 1152*l.*, which may be enforced by the Belgian Government against the owners of the *Vaderland* in respect of delay in the mail service of the said Government during the six months ending the 30th June inst., pronounced the sum of 7000*l.* to be due to the plaintiffs for the salvage services by them rendered to the steam vessel *Silesia* and her cargo, the said sum to include all expenses, other than the fines aforesaid incurred by the said plaintiffs in rendering such services, and he condemned the defendants and their bail in the said sum of 7000*l.* and the amount of the said fines not exceeding 1152*l.* as aforesaid, but he reserved the question as to costs.

Dated the 24th June 1890.

The judge having heard counsel on both sides on the reserved question as to costs, directed each party to pay his own costs of the action.

Solicitors for plaintiffs, owners of the *Vaderland*, *Hollams, Son, and Coward.*

Solicitors for defendants, owners of the *Silesia*, *Lowless and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

Nov. 11, 12, 13, *and* 15, 1880.

(Before the LORD CHANCELLOR (Selborne), COCKBURN, C.J., and BRETT, L.J.)

THE WEST INDIA AND PANAMA TELEGRAPH COMPANY LIMITED *v.* THE HOME AND COLONIAL MARINE INSURANCE COMPANY LIMITED.

APPEAL FROM THE COMMON PLEAS DIVISION.

Marine insurance—"Adventures and perils of the seas, and all other perils, losses, and misfortunes"—Damage by explosion of boiler—Liability of underwriters.

Plaintiffs' steamer was insured by a time policy against "adventures and perils . . . . of the seas . . . fire . . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof."

The steamer was damaged while at sea by the bursting of the boiler, which took place in consequence of the plates being worn too thin to resist the pressure of the steam.

This condition of the plates was due to the negligence of those who had charge of the boiler in omitting to clean and inspect it at proper intervals.

In an action against the underwriters:

Held (affirming the judgment of Baggallay, L.J.), that the damage caused by the bursting of the boiler was covered by the policy, and plaintiffs were entitled to recover.

THIS action was brought on a policy of marine insurance, effected by the plaintiffs with the defendants on the plaintiffs' steam-vessel *Investigator*, which was used for telegraphic purposes in the seas between the island of St. Thomas and the continent of America.

The *Investigator* was insured for 5000*l.*, the insurance being declared to be upon

Hull, stores, &c. valued at	£75
Paying out and picking up machinery, cable, stores, for picking up, repairing, &c., valued at	4000
Machinery, boilers, &c., valued at	3500
	£15,000

The policy was a time policy "for and during the space of twelve calendar months from the 6th May 1878 to the 5th May 1879, both days inclusive."

The clause in the policy stating the perils insured against was as follows:

> And touching the adventures and perils which the said company are made liable unto or are intended to be made liable unto by this insurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof.

The trial was commenced before Baggallay, L.J., without a jury, at the Hertford summer assizes, in 1879, and the further hearing was then adjourned, and afterwards took place in the Rolls Court. After taking time to consider, the Lord Justice, on the 8th Sept. 1879, delivered a judgment, in which he stated the facts which had been proved as follows:—"The following are the circumstances under which the accident occurred. On the 8th Jan. 1879 the *Investigator* was lying in the port of St. Thomas, and her master having received orders to proceed to repair a break in the telegraphic cable between St. Thomas and San Juan, Porto Rico, weighed anchor about half-past ten on the morning of that day, and set-on easy. After making some fifteen revolutions, her engines were stopped to allow of the vessel's head canting round, and, within a few seconds of their being so stopped, the port boiler burst, gutting the middle of the ship, and blowing up her decks; a considerable portion of the boiler fell overboard, carrying away the port bulwarks, and doing much other damage to the ship, to the particulars of which damage it is unnecessary now to allude. By great exertions on the part of her crew, aided by the crews and boats of other vessels lying in the port, the *Investigator* was got into shoal water. She did not sink, but the wreck of her hull was ultimately sold for 250*l*., and the present action has been brought to recover the loss sustained by the plaintiffs in respect of her hull and stores. . . . . From the evidence, it appears that the general thickness of the iron shell of the boiler had been reduced, at the part where it gave way, from its original thickness of at least three-eighths of an inch to less than one-eighth of an inch, and that such reduction was due chiefly to the action of bilge-water upon its external surface, and to some—though to a less—extent by the accumulation of sediment and dirt, in the form commonly known as "scale," on the inside: that it was the duty of the engineering staff of a steam-vessel to frequently examine both the inside and the outside of their boilers, and to keep them free from these causes of corrosion, and, for that purpose, to keep down the bilge-water by the pumps, and to remove the scale from the inside."

After fully reviewing the evidence the Lord Justice arrived at the conclusion that "the explosion was occasioned by the negligence of those who had charge of the boiler, and that such neglect consisted—first, in omitting to clean out the boiler at proper intervals; secondly, in omitting to make frequent and careful inspection of the boiler inside and out; thirdly, in allowing the bilge-water to accumulate and to wash the outside of the boiler plate; and fourthly, in working the boiler at a pressure of 50lbs., which was greater than was consistent with its age and condition.

The Lord Justice then stated that in his opinion the bursting of the boiler was a peril insured against by the policy, and gave judgment for the plaintiffs.

The defendants appealed.

Nov. 11, 12, *and* 13.—*Benjamin*, Q.C. and *Arbuthnot* for the defendants.—The defendants are not liable on the true construction of the policy. The bursting of the boiler does not come within the words "adventures and perils of the seas," nor is it covered by any of the other words describing the particular perils insured against, nor by the general words at the end of the clause, for it is not a peril *ejusdem generis* with any of those particularly described. The case is one of first impression in the courts of this country, and the American decisions, which are referred to and relied on by Baggallay, L.J. in his judgment (*Administrators of Isaac Perrin* v. *The Protection Insurance Company*, 11 Ohio Rep. 147, and *Citizens Insurance Company of Missouri* v. *Glasgow*, 9 Missouri States Rep. 496), cannot be considered as authorities. Moreover in this case the proximate cause of the loss was the inherent defect or unseaworthiness of the boiler itself, and this defective condition of the boiler was caused by ordinary wear and tear. It must be admitted that in a time policy there is no warranty of seaworthiness, and therefore, if the loss is caused by any peril insured against, the underwriters are liable, although the vessel is unseaworthy; but, if the unseaworthiness is itself the cause of the loss, the underwriters are not liable.

Cohen, Q.C. and *J. C. Mathew* for the plaintiffs.—The loss by explosion of the boiler is a loss insured against in this policy, for, if not strictly within the words "adventures and perils of the seas," it is a loss of a like nature, within the meaning of the rule laid down by Lord Ellenborough, C.J., in *Cullen* v. *Butler* (5 M. & S. 461), and is therefore covered by the general words. The general words cover all perils incident to navigation, including those arising from the improper navigation of the vessel, and in the case of a steamer improper navigation includes improper management of the boiler and engines. Here it is shown by the evidence that the explosion was caused by the negligence of those who had charge of the boiler, and if explosion is a peril insured against the underwriters are clearly liable for it, though caused by negligence:

Dixon v. *Sadler*, 4 M. & W. 405; 8 M. & W. 895.

In addition to the authorities above mentioned, the following were referred to in the course of the argument:

Boehm v. *Combe*, 2 M. & S. 172;
Carruthers v. *Sydebotham*, 4 M. & S. 77;
Busk v. *The Royal Exchange Assurance Company*, 2 B. & A. 73;
Phillips v. *Barber*, 5 B. & A. 161;
Fawcus v. *Sarsfield*, 6 E. & B. 192; 25 L. J. 249, Q.B.;
Thompson v. *Hopper*, 6 E. & B. 172; 25 L. J. 240, Q.B.; E. B. & E. 1038; 27 L. J. 441, Q.B.;
Patterson v. *Harris*, 5 L. T. Rep. N.S. 53; 1. B. & S. 336; 1 Mar. Law Cas. O.S. 124;
Taylor v. *Dunbar*, L. Rep. 4 C. P. 206;
Davidson v. *Burnand*, 19 L. T. Rep. N.S. 782; L. Rep. 4 C. P. 117; 3 Mar. Law Cas. O.S. 207;
Good v. *London Steamship Owners Mutual Protecting Association*, L. Rep 6 C. P. 563;
Great Western Railway Comany v. *Blower*, 27 L. T. Rep. N.S. 883; L. Rep. 7 C. P. 655;

Jackson v. *Union Marine Insurance Company*, 31 L. T. Rep. N. S. 789; L. Rep. 8 C. P. 572; L. Rep. 10 C. P. 125; 2 Asp. Mar. Law Cas. 435;
Anderson v. *Morice*, 31 L. T. Rep. N. S. 605; 33 L. T. Rep. N. S. 355; 35 L. T. Rep. N. S. 566; L. Rep. 10 C. P. 58, 609; and 1 App. Cas. 713 (judgment of the Court of Common Pleas delivered by Brett, J., 31 L. T. Rep. N. S. at pages 610, 611; L. Rep. 10 C. P., at pages 66 and 68); 2 Asp. Mar. Law Cas. 424; 3 Asp. Mar. Law Cas. 31, 290;
Dudgeon v. *Pembroke*, 31 L. T. Rep. N. S. 31; 34 L. T. Rep. N. S. 36; 36 L. T. Rep. N. S. 382; L. Rep. 9 Q. B. 581; 1 Q. B. Div. 96; and 2 App. Cas. 284; 2 Asp. Mar. Law Cas. 323; 3 Id. 101 393;
Merchants' Trading Company v. *Universal Marine Insurance Company*, 2 Asp. Mar. Cas. 431;
Pickup v. *Thames and Mersey Marine Insurance Company*, 39 L. T. Rep. N. S. 341; L. Rep. 3 Q. B. Div. 594; 4 Asp. Mar. Cas. 43;
Arnould on Marine Insurance, 5th edit., pp. 707, 776;
Emerigon, c. 12, sects. 1, 2.

[Cockburn, C.J.—At the time when Emerigon wrote, the distinction between time policies and voyage policies was unknown.]

Arbuthnot was heard in reply.

Cur. adv. vult.

Nov. 15.—Lord Selborne, L.C.—The question in this case is, whether a loss by the explosion of a boiler was or was not covered by a time policy on the steamship *Investigator*, dated the 6th May 1878. The insurance was for twelve months from that date, "in port and at sea, at all times, and in all services, situations, and circumstances." The risks to which the appellants were made liable were described in the ordinary form "of the seas, men-of-war, fire, enemies, &c.," and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, and damage of the aforesaid subject-matter of this insurance, or any part thereof." The ship, when about to leave the port of St. Thomas on the 8th Jan. 1879, was reduced to a wreck (though not submerged or filled with water) by a sudden explosion of her boiler in ordinary weather. The underwriters disputed their liability on two grounds: first, that such an explosion was not a peril insured against, within the true meaning of the policy; and, secondly, that (assuming it to be so) this particular explosion happened because the boiler was worn out, and that they were not liable for any loss due to that cause. But these grounds of defence were overruled at the trial (without a jury) before Baggallay, L.J., and judgment was given for the plaintiffs, the assured. The present appeal is from that judgment.

Assuming (as for the purpose of this decision I think it right to assume) that such an explosion is not, properly speaking, "a peril of the seas," and that it cannot be brought within any of the other particular perils enumerated in the policy, the main question is, whether it is within the general words with which the specification of the risks insured against concludes, "and all other perils, losses, and misfortunes," &c.

The principles of construction applicable to those general words, in policies of this description, was explained by Lord Ellenborough in the case of *Cullen* v. *Butler* (5 M. & S. 461), cited during the argument. "As they must," he said, "be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes." He proceeded to refer to an observation of Emerigon to the effect that phrases more or less similar have been introduced into various continental forms of policies to prevent doubts and disputes as to the extent and application of what the writer described as "the general rule that assurers answer for all loss and damages that happen on the seas." It is unnecessary to consider whether such a description of "the general rule" is not too wide, because the canon of construction laid down by Lord Ellenborough if reasonably understood, is sufficient for the solution of the present question.

In *Devaux* v. *I'Anson* (5 Bing. N. C. 519) similar general words were held by Tindal, C.J., and the other judges of the Court of Common Pleas, to cover damage to a ship occasioned neither by wind nor water, but by the strain on her timbers of cables employed by workmen to remove her from her berth in a dry dock, in which she had been placed for necessary repairs.

I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boiler, or from defects of safety valves, or from neglect or mismanagement making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of winds and defects or mismanagement of a ship, sails, or tackle. I agree, therefore, on this point with the judgment of Baggallay, L.J., and with the decision in the Supreme Court of Ohio to which that learned judge referred.

Upon the second point the only material facts appear to be, that, either through the access of bilge-water without, or through the accumulation of "scale" within, the boiler, certain parts of the lower plate of the boiler had become worn in an unusual manner, and to an extreme degree of thinness; that this was the cause of the liability of the boiler to resist a degree of steam pressure not otherwise extraordinary or improper; and that this unusual wearing away of the plate might have been prevented by proper care. It is certain that, when the policy was effected, this defective condition of the boiler (in whatever degree it may have then existed) was unknown to the assured. The defect was not until several months after the date of the policy sufficient to prevent the boiler from doing its usual work; though, being progressive, it eventually led to the explosion. These facts cannot, in my judgment, amount to more than what was assumed by the House of Lords in *Dudgeon* v. *Pembroke* (L. Rep. 2 App. Cas. 284), viz., that the ship was unseaworthy, and that such unseaworthiness (unknown at the date of the policy to the assured) was the *causa sine quâ non* of the loss. That was a case on a time policy like the

present; and the House decided that the assured on these assumptions were entitled to recover. That decision binds us.

So far as negligence on the part of those who ought to have examined and attended to the state of the boiler may be an element in the present case, the same authority, as well as *Dixon* v. *Sadler* (5 M. & W. 405; 8 M. & W. 895), shows that it is immaterial. The appeal must be dismissed with costs. The Lord Chief Justice of England agrees with this conclusion; and, though he is not responsible for my words, I understand him also to agree in the substance of the reasons which I have given.

Brett, L.J.—This case has been argued with remarkable force on both sides. It is a case in which I have found considerable difficulty but, in the result I have come to the same conclusion as the Lord Chancellor and the Lord Chief Justice. The first question is, whether, assuming an explosion of steam to be so far the proximate cause of the damage as to be within the rule applicable to marine insurance, this is a loss which is insured against in an ordinary policy in the form of the present. The question so stated is a question of the mere construction of an English policy. It has been said on behalf of the defendants that no perils are insured against except such as are external to the ship. It is said on the other side that all fortuitous circumstances are insured against, including negligence on the part of the captain or crew of the vessel. To my mind the latter contention is too wide, and the former is too narrow. A policy of marine insurance is to be construed like any other mercantile instrument. When there are particular terms and a general phrase following them, the general phrase must be construed with reference to the particular words, and not as if it stood alone. On the other hand, the argument, which seeks to restrict the words of the policy as desired by the defendants, is founded on a fallacious interpretation of the words "perils of the sea." It is true that some judges have used the words "external force," but, with deference, the word "external" seems to me to be surplusage, for it is difficult to see how damage caused by wind, sea, lightning, or anything similar, could be internal. The term "perils of the sea," as has been settled by decision, includes only sea damage or violence of the elements, and does not apply to all accidents happening at sea from whatever cause they may arise. Therefore, so far as the argument here was made to rely upon the first term of the perils insured against, it seems to me that we are not at liberty to say that this peril was within that term.

But that is not the only term in the policy, and new terms have been introduced from time to time. The last general phrase which is used here has been in all policies of marine insurance from the beginning, but many of the particular words which precede it have been introduced from time to time, and the effect of the introduction of new particular words into a policy is to alter the general words, and make them include something which they did not include before; that is, perils not the same as those included in the new words introduced, but of a like kind with them; so by adding to the particular words you introduce a new term into the policy, and also make it include perils like those described by the new term introduced. As to the possibility of holding that under the general terms may be included all losses which may happen during a voyage by fortuitous accidents, the contrary is decided by authority, for in *Cullen* v. *Butler* (5 M. & S. 461) Lord Ellenborough, one of the greatest masters of this branch of the law said that in an English policy the general words comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes. I can imagine many cases which would come within the definition of losses by fortuitous accident, and yet would not be within the general phrase in the policy. For instance, take the case of a policy on casks of spirits; by negligence or accident a cask is stayed and the spirits contained in it lost: that clearly would not be within the policy. Or take the case of a vessel which sails on a voyage with a perishable cargo; the captain and crew are attacked by some epidemic sickness, and are unable for a considerable time to work the ship properly, which causes so long a delay on the voyage that the cargo is spoiled: It seems to me that there is nothing in an English policy to cover such a loss. It follows that I am unable to agree in the larger definition to which I have referred. The Lord Chief Justice suggested during the argument that the words might cover that without exposure to risk of which navigation could not take place; but on consideration I cannot agree with the suggested definition. Lord Ellenborough and Lord Tenterden have limited the general words to other perils, not of the same kind, but of a like kind; I think, therefore, that the passage from Emerigon, which has been cited, was in all probability correct as to many foreign policies, and was correct as to the general view of underwriters and merchants at the time when it was written, but it does not apply to an ordinary English policy. It is valuable as showing that, subject to the limitation which I have mentioned, the general words ought to receive a large construction. If the clause enumerating the particular perils insured against in this policy contained only the words "perils of the sea," I should think that this would not be a peril of a like kind with those specially enumerated. Unless the special clause had contained the word "fire," I think this would not be a peril of a like kind. I have had some difficulty in bringing my mind to see that it is a peril of a like kind to those enumerated, so as to bring it within the general phrase, but on consideration I think it is similar to the perils specified in this way: an explosion often ends in fire, and fire often causes an explosion which blows up the deck. In this way I think there is sufficient likeness to enable us to say that an explosion, although it is only an explosion of steam, is within the general terms of the policy. Therefore, on the construction of the policy, I think that a loss caused by explosion of steam is a loss caused by a peril insured against.

The next point is this: Assuming that loss by explosion of steam is insured against, it is said that this loss is not covered for other reasons. It is said that it was caused by the infirmity of the boiler, and therefore by the infirmity of the subject-matter insured. It is necessary to consider therefore what the actual loss is,

The plaintiffs have not claimed for the loss of the boiler itself, and, as I think, rightly; for if there had been no explosion they could not have recovered for the boiler, which was worn out, and if they could recover for the boiler at all, they could only recover the difference between the value of the boiler just before the explosion and its value after the explosion, which would be nothing, for the boiler at the moment before the explosion was worth nothing at all. What they are seeking to recover for is the damage to the ship. Now the infirmity of the boiler by itself did not cause this damage, nor did the steam by itself, and therefore the loss is not merely a loss caused by the infirmity of the boiler, and it is not caused by the introduction of the steam, but by the explosion, which was the proximate cause. Therefore, if the explosion is a peril insured against, the loss is a loss for which the plaintiffs are entitled to recover.

Then it is alleged on behalf of the defendants that the explosion was caused by the infirmity of the boiler, which infirmity was caused by the negligence of the crew; that is, that the cause of the explosion was the unseaworthiness of the boiler. That argument means that, if the *causa proxima* of the loss is caused by negligence or unseaworthiness, that is a defence to an action on the policy. As far as negligence is concerned, this contention has often been overruled.

The other point occurred to Lord Blackburn at the trial of the action of *Dudgeon* v. *Pembroke*, and he left certain questions to the jury in order to raise it. It is true the jury did not answer these questions, but the case was argued throughout as if they had answered them. That case is, to my mind a clear decision, that if the proximate cause of the loss would not have occurred but for unseaworthiness, this is no defence. Another argument is, that the loss was the result of mere wear and tear; but the damage was done to the whole of the ship, and even if the boiler had been brought into the state in which it was by mere wear and tear, I should think the case would be within *Dudgeon* v. *Pembroke* (*ubi sup.*), but it is not necessary to decide this, because to my mind it seems clear beyond all doubt upon the evidence that the damage to this boiler was not mere wear and tear. It was urged that it was so because the boiler was of a certain age; but surely no such rule is applicable. The question of a certain age must depend upon the thickness of the particular boiler, upon the nature of the material of which the boiler is made, and upon the amount of work done by the boiler within the given time. Here it seems to me that the evidence shows that, if it had not been for either negligence or inadvertent want of examination, and want of cleaning the boiler from time to time, the boiler would not have been in the condition in which it was at the time of the explosion. The infirmity of the boiler was not the result of mere wear and tear, but was hastened either by negligence, or by inadvertent and accidental omission to inspect the boiler; therefore that point does not arise on the facts. For these reasons I agree that the judgment ought to be affirmed.

Judgment affirmed.

Solicitors for plaintiff, *Waltons, Bubb,* and *Walton*: for defendants, *Freshfields* and *Williams.*

June 12, 14, 15, 17, 18, *and Nov.* 19, 1880.

(Before Bramwell, Baggallay, and Brett, L.JJ.)

Glyn, Mills, Currie, and Co *v.* East and West India Dock Company.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bills of lading—Sets of three—Rights of indorsee—Entry under second bill—Liability of warehousemen.

The consignees and owners of a cargo to arrive in London indorsed and delivered the first of three bills of lading to the plaintiffs as a collateral security for money advanced. These bills of lading had been signed by the master of the ship in the usual set, marked respectively "First," "Second," and "Third," and they represented the goods as deliverable to the said consignees or their assigns, that freight was made payable in London, and that the master had affirmed to three bills of lading, "the one of which bills being accomplished, the rest to stand void." When the ship arrived the consignees made entry of this cargo, and it was placed in defendants' warehouses. The master on the same day lodged with the defendants a copy of the manifest of the cargo, with an authority to defendants to deliver the goods to the holders of the bill of lading; and, on the following day, notice to detain the cargo until the freight should be paid. Upon receipt from the consignees of the second of the bills of lading, the defendants entered the consignees in their books as enterers, importers, and proprietors of the goods, and after removal of the stop for freight, delivered the goods to persons other than the plaintiffs, on delivery orders signed by the consignees, the plaintiffs having no knowledge of any dealings with the cargo.

Held, by Bramwell and Baggallay, L.JJ. (Brett, L.J. dissenting), that the defendants were not liable to the plaintiffs in an action to recover the value of the goods.

Judgment of Field, J. reversed.

This action was brought by the plaintiffs, as indorsees and holders of a bill of lading, to recover the value of certain goods which had been deposited with the defendants, and which the defendants had delivered to other persons.

The facts are fully stated in the judgments.

The trial took place at Guildhall, in December 1879, before Field, J., without a jury, when judgment was reserved.

On 23rd Jan. 1880, Field, J. delivered a judgment in favour of the plaintiffs, which is reported 42 L. T. Rep. N. S. 90; 4 Asp. Mar. Law Cas. 220.

The defendants appealed.

June 12, 14, 15, 17 *and* 18.—The appeal was argued by *Watkin Williams*, Q.C. and *Pollard* for the defendants, and by the *Solicitor-General* (Sir F. Herschell, Q.C.) and *J. C. Mathew* (*Bompas*, Q.C. being with them) for the plaintiffs.

The arguments are sufficiently referred to in the judgments.

The following authorities were referred to:

The Tigress, 32 L. J. 97, P. M. & A.; 1 Mar. Law Cas. O. S. 323;
Fearon v. *Bowers*, 1 H. Bl. 364;
Caldwell v. *Ball*, 1 T. R. 205;
Meyerstein v. *Barber*, 16 L. T. Rep. N. S. 569; 22 L. T. Rep. N. S. 808; L. Rep. 2 C. P. 38 and 661, and 4 H. of L. 317; 2 Mar. Law Cas. O. S. 420, 518;
Sheridan v. *New Quay Company*, 4 C. B. N. S. 618; 28 L. J. 53, C. P.;

Burroughes v. *Bayne*, 5 H. & N. 296; 29 L. J. 185, Ex.;
Babcock v. *Lawson*, 42 L. T. Rep. N. S. 289; L. Rep. 5 Q. B. Div. 284;
Reeves v. *Capper*, 5 Bing. N. C. 136;
Hollins v. *Fowler*, 33 L. T. Rep. N. S. 73; L. Rep. 7 H. of L. 757; and the judgments delivered in the Exchequer Chamber in the same case, 27 L. T. Rep. N. S. 168; L. Rep. 7 Q. B. 616;
Lancashire Waggon Company v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. 231, Ex.

Watkin Williams, Q.C. replied.

Cur. adv. vult.

Nov. 19.—The court being divided in opinion, the following judgments were delivered:—

Brett, L.J.—This case seems to me to be one of unusual difficulty. The solution of it depends so entirely upon a minute examination of the business and legal effect of each step in the transactions described in it between the various parties, that it seems to me to be necessary to state those successive steps with considerable particularity. The sugar which is the subject-matter of the litigation, was shipped in Jamaica by one Elliot, and consigned to Messrs. Cottam, Morton, and Co., merchants in London, as owners. The captain signed three copies of a bill of lading in ordinary form, dated the 16th April 1878, in favour of Cottam, Morton, and Co., or their assigns, deliverable on payment of freight. On the 15th May 1878, whilst the ship was at sea, Cottam, Morton, and Co. obtained an advance from the plaintiffs, who are bankers in London, and in respect of such advance, indorsed one copy of the set of the bills of lading, and handed it to the plaintiffs, with a letter of charge, in the following form: "15 May 1878.—We beg to apply for an advance of 13,000*l.*, to be repaid on or before the 15th July 1878, on bills of lading in schedule over leaf, to be lodged with you as collateral security. We may, with your consent, substitute other bills of lading for all or any of the bills of lading now lodged by us. We further agree that the total of our indebtedness to you in respect of this advance and any other advances from you to us on bills of lading, or any other account, shall be regarded as collaterally secured by all bills of lading lodged by us with you, and in your possession from time to time. In the event of default being made in payment of this or any other advance from you to us at due date or in other case of need, you are at liberty to realise all the produce represented by the bills of lading in your possession." The ship arrived on the 27th May, and went into the East and West India Docks, belonging to the defendants, the Dock Company. Cottam, Morton, and Co. entered the goods at the Custom-house, and afterwards perfected such entry. On the 28th May, the captain, with the knowledge, and at the request of Cottam, Morton, and Co., landed the sugar, and deposited it with the defendants—the freight not being paid. The captain landed at the same time the whole of his cargo, chartered partly for other people. At the time of so doing, the captain lodged with the defendant a copy of his manifest, the copy being made by entries on a form of manifest distributed by the defendants. The names of Cottam, Morton, and Co., and others were entered in the manifest as "consignees" of the goods severally consigned to them. At the bottom of the defendants' forms of manifest there was a printed statement, as follows: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorise the East and West India Dock Company to deliver the same to the consignees, as above, or to the holders of the bills of lading." In the present case, the words "to the consignees, as above," were struck out, and the captain signed the order as an authority in terms to deliver the same "to the holders of the bills of lading." On the back of the form of manifest was a memorandum for the guidance of captains and owners of all vessels entering the East and West India Docks to discharge their cargoes, in respect to making their reports and completing their manifests. "The report of the ship and of the cargo must be made at the Custom-house within twenty-four hours after her arrival; and two true copies of the manifest of the cargo must be delivered into the general office of the East and West India Dock Company at the dock-house, &c. No ships can receive their rotation, or be allowed to break bulk, until their cargoes are duly entered, and such cargoes will be landed in due succession, according to the strict order in which the manifests are delivered at the general office. Care must be taken that the names or firm of the consignees agree with the bills of lading." "Notice to detain the cargo for freight, and for subsequently removing the stop, should be given in the printed forms, which may be obtained at the general office." "By the Act of 25 & 26 Vict. c. 63, s. 68, &c., goods landed in the docks and lodged in the custody of the company are subject to the same claim for freight as such goods were subject to and liable to while the same were on board the vessel, and upon due notice in that behalf being given, will be detained accordingly." "No goods can be stopped for freight after the documents for delivery have been issued." Upon the landing of goods in their docks and delivery of them into their custody, the defendants were in the habit of having a copy of the bill of lading of the goods entered on a form of bill of lading of their own. On the back of this form was a memorandum: "When the consignee in the manifest is not the holder of the bill of lading, or the goods are reported as consigned to order, the bill of lading must be produced, and a duplicate or true copy thereof deposited, except for East India produce; in such cases the originals only can be accepted." "Particular attention is necessary in the regularity of the indorsements, as the company's officers cannot pass any bill of lading on which the authority of the shipper to the holder is not deduced by a complete and accurate chain of indorsements." "In all cases of informality in bills of lading, from want of indorsement, &c., or of them being lost, application must be made to the court by letter, stating the circumstances and inclosing any documents which will show the title to the goods. In every such case the applicant must engage to indemnify the company by bond or otherwise, as the court may direct." On the 29th May, the captain lodged with the defendants a stop order for the freight, pursuant to 25 & 26 Vict. c. 63, s. 68: I hereby give you notice to detain, &c., the goods, except samples, &c., until the freight, &c., shall be paid, &c." In the present case, Cottam, Morton, and Co., instead of filling up at the time of the landing of the goods, as above described, a bill of lading form of the defendants, so as to make it a copy of the bill of lading of the sugar, brought, on the 31st May,

and handed to the defendants one of the copies of the bill of lading of the sugar. Whereupon the defendants made an entry in a column of their books of the name Cottam, Morton, and Co., under the heading "Proprietor by bill of lading or transfer order." The copy of the bill of lading thus handed to the defendants was not indorsed. On the 7th June, on payment of the freight by Cottam Morton, and Co., the stop for freight was taken off by authority of the captain's agents. On the 3rd July, Cottam, Morton, and Co. gave a delivery order of the sugar to Williams and Co., which order was, on presentation to the defendants, accepted by them, and on it they afterwards delivered the sugar to Williams and Co, Cottam, Morton, and Co. filed their petition for liquidation on the 15th August. The plaintiffs demanded the sugar of the defendants, producing to them the indorsed bill of lading, but could not obtain delivery, the sugar having been already delivered to Williams and Co.

The first step to be considered is the advance by the plaintiffs to Cottam, Morton, and Co., the indorsement in respect of it of the bill of lading by Cottam, Morton, and Co., and the signing by them, and acceptance by the plaintiffs, of the accompanying letter of charge. The business effect was according to the manifest intention of the parties, as it appears to me, to give to the bank, until the advance should be repaid, the security of the goods, but in such a manner as that the borrowers of the advance might in the meantime deal with the goods to a certain extent as owners of them. They were to have the power of making contracts as to their ultimate disposal; they might, on the arrival of the ship, so far as the plaintiffs were concerned, select the wharf or dock in which the goods were to be deposited until the freight should be paid; they might perfect the entry at the Custom-house; they might do everything with regard to the goods which an unshackled owner might do except take them into their own possession, or deliver them actually into the possession of any other persons than the plaintiffs, to be held by such persons otherwise than subject to the plaintiff's right of actual possession, immediately the freight should be paid. As between the plaintiffs and Cottam, Morton, and Co., the freight was not to be paid by the latter until they had redeemed the bill of lading from the plaintiffs. I think this is so, because, if the other copies of the bill of lading had been destroyed, as they ought to have been, the dock company would not have, as a matter of fact, delivered to Cottam, Morton, and Co. without the production of a copy of the bill of lading, which must then have been the redeemed one reindorsed by the bank. Cottam, Morton, and Co. would not in regular course have deposited any copy of the bill of lading with the dock company: they would have made a copy of the bill of lading on a form of the defendants. The power left to Cottam, Morton, and Co. was, according to the intention of the parties, not a power to act as agents for the plaintiffs, but a power to act on their own behalf in respect of the conditional equitable interest in the goods still left by the agreement in them. The legal effect of the transaction, in my opinion, was, that by the indorsement of the bill of lading the legal property in the sugar was transferred to the plaintiffs, and as between them and Cottam, Morton, and Co. a legal right to the immediate actual possession of the sugar by the plaintiffs on the arrival of the ship; but by the letter of charge there was left to Cottam, Morton, and Co. an equitable right to resume the legal and absolute ownership of the sugar on repayment of the advance, and an equitable right that the plaintiffs should not for a specified time exercise any right of ownership over the sugar; but that Cottam, Morton, and Co. might exercise any such rights which would not be inconsistent with the validity of the plaintiff's security.

The relation between two such parties was likened by Willes, J., in *Meyerstein* v. *Barber* (*ubi sup.*), to that between a pledgor and pledgee of goods where the goods under pledge are left in or given into the actual custody of the pledgor to be used by him, but are held to be nevertheless in the constructive possession for the purpose of the validity of the pledge of the pledgee, inasmuch as without such possession there could be no valid pledge, which was nevertheless intended to be valid. I think, however, that he was speaking of the likeness of the business views in the two cases, and not of the legal view.

To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow* v. *Mason* (*ubi sup.*), namely, that such an indorsement passes the legal property.

It is suggested that the endorsement of a bill of lading when accompanied by such a letter of charge has not the same fulness of effect in passing the property as if there were no such letter of charge. But, upon consideration, I am of opinion, that an indorsement of a bill of lading for an advance does by the mercantile law of England pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world except someone who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which was still an equity though recognised by the common law courts. The plaintiffs, therefore, on the indorsement of the bill of lading to them, had, as against Cottam, Morton, and Co., and all the world, the legal property in the sugar, and as against Cottam, Morton, and Co., and all the world, except the shipowner, a legal right at common law to immediate actual possession of the sugar on the arrival of the ship. The shipowner, until the freight should be paid, had a superior legal right to temporary possession; but, on payment of the freight, the legal right to immediate possession would be in the plaintiffs, and in them alone. Cottam, Morton, and Co., as between themselves and the plaintiffs, had an equitable right to deal with the sugar as if they were still the owners of it, in any way not inconsistent with the safety of it, as a security to the plaintiffs; but any taking or giving of possession by them, otherwise than as subordinate and subject to the

plaintiffs' power to take immediate actual possession, would be inconsistent with such safety. The equity existed solely as between the plaintiffs and Cottam, Morton, and Co. There was nothing to raise an equity between the plaintiffs and anyone else. As regards all other people, the sugar was absolutely and unconditionally, in law and in equity, the sugar of the plaintiffs, to which, on payment of the freight, unless some other independent right should have accrued, they would have a right of immediate actual possession. No dealing between Cottam, Morton, and Co. and other persons, unauthorised by the plaintiffs or by the law, could affect the plaintiff's rights of property and possession.

By the indorsement of the bill of lading, the plaintiffs, as it seems to me, acquired also another legal statutable right, and incurred a corresponding legal statutable liability. By the Bill of Lading Act (18 & 19 Vict. c. 111), ss. 1 and 2, "Every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself. Nothing herein contained shall prejudice or affect any right to claim freight against the original shipper or owner, &c., &c." It was suggested for consideration that this statute might only apply where the indorsement and the attendant circumstances passed a complete clean transfer, untrammeled by any limitation either at law or in equity. But this cannot be without adding words to the enactment for which there appears no necessity. If in the case supposed it is assumed that the legal property in the goods has passed upon or by reason of the indorsement, the words of the statute, construed in their ordinary sense, are satisfied, and then the enactment in its ordinary sense must take effect. If it be true to say that the property does not pass, that there is no more than a pledge wherein the property does not pass, then I think the Bill of Lading Act does not apply. But as I have said, I am of opinion that the property does pass. As the statute is in my opinion applicable, the rights of suit under the contract against the shipowner, that is, the right to performance of the contract by the shipowner are transferred to the indorsee. If it were not for the subsequent part of the enactment the meaning of the word "transferred" would be that all rights and liabilities under the contract would arise and exist between the shipowner and the indorsee, and would cease between the shipowner and the original shipper and owner. All such rights and liabilities are so "transferred," that is to say, so arise and so cease, except such as are reserved by the proviso in sect. 2. No right is reserved to the original owner or shipper except the right to stop *in transitu*. Therefore, by virtue of the statute, the original owner or shipper has lost all accruing claims and rights to performance under the contract against the shipowner, and all such claims and rights are transferred to the indorsee. By the indorsement, therefore, Cottam, Morton, and Co. lost all rights to insist on any performance by the shipowner of the bill of lading contract, and such rights as against the shipowner were transferred to the plaintiffs, accompanied by liabilities.

As between the plaintiffs and the shipowner, the latter retained his lien upon their goods for his freight, but was bound to them, on payment of his freight, to fulfil the bill of lading obligations as to the delivery of the goods, *i.e.*, as it seems to me, unless something intervened to relieve them, to deliver to the plaintiffs or their assigns.

The next step in the transaction which was discussed was the entry at the Custom-house. That was conducted by Cottam, Morton and Co. They might properly do so, as far as the Customs statutes were concerned, as original consignees or importers, although they had subsequently to the shipment indorsed the bill of lading. Such being the law, no one could properly be misled from the fact of their so doing into a belief that they had not indorsed the bill of lading for an advance. It follows that the fact of their conducting the Customs entry had no legal effect on the plaintiffs' rights, if any, against either the shipowner or the defendants.

The next step therefore to be examined is the deposit of the sugar for custody with the defendants, accompanied by a stop order for freight given by the captain. Assuming even that the deposit with the defendants was a deposit in fact accepted by them at the request of Cottam, Morton, and Co., and not by the sole order of the captain, the question is, what was the legal effect of the whole of that step of the transaction. If the delivery by the captain to the defendants was equivalent to a delivery to Cottam, Morton, and Co., the captain thereby lost his lien for freight. Yet if the delivery to the defendants was a delivery to them as agents of Cottam, Morton, and Co., it was equivalent to a delivery to Cottam, Morton, and Co. If the defendants accepted the goods simply as agents for Cottam, Morton, and Co., they could only have a right of action for rent against Cottam, Morton and Co., and could have no right to hold the plaintiff's property as by virtue of a lien for rent available against the plaintiffs. It is obvious, as it seems to me, from these considerations, as also even more clearly from the references in terms to the Merchant Shipping Amendment Act, which are contained in all the documents as to the reception of the sugar by the defendants, and the stop for freight by the captain, that all the three parties, the merchants, the captain, and the dock company, were dealing with the sugar not under contracts expressed, or to be implied, but solely under and subject to the enactments contained in the statute (the Merchant Shipping Act Amendment Act 1862, 25 & 26 Vict. c. 63, ss. 66 to 67). It follows that the legal rights and liabilities of each were those enacted by the statute, and depend as to their effect upon the true legal construction of the statute. The statute does not deal with the case of a delivery of goods to a person ready to take delivery after paying freight. It deals with the case of no such person being ready to take delivery. If the goods are landed and deposited under the statute they are assumed by it to be so landed and deposited by the captain. "Where," says sect. 67, "the owner of any goods imported in any ship" ("owner" being said by the interpretation clause to include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods), where the owner "fails to make entry thereof or having made entry thereof to land the

same, or take delivery thereof, &c." . . . "the shipowner may make entry of and land or unship the said goods at the time, in the manner, and subject to the conditions following." A landing under this section is therefore a landing by the shipowner. The place in or into which, if he lands, he must deposit the goods is then stated. . . . The shipowner in landing goods by virtue of this enactment shall place them in or on some wharf or warehouse. "If at the time when any goods are landed from any ship and placed in the custody of any person as a wharf or warehouse owner" (which is a landing under the statute, and therefore is a landing by the shipowner) "the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight; or other charges payable to the shipowner, &c. . . . the goods so landed shall in the hands of the wharf or warehouse owner continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof." And then the section deals with the obligation or duty of the wharfinger. "And the wharf or warehouse owner, receiving such goods (*i.e.*, receiving under the statute), shall retain them until the lien is discharged, &c." (sect. 68). "If the lien is not discharged, &c., the wharf or warehouse owner may, and if required, &c., shall sell the said goods" (sect. 73). "In every case of any such sale the wharf or warehouse owner shall apply the moneys received from the sale as follows: first, in payment of duties; secondly, of expenses of sale; thirdly, of rents, rates, and charges due to the wharf or warehouse owner in respect of the said goods; fourthly, of the amount claimed as due for freight; and the surplus shall be paid to the owner of the goods" (sect. 75). "Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this Act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses" (sect. 76). Now the person who is assumed to deliver the goods to the wharfinger or warehouseman, when they are treated as delivered under this statute, is the shipowner. If there were any contract with the wharfinger or warehouseman outside the statute, it must then be between him and the shipowner. There is no express contract by the shipowner to be liable to an action for rent or charges. Can it be implied that the captain who intends to sail away intends to bind himself or his owners to a contract, or that the wharfinger who knows the rights given to himself by the statute, and that the captain intends to sail away, has a right to suppose or does suppose that the captain intends to bind himself or his owners to a contract? The statute imposes in terms no contract, but it gives certain rights by way of remuneration to the wharfinger or warehouseman. These rights being so given, there seems nothing from which a contract giving any other rights can be inferred to be given by the statute. There is no contract, therefore, with the shipowner. None is given by the statute with the original consignee of the goods, or with the real owner of the goods. There is nothing from which any contract giving a right to sue for rent or charges can be inferred with either of them. There is therefore no such contract. There is no contract with any one. The remedies of the warehouseman or wharfinger are the power of sale and the lien given by the statute. Both of these take effect upon the goods, that is to say, both are effective only against him to whom the goods belong, that is to say, against the real owner of the goods at the time of the sale. There is no specific statement in the statute as to the person for whom the wharfinger or warehouseman is to hold the goods at the moment the stop for freight is taken off, no specific enactment as to the person to whom he is to deliver the goods. If he sells, the person for whom he is to hold the surplus is "the owner of the goods" (sect. 75). That must be the person whose property is sold, *i.e.*, the real owner at the time of the sale. It follows, as it seems to me, that by the only reasonable intendment which can be made, and an intendment must be made, the wharfinger or warehouseman, by virtue of the statute, holds from the time the stop for freight is taken off, for, and is then and afterwards bound to deliver to, the real owner of the goods. If it is held that he may deliver to any one else, he may have the captain's lien and his own paid off by the owner of the goods, against whose interest such lien is alone effective, and may nevertheless deliver the goods to the person who is no longer owner.

If the wharfinger or warehouseman thus holds, as I think he does, under the statute and according to its enactments, he is not in the same position as the shipowner was whilst the goods were on board. He has different rights and different liabilities. He is not the mere agent of the shipowner. There is nothing that I can see in the statute which would authorise him to give back the goods to the shipowner. There is nothing which would make the shipowner liable for any acts of the wharfinger or warehouseman. The shipowner has no longer charge or power or liabilities with regard to the goods. He has only his right of lien for freight. The relation of the wharfinger or warehouseman to the goods is a statutory relation, with statutory rights and liabilities attaching to him, and to him alone. The statute does not give any rights to the shipowner except the right of lien after he has landed and delivered the goods. It imposes no liabilities on the shipowner. There is nothing affecting the plaintiffs' rights other than the effect produced on them by the statute. The only way in which they could have been affected by the statute would have been that their goods might have been detained or sold for the freight and charges. They were not detained or sold for either, but were sold and given up in a way not authorised by the statute.

If I am right in saying that the wharfinger or warehouseman is not identified with the shipowner, the question raised as to the right of the shipowner to deliver to the person first presenting to him a copy of the bill of lading does not arise. The bill of Lading Act does not transfer the rights and liabilities of the contract in the bill of lading from the original shipper to the indorsee, so that they should arise between him and the wharfinger or warehouseman, but only so as that they should arise between him and the shipowner. But if the defendants could rely upon the rights given to the

shipowner as against the indorsee of the bill of lading by the transfer of the bill of lading contract, I do not think that the shipowner would have been excused, as against the plaintiffs, for a delivery to the order of Cottam, Morton, and Co., upon the production of the copy of the bill of lading held by them, after they had effectively and validly indorsed the whole bill of lading by indorsing a copy of it to the plaintiffs for value.

It cannot be, I think, fairly said that the plaintiffs were guilty of laches in not obtaining possession of all three copies of the bill of lading. All the courts so stated in *Meyerstein* v. *Barber* (*ubi sup.*), and every one conversant with business knows that no such thing is ever done.

But it is said that the captain has the right, by virtue of the words in the bill of lading, "the one of which being accomplished, the others to stand void." Can it be maintained that the meaning of these words is to impose a duty, or to give a right to the captain, under all circumstances, to deliver to the person who first presents to him a copy of the bill of lading? If so, he may, or, as they are part of the contract, must so do, although the real indorsee is present and satisfies the shipowner that he is the real indorsee; yet that was not contended, nor could it in my opinion be reasonably contended. If so, although the captain is informed by his owner, and by the real indorsee, and by the indorser during the voyage, that the bill of lading has been indorsed for value, and that his contract liability to deliver to the assigns of the indorser, has thereby by virtue of the Bill of Lading Act become a contract liability with the indorsee to deliver to him or to his assigns, he may fulfil that contract with the indorsee by delivering the goods to a person who is not the assignee of the indorsee, nor even the legal assignee of the indorser. The known practice of merchants to accept an indorsement of one copy of the bill of lading without requiring delivery of the other copies is inconsistent with this view. If the indorsement of the first copy indorsed is made whilst the ship was at sea, and made for payment of a price or an advance, the copy remaining with the captain or purser cannot in fact be then delivered up, and the indorsement of the copy to hand, if the contention be valid, would be, as it seems to me, an idle security, and the meaning of the words cited from the bill of lading, must, I think, be "the one of which bills being rightly accomplished, the other to stand void," a wrongful delivery to one of the copies of the bill cannot be an accomplishment of it intended by the contract, and is not therefore an accomplishment within the contract. This is contrary to the dictum of Dr. Lushington in the case of *The Tigress* (Browning and Lush. p. 36). I must respectfully differ from that dictum; it was not necessary for Dr. Lushington carefully to consider the words, neither was it for Lord Loughborough, in *Lickbarrow* v. *Mason* (*ubi sup.*). In both cases the observations are mere passing observations. I think the observation of Lord Westbury was merely by way of caution. The decision in H. Blackstone, if it means that the captain has a wayward choice cannot, I think, be held to be even reasonable. I am, therefore, of opinion, that the delivery of this sugar by the defendants to Williams and Co. was a wrongful delivery as against the plaintiffs who were the owners of the sugar, and who were entitled to immediate possession of it from the defendants. There was a misdelivery by the defendants of the plaintiffs' property with intent to deal with the property.

I do not think that the difficulties arising in the case of *Hollins* v. *Fowler* (*ubi sup.*) exist in this case. In this case the defendants delivered the goods to Williams and Co. as the property of Williams and Co., intending to pass the property to Williams and Co., when they were bound to hold them for and to deliver them to the plaintiffs alone. By the notices contained in their own habitual documents which I have set out at the beginning of this judgment, it is shown clearly, as it seems to me, that they undertook to consider and deal with the question of the right of property in the person who should demand delivery of goods placed in their custody under the statute. They assumed to deal with the delivery according to the right of property.

To sum up, then, the reasons on which my opinion is founded, they are, that Cottam, Morton, and Co., by indorsing the bill of lading, passed the legal property in the sugar to the plaintiffs, reserving to themselves nothing but an equity of redemption; that upon such an indorsement so passing the legal property, the Bills of Lading Act transferred the contract between the shipowner and Cottam, Morton, and Co. into a contract between the shipowner and the plaintiffs; that consequently the plaintiffs were in law the absolute owners of the sugar, with a contract from the shipowner to deliver to them upon payment of freight. The shipowner was bound by contract to deliver to the plaintiffs, but with a right by statute to hand the sugar according to the terms of the statute to a dock company if the freight was not paid on arrival. The shipowner did hand the plaintiff's sugar to the defendants. He handed it under and according to the statute, and the defendants accepted the sugar, the plaintiff's sugar, under and according to the statute, and there was no contract between the defendants and the plaintiffs, or between the defendants and the shipowner, or between the defendants and Cottam, Morton, and Co. The defendants were bound by a statutory duty to hold the sugar until the freight was paid, and when it was paid to hold it for and deliver it to the plaintiffs, the holders of the bill of lading, and the defendants, contrary to such duty, and therefore, wrongfully, delivered the plaintiffs' sugar to Williams and Co. That is a conversion. If the defendants could be said to be in the same position as the shipowner, a similar delivery by the shipowner would have been a conversion. I am of opinion, for these reasons, that the judgment of Field, J. should be affirmed.

Bramwell, L.J. (judgment read by Baggallay, L.J.)—This case is, I think, one of very great difficulty—a difficulty arising from there being an unreality in the delivery of the goods in question to the plaintiffs, that delivery being symbolical. An unreality in the alleged cause of action, viz., a conversion of those goods to the use of the defendants, which, as a matter of actual fact, is untrue, from the unusual facts of the case, and, as far as I am concerned, from a want of an intimate and familiar acquaintance with the practice of merchants and bankers, shipowners and warehousemen, the Customs, the other matters

which have to be considered. It is not necessary for me to state the facts—my brother Brett has favoured me with his judgment, where they are, as I think, correctly stated, save that, with submission, I cannot quite appreciate them as he does.

I do not think that the property in the sugars was passed to the plaintiffs with an equity of redemption or some other equity in Cottam and Co. I think that what took place was a pledge at common law, with a right in the plaintiffs to sell in certain events, and with a common law right to redeem in Cottam and Co. I think if there had been, instead of a symbolical, an actual delivery of goods from Cottam and Co. to the plaintiffs on the same terms, as, for instance, of a case of diamonds, that the general property would not have been transferred, but would have remained in Cottam and Co. The plaintiffs having only a special property and right of possession, I cannot think that any action could have been maintained against them under the Bills of Lading Act for the freight, nor any action by the dock company for warehouse rent, or charges, or otherwise, supposing such action would lie against some one. The plaintiffs, however, by the handing over to them of the bill of lading indorsed under the agreement, acquired special property and right of possession. And I cannot doubt that, as against an actual wrong-doer and against any person who had actually converted the sugars to his own use, as by consumption or sale, or dealt with them under a claim of title, they might have maintained an action such as the present, as they would have been able to do if the supposed case of diamonds had been taken from them and delivered to a person who sold them or used them, and would not give them up.

Why, then, is not this action maintainable? The plaintiffs have a special property, and the defendants have disposed of the goods in a way they had no right to do. My difficulty is to see that the plaintiffs have made out the latter part of the proposition. It must be remembered that this is an action for conversion. If the defendants have disposed of the goods according to the terms on which they received them, having no notice of any claim, title, or right other than that of the person from whom they received them, it is clear that they have not converted them to their own use, that they are not guilty of a conversion—indeed, have done nothing wrong. A man steals a chattel and takes it to a carrier to be carried to A., and there delivered to X. The carrier takes, carries, and delivers the chattels accordingly; it is clear and settled law that he would not be guilty of a conversion. A case more like the present would be where the chattel was taken by mistake, and handed to the carrier and then carried and delivered by him. In that case clearly the carrier would not be liable to the true owner. Have the defendants done anything more than the equivalent of this? This involves an examination as to who it was from whom they received the goods, and on what terms did they receive them?

In my opinion, in such cases as these, as a rule, where there are no special circumstances a warehouseman receives the goods from the ship or ship's captain on the terms of holding them for the ship till the freight is paid, and there and thenceforth of holding them to deliver to such person as the shipowner or captain would have been justified in delivering them to under the bill of lading. This is Willes, J.'s opinion in *Meyerstein* v. *Barber* (*ubi sup.*). This, however, is subject to further considerations arising out of the particular facts of this case, to which I shall afterwards call attention. I think these are the general terms on which such warehousemen as the defendants receive goods with a stop for freight, and, with submission, I think nothing turns on any statute, private or public. This also seems to me the opinion of Willes, J. (*ubi sup.*) I think the question is the same as it would be if the goods had been warehoused in the private warehouse of the shipowners, or of any other warehouseman, where, consistently with Customs laws and regulations, they could have been warehoused, or if they had been left on the quay where the ship discharged, but in the custody of someone who was not to give them up till the freight was paid. I cannot think that the duty and right of the shipowner were other and different because he discharged his cargo instead of keeping it on board, and I cannot think that the warehouseman undertakes a different duty to that of the shipowner. I set no value on the company having struck out from the manifest the word "consignee." For "deliver to the consignee or holder of the bill of lading" is the same as "deliver to the holder of the bill of lading." For "deliver to the consignee" means "deliver to him if he is the holder of the bill of lading." Of course some light is thrown on the matter by the terms of the various statutes, as showing what are the mercantile usage and practice; but I cannot think that the case is governed by them.

Then, would the captain of the ship have been justified in delivering the goods to Cottam and Co. on production of their bill of lading, and tender of the freight? I cannot bring myself to say he would not. I think if that is to be said it should be by the ultimate Court of Appeal. Nearly a century and a half ago it was held in a much stronger case, viz., when the captain had notice of the true title, that he was justified in preferring the holder of one bill of lading to the holder of another really entitled. That decision was approved in *Lickbarrow* v. *Mason* (*ubi sup.*), and by Dr. Lushington in *The Tigress*. It was not disapproved in *Meyerstein* v. *Barber*, and it is the undoubted practice to deliver without inquiry to any one who produces a bill of lading.

Then there are the words of the bill of lading, "one of which being accomplished, the other two to stand void." It struck me in the argument of the case that the terms of the bill of lading were against this contention, because the bill of lading says the goods are to be delivered to it, or order, or assignees, in this case to Cottam and Co. or assignees, and that ought to be read to Cottam and Co., or, if they assign, to their assignees, and that the meaning of "one being accomplished, the other two to stand void," is, as my brother Brett puts it, one being rightly accomplished, the other two to stand void. I will not say that is not a possible meaning. The bill of lading could not mean, to be delivered to them though they have assigned, or to their assignees, whichever presents the bill of lading. Another argument occurred to me, viz., suppose a bill of lading so indorsed and stolen, would a delivery to the thief, the bearer, be a good delivery; if not, why was this? If a carrier received goods to carry to A. and hold till called for by X., and Y. came and

represented himself to be X., a delivery to Y. would be a misdelivery and a conversion according to the authorities. If so, why was not this? An answer given is that in the case supposed the thief would not be the lawful owner of the bill of lading, and Y. would be committing a fraud and a crime, viz., obtaining goods under false pretences, whereas here Messrs. Cottam have lawful possession of them. I may observe, however, that Y. in the case put is not necessarily guilty of a crime; he may *bonâ fide* believe that the goods were for him, that he is entitled to represent X. Still he would be a tortious holder of the bill of lading, which Cottam was not. I confess to be very much embarrassed by these arguments *pro* and *con*. Looking as I do on a bill of lading as a mere receipt for the goods, I should construe it as my brother Brett does. But, whatever their weight, there are the authorities to which I have referred, and there is the undoubted practice I have mentioned of delivering the goods to him who presents a bill of lading; and there is the possibility expressed in *Meyerstein* v. *Barber* that the captain might not be liable in respect of a delivery under such circumstances. If liable on his contract to carry and to deliver to the consignee or his assignee, he would be liable as in a conversion. He is indeed endeavouring to perform his contract; but so is a carrier who delivers to Y., believing him to be X., to whom he was to deliver. I may notice that, in the case before Lee, C.J., (*Fearon* v. *Bowers* (*ubi sup.*), the action was in detinue against the captain, which would have been maintainable if trover would have been, and *e converso*. On these grounds, I should hesitate long before deciding for the plaintiffs.

But there are other considerations in this case, which, I think, entitle the defendants to judgment. We are judges here of fact and law. Cottam and Co. retained the bill of lading in their hands with the assent of the plaintiffs, who had notice by the terms of the one deposited with them that there were two other originals, and which they must or ought to have known were, or that one would be, in Cottam and Co.'s hands. The plaintiffs, according to my view knew that the absolute property remained in Cottam and Co., and that they, the plaintiffs, were only pledgees. The plaintiffs in no way interfere or act on the arrival of the ship. This can be and is done by an assignee of a consignee, who watches for the announcement of the ship's arrival. But Cottam and Co. act as the consignees and persons entitled to the cargo, enter the goods at the Customs, direct where they shall be warehoused, pay the freight, and take such steps at the docks as owners would do. Cottam and Co., by the agreement with the plaintiffs, were to insure the goods in their own name against fire, receive the sum insured if there was a loss, and pay it to the plaintiffs. I cannot doubt, and I find that all this was done with the consent of the plaintiffs. I have no doubt they intended that should be done which was done, except, perhaps, the giving of the delivery order to Williams. I impute no laches to the plaintiffs. I have no doubt that nothing they intended to do was left undone by them, and that they intended Cottam to do what he did, except, perhaps, as I have said, to give the delivery order to Williams. The general property in the goods was, as I have said, I think, in Cottam and Co., and, as my brother Brett says, it was intended that Cottam and Co. should do all the owner's acts, that they should have power to sell and give immediate delivery orders, and that the goods should not be entered in the plaintiffs' name at the docks, so that on a sale by Cottam and Co. either the delivery order would have had to be given by Glyn and Co. or a transfer made by them to Cottam and Co., and then a delivery order given by them. The plaintiffs never supposed they were to be liable for freight or warehouse rent, or that they were in any way to see to the goods. They might, if they had thought fit, have watched the arrival of the ship and landed the goods; they might have required a transfer from Cottam and Co., or given notice to the defendants of their title. They did nothing, and they did nothing for a long time after Cottam and Co.'s insolvency, and then they inquired about the goods in a way showing that they had trusted to Cottam and Co. and did not know their own position and rights. It is said that to hold this is to say they had no security. That is not so. They had a perfectly good title against a vendee of Cottam, against an execution creditor, and against a trustee in bankruptcy, saving the question of reputed ownership, as to which I am by no means certain they would have any answer to a claim by such trustee. I am by no means satisfied that these goods were not in the reputed ownership of Cottam and Co. with the plaintiffs' consent within the bankruptcy law. I think Cottam and Co. had with their consent taken upon themselves the sale and disposition as owners of these goods, and that which shows that shows also the state of facts which gives rise to this defence. I have said that perhaps Cottam and Co. ought not, without the plaintiffs' leave, to have given the delivery order for these goods to Williams. Undoubtedly it could not have been intended that the goods pledged should be sold and transferred if of any considerable amount. But I cannot help thinking that as to a small parcel like the present no difficulty would have been made, and that it would not have been necessary for Cottam and Co. to run to the plaintiffs for leave to dispose of a hogshead of sugar. Certainly I have no doubt, and find as a fact, that according to the contemplation of both parties the sale might be first and the leave asked for, if at all, afterwards. This being my view of the facts, I come to the conclusion that with the assent of the plaintiffs (though I think that not necessary), the defendants received the goods to hold for the ship till the freight was paid, and then to hold at the order and disposition of Cottam and Co.; consequently that delivering them to Cottam and Co.'s orders was no conversion of which the plaintiffs can complain, and that the judgment must be reversed.

I say the assent of the plaintiffs is not essential, because, if Cottam warehoused the goods in their names without the plaintiffs' assent, it might be wrong in Cottam, but a delivery by the defendants to Cottam would not be a conversion.

It is scarcely necessary to add that I find no fault with the eminent firm who are plaintiffs for bringing this action. A wrong has been done by Cottam and Co., and the question arises on whom is the loss to fall? The plaintiffs are advised not on them but on the defendants, and have accordingly properly brought this

action; I could not blame them for so doing, unless I blamed them for adopting an opinion which I have come to several times in the course of the arguments and consideration of this case.

I am sorry that in the conclusion I differ from my brother Brett, but it is not a difference on any principle of law, but one in our appreciation of the facts. He considers that the defendants received the goods to hold, after payment of freight, for the person entitled to present possession as against all the world. I think on the particular facts of this case that the defendants received them with the consent of the plaintiffs to deliver them, after payment of freight, to Cottam and Co., or their order. I think it would be very hard if it were otherwise, and while I admit on the one hand that hard cases make bad law, I contend on the other hand that the fact that a case is hard is *primâ facie* proof that it is not law. The plaintiffs are not without remedy; they have one against Cottam and Co. and another against Williams, unless, indeed, they are taken to have authorised the delivery to them. If they have authorised that, it is clear they have none against the defendants. It is said that the defendants might have protected themselves by requiring the second bill of lading; the answer is that is not customary. Further, the plaintiffs might have protected themselves that way and many others.

I cannot agree with my brother Field's judgment, which I have most carefully studied. He does not view the facts as I do. Further, as to the law, he says, and says most truly, that treating the defendants as bailees of Cottam and Co., they had no better title than Cottam. But, with great respect, I cannot agree to the consequence he puts. The same would be true of a carrier who carried for the thief a stolen chattel, but the carrying and delivering would not make a conversion or any wrongful act. The defendants did not act as on a title.

The same conclusion in favour of the defendants may, I think, be arrived at in a different way. This is an action for conversion; the alleged conversion is a delivery to the order of Cottam and Co. If the defendants received the goods to deliver to the order of Cottam and Co., then the delivery to their order is no conversion whether Cottam had authority so to deal with the goods or not. Now, I think Cottam had such authority from the plaintiffs intentionally, though whether intentionally or not is unimportant. But suppose Cottam had not actually such authority, I still think they were permitted by the plaintiffs to have the appearance of it, and that the plaintiffs cannot be heard to say that Cottam had it not; still further, if Cottam had no authority, actual or apparent, and if their assumption of it was wholly wrongful, yet even then, if all the defendants did was to receive from Cottam to deliver to their order, and delivered accordingly, they are not guilty of a conversion. Supposing that not to be so, a more difficult question would arise. If all that appeared was that the ship landed the goods with a stop for freight, then no doubt it must be taken that the defendants received the goods on the terms in which the ship, or captain, delivered them to the defendants. What were they? It cannot be supposed that the captain delivered the goods to the defendants to deliver to any one to whom he would not be justified in delivering them, and so the question would arise whether he would have been justified by a delivery to a *de facto* lawful holder of a bill of lading. This, for the reasons I have given, I think we need not determine.

Baggallay, L.J.—The action in which this appeal is brought is founded upon an alleged conversion by the defendants of certain sugar and rum forming part of the cargoes of three vessels, the *Mary Jones*, the *Tropic*, and the *Anglo-Indian*, and which in the spring of 1878 had been shipped by the said vessels from the West Indies, and consigned to Messrs. Cottam, Morton, and Co., of London. The circumstances affecting the goods shipped by each of the vessels were, so far as the present action is concerned, in all respects similar, and the arguments, both on the trial before Field, J. and on the present appeal, were confined to the case of some twenty hogsheads of sugar which had been shipped by the *Mary Jones*. I shall confine my observations to these goods, and in doing so, I shall abstain from entering into any details of the facts, as they have been already fully stated by Brett, L.J. It must, however, be borne in mind that on the 15th May, whilst the vessel was still at sea, Messrs. Cottam, as consignees of the goods, delivered one part of the bill of lading, duly indorsed, to the plaintiffs, as a collateral security for an advance of 13,000*l*., to be repaid on the 15th of July; that the vessel arrived in the port of London on the 18th May, when the goods were landed and delivered into the custody of the defendants, and that eventually, though in ignorance of the plaintiffs' title or of any claim on their part, the defendants delivered them to Messrs. Williams under an order signed by Messrs. Cottam, and dated the 2nd July.

Several questions of great interest and of more or less difficulty have arisen in the course of the arguments; of such questions the principal may be stated in the following terms: 1. What are the duties and corresponding responsibilities of a shipowner, acting through the master of his ship, when a demand is made for the delivery of goods, accompanied by a tender of the amount of freight due in respect of them by a party producing the ostensible *indicia* of ownership, but having in fact no right or title to them by reason of his having previously delivered to another party, for value, an endorsed part of the bill of lading? and 2. What are the duties and corresponding responsibilities of a dock proprietor or warehouseman into whose custody the goods have been delivered, under the provisions of the Merchant Shipping Act of 1862, who, whilst in ignorance of any previous or other dealing with the goods, is in like manner applied to for their delivery by a party who is apparently the true owner? Are such duties and responsibilities similar to, or in what respects do they differ from, the duties and responsibilities of a shipowner under the circumstances just mentioned?

Field, J., who tried the action without a jury, gave judgment for the plaintiffs on the 23rd Jan. 1880, and from his judgment the present appeal is brought.

Now, I take it to be clear that upon an application of well-recognised and established principles to the admitted facts of the present case, the following propositions are unquestionable: 1. That the effect of the delivery by Messrs. Cottam to the

plaintiffs on the 15th May of the indorsed bill of lading, the other parts of the original set of three not having been previously dealt with, was to pass to the plaintiffs the property represented by it, and to confer upon them the right to the possession of such goods upon the arrival of the *Mary Jones* in the port of London, subject, nevertheless, to the payment of the freight due to the shipowner. 2. That it was immaterial that the bill of lading so indorsed was the first, or rather, that numbered as "first" of the set, and that the plaintiffs would have acquired an equally good title to the goods if the bill of lading so indorsed had been that numbered "second" or "third" of the set, provided the others had not been previously dealt with. 3. That it was not necessary for the plaintiffs to give any notice to the master of the *Mary Jones*, or to the defendants as owners of the docks where the goods were warehoused after being landed from the vessel, or to do any other act in order to perfect or assert their title to the goods as against persons acquiring possession of or laying claim to the same under any subsequent dealings with the other parts of the bill of lading or any delivery order obtained from the consignees or any persons claiming under them. The principles involved in these three propositions were affirmed by the House of Lords in *Barber* v. *Meyerstein* (*ubi sup.*), if any affirmation were necessary of what appear to have been previously well-recognised principles of mercantile law.

It is a consequence of the principle involved in the third of these propositions that every person who makes an advance upon a bill of lading without ascertaining in whose custody the other parts remain, does so at the risk of such other parts having been previously dealt with; and in like manner every person who, after the bill of lading has been accomplished, makes an advance upon a delivery order without inquiring as to the bill of lading, does so at the risk of the property in the goods having been passed to some other person by virtue of the bill of lading. The party making the advance in either case runs this risk, and must take the consequences if the result turns out to his detriment. That he can protect himself, if he thinks fit, against such risks is clear from the report of the case to which I have already alluded of *Barber* v. *Meyerstein* (*ubi sup.*) In that case, the Chartered Mercantile Bank of India not only took the precaution of having all three parts of the bill of lading delivered to them at the time of their making the advance, but, as a further protection, lodged a stop order upon the goods in the warehouses, and by the adoption of these precautions prevented any dealing with the goods until their stop was released. Moreover, Meyerstein, when making his advance, after the claims of the bank had been satisfied, and the three parts of the bill of lading had been returned to the consignees, obtained two of the three parts of the bill of lading, and only did not press for the third because he was led to believe, or was under the belief, that it was still in the hands of the master.

It would follow from these considerations that in the absence of any modifying circumstances, which may, though I am not aware that they do, exist in the present case, the title of the plaintiffs to the goods, and their right to recover their value as against Messrs. Williams, who have obtained possession of them under the delivery order of Messrs. Cottam, would be clear. Both parties ran the risks to which I have adverted; neither of them made or deemed it necessary to make any inquiry as to the custody of the other parts of the bill of lading. In the case of the plaintiffs, their confidence was well founded. Their title has not been interferred with by reason of the other parts of the bill of lading having been previously dealt with, but as regards Messrs. Williams, their claim to the goods could not prevail against that of the plaintiffs, to whom the property in the goods had passed under their indorsed part of the bill of lading.

Though, however, it was not necessary for the plaintiffs to give any notice, or to do any act to perfect their title as against Messrs. Williams, considerations of a very different character would arise if the plaintiffs had by any act or conduct on their part led or induced Messrs. Williams to believe that Messrs. Cottam had authority to deal with the goods as their own. At first sight it appears somewhat strange that no notice was given by the plaintiffs to the master of the vessel or to the defendants not to part with the goods otherwise than to themselves, and still more so that it was not until some time after Messrs. Cottam had gone into liquidation that the plaintiffs made any claim in respect of the goods or any inquiry about them; but it is not suggested that in so acting or abstaining from acting the course pursued by the plaintiffs was different from the usual practice of bankers who make advances on bills of lading. The practice has doubtless been adopted for the convenience of those engaged in like mercantile transactions, and it is based upon the confidence of the banker that the consignees will neither fraudulently nor negligently so deal with the goods as to occasion him loss in respect of his advance, and to some extent, perhaps, upon a confidence in the solvency of the consignee. In the present case, had Messrs. Cottam remained solvent no difficulties would have arisen; their liability to the plaintiffs would have been clear, and they would doubtless have discharged themselves from it. That it was within the contemplation of the plaintiffs that Messrs. Cottam would, or might, to some extent, and without any previous communication with the plaintiffs deal with the goods as their own, appears to me to be beyond doubt.

But assuming the rights of the plaintiffs against Messrs. Williams to be clear, the question remains whether it is equally clear, as the respondents have contended, that the plaintiffs are entitled to recover from the defendants the value of the goods delivered by the defendants to Messrs. Williams and Co. I think they are not so entitled, and I proceed to state the grounds upon which I have arrived at this conclusion.

In *Barber* v. *Meyerstein*, though it was held that the legal ownership of the goods acquired by Meyerstein, who, in consideration of an advance to the consignees, first got the bill of lading, must prevail, as against Barber, who was the holder of a subsequently taken part of the same set, the question was left open whether a shipowner might not be excused who, having no notice of an earlier dealing with a bill of lading, delivered the goods to a person who produced to him another part, which had been subsequently dealt with. In the course of his judgment Lord Westbury said: "It might

possibly happen that the shipowner having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But, although that might be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property." It is quite true, as has been pressed upon us in argument, that the judgment in *Barber* v. *Meyerstein* was in no respect based upon the distinction, so suggested by Lord Westbury, between the position relatively to the first holder for value of a bill of lading, of a person who, by virtue of another part of the same bill subsequently dealt with, has acquired possession of the goods represented by it, and that of a shipowner who, in ignorance of the existence of a first holder, has delivered the goods to a person producing the ostensible *indicia* of title to them; but in my opinion such distinction is not only not inconsistent with general principles, but is based upon an equitable foundation. Let us examine it a little closer. The party who upon the hypothesis obtains possession of the goods, obtains possession of that to which he has no legal title, though he, as well as the first holder, may have given valuable consideration for it. For convenience, or for some other reason satisfactory to himself, he abstained at the time when he made his advance from making those inquiries which, if made, might have protected him. He must have known, or he must be presumed to have known, that, as he had not all the parts of the bill of lading, it was at least possible that some other part had been previously dealt with, and that, if so, the claim under it would be entitled to preference over his own; and in the event the possibility becomes a reality. Has he any equity which should prevail against the legal title of the first holder? I think not. But the position of the shipowner who, in ignorance of any previous dealing with the bill of lading, delivers the goods to the consignee or to a person producing an indorsed part of a bill of lading, is very different. He acts strictly in accordance with his contract. There is no question of title as between him and the first holder whose rights have been interfered with; if responsible to the first holder at all, he is responsible in respect of something which he has improperly done or omitted to do. What course can be suggested as proper to be pursued by the shipowner acting through the master, other than that of delivering the goods to the person who, either as consignee or as holder of an indorsed bill of lading, tenders the freight and demands such delivery? Upon the hypothesis there is no rival claimant; there is nothing in the surrounding circumstances to suggest a title to the goods in any person other than the party claiming them. Is the master to inquire of the party before him whether there is an absent legal owner? Is he to insist upon a production of all the other parts of the bill of lading, even though a plausible reason be assigned for their not being produced? Is he under such circumstances to deliver the goods at the peril of having to account for their value in the event of the alleged reason for the non-production of the several parts of the bill of lading proving to have been fraudulently or otherwise falsely assigned; or is he to refuse to deliver them if he desires to keep himself free from loss? Furthermore, is he to pursue the same course with reference to every separate consignment of which his whole cargo may be made up? It would be impossible for a shipowner to carry on his business if he were to adopt the only course which prudence would dictate in such a position of responsibility. And the question naturally suggests itself, why should the shipowner be required to take all these precautions for the protection of a first holder who has not thought it necessary to take any precaution for his own protection?

In the view which I take of this case it is unnecessary to consider whether the decision in *Fearon* v. *Bowers* (1 H. Bl. 364) is one which should be followed in the present day. In that case there were rival claimants for the goods, and the effect of the decision, as it has been commonly understood, was, that the master had under such circumstances a right to deliver to whichever he thought proper, and would be fully discharged by a delivery to either. That decision was cited with approval by Lord Loughborough in *Lickbarrow* v. *Mason*, and by Dr. Lushington in the case of *The Tigress*; and though the case of *The Tigress* was cited during the argument in *Barber* v. *Meyerstein* in the House of Lords, no dissent from the principle involved in it was expressed in any of the judgments. But notwithstanding the weight of authority to which I have just referred, I should, as at present advised, hesitate before adopting the rule that the master has in all cases an unlimited right of selection between rival claimants. I, however, readily adopt the more guarded suggestion of Lord Westbury, that the shipowner who is ignorant of any previous dealing with the bill of lading may be justified in delivering the goods to the party presenting the ostensible indicia of ownership. Adopting this view of the responsibilities of the shipowner, I should have had no hesitation in holding that, if the goods had remained on board the *Mary Jones* instead of being landed, he would have been discharged by the delivery of them to Messrs. Williams upon a delivery order of Messrs. Cottam after payment of the freight.

In the present case, however, we have to deal not with the acts or defaults of the shipowner, but with the acts of a dock company, into whose custody the goods have been delivered.

On the part of the appellants, the defendants the dock company, it has been contended that, under the circumstances of the present case, their responsibilities to the plaintiffs as first holders of the bill of lading were the same as were those of the shipowner whilst the goods remained on board his vessel, and that, inasmuch as the master or the shipowner would not have been responsible to the plaintiffs for the value of the goods if delivered from the vessel to Messrs. Williams upon the directions of Messrs. Cottam, the defendants are in like manner free from any responsibility to the plaintiffs in respect of their delivery to Messrs. Williams upon the order of Messrs. Cottam. In my opinion this contention is well founded. It appears to me that, in the absence of any special circumstances, of which I can find no trace in the present case, the considerations to which I have already adverted as applicable to the responsibilities of the shipowner apply with at least equal

force to the responsibilities of the dock proprietor, in whose warehouse the goods are deposited after being landed from the vessel.

The respondents, however, contend that the responsibilities of the defendants in respect of the deposit of the goods in their warehouse were regulated by the provisions of the Merchant Shipping Act 1862, and that under such provisions the defendants were bound to hold the goods (subject to duties, to their own claim for rent, and to the shipowner's claim for freight), for the rightful holder of the bill of lading; and that inasmuch as the plaintiffs alone filled that character, the delivery of the goods to Messrs. Williams was a wrongful dealing with the goods for which the defendants are responsible to the plaintiffs. In support of this contention it has been urged that the deposit of the goods was not made upon the instructions or at the instance of Messrs. Cottam, as ostensible owners of the goods, but by the master availing himself of the statute and with the view of securing a continuance of his lien for freight after the goods were landed and warehoused, and that it was understood and intended by him, as also by Messrs. Cottam and the defendants, that the goods should be dealt with under the provisions of the statute.

Having regard to all the facts and circumstances of the case, I have arrived at the conclusion that the landing and warehousing of the goods was the result of an arrangement between the three parties, the master as representing the shipowner, Messrs. Cottam the consignees and ostensible owners of the goods, and the dock company, and it may I think be assumed that the master in entering into such arrangements intended to secure a continuance of his lien for freight upon the goods after they were deposited in the defendants' warehouses, and to obtain the benefit of all the provisions of the statute in that behalf; he was within the terms of the statute when he landed the goods, for, though entry had been made, the owner had failed to land or to take delivery of them; his notice of stoppage for freight was expressed to be given under the provisions of the statute, as was also the subsequent notice of removal after the freight had been paid.

What then was the effect of the arrangement so entered into by the master, Messrs. Cottam, and the dock company, and of the landing and warehousing of the goods consequent thereon? It appears to me that the rights of all parties and their responsibilities also were thenceforth regulated by the provisions of the statute so far, but so far only, as such provisions were applicable to the circumstances of the case; but that in all other respects their rights and responsibilities were the same as they would have been had no such statute been in force.

If this be so, to what extent were the provisions of the statute applicable? It would appear to have been the object of the Legislature to enable the shipowner, in a case in which the owner was not ready to take delivery, to land and warehouse the goods, and at the same time to preserve his lien for freight; but that it was not intended to interfere with the rights or responsibilities of persons interested or claiming to be interested in the goods further than was necessary to attain that object. Under its provisions the shipowner may in certain events land the goods and deposit them in a warehouse and by giving notice to the warehouse owner that the freight in respect of such goods has not been paid, may secure a lien upon them for its amount whilst they remain in the warehouse, and in the event of such lien not being discharged a sale may, or, at the instance of the shipowner, must, be made by the warehouse owner; should such a sale be made the warehouse owner is to hold the surplus of the proceeds, after discharge of duties, rent, and freight, for the holder of the bill of lading. It may well be in the present case that, if the lien for freight had not been discharged, the defendants would have exercised the power of sale given to them by the statute, and the several provisions of the statute applicable to such a state of circumstances would then have come into force; but there was no occasion for the exercise of any such power, inasmuch as the freight had been paid, and the purpose for which the captain had concurred in the landing and warehousing of the goods had been accomplished. The defendants had doubtless acquired under the statute a lien for their rent, and for any expenses incurred by them in respect of the goods; but such lien could only be enforced in the usual way, viz., by detaining the goods until the claim was satisfied.

I can find nothing in the statute which in terms, or, in my opinion, impliedly declares or directs that, after satisfaction of the shipowner's lien, and of their own, the dock company shall hold any goods delivered to them under its provisions for the holder of the bill of lading. On the contrary, it appears to me that after such satisfaction it was incumbent upon the dock company, and especially so in the absence of any notice of right or title to the goods in any other person, to deal with them as directed by those who were the ostensible owners of them at the time of their deposit, and who as such ostensible owners had concurred in placing them in their custody, and that by so dealing with the goods the defendants have not come under any liability to the plaintiffs in the present action.

It has been further, or rather in the alternative, contended on the part of the respondents that the defendants should be regarded as the bailees of Messrs. Cottam, and that so regarded they could have as against the plaintiffs no better title than their bailors, and could in no way justify the delivery of the goods upon their order, and this view of the case appears to have been regarded by Field, J. as its true result. That the goods were landed and deposited in the defendants' warehouse at the instance of Messrs. Cottam, though with the concurrence of the captain, is, in my opinion, in accordance with the proved and admitted facts of the case. I assent also to the proposition that the defendants acquired no better title to the goods than that of Messrs. Cottam, but there is no question in the present case of any title to the goods in the defendants; it is clear that they never had any, nor has it ever been suggested that they had.

The only question, as it appears to me, upon the hypothesis of the defendants being the bailees of Messrs. Cottam, is, whether the defendants, having in their possession goods delivered to them by and as the goods of Messrs. Cottam, and to be disposed of according to the order

of Messrs. Cottam, though in fact being the goods of the plaintiffs, can be held liable to the plaintiffs for disposing of them upon the order of Messrs. Cottam. I am of opinion that they cannot; they dealt with the goods in the ordinary course of their business as dock proprietors and warehousemen, and in the manner and for the purpose for which they were deposited with them.

It is doubtless true, as was pointed out by Field, J. in his judgment, that the facts of the present case are in many respects different from those in *Hollins* v. *Fowler* (*ubi sup.*); indeed, in that case it was held that there had been a conversion; but adopting the general views expressed by Lord, then Mr. Justice, Blackburn, in the course of the answer given by him to the question submitted to the judges by the House of Lords, I can arrive at no other conclusion than that the defendants have not in the present case been guilty of conversion. I agree therefore with Bramwell, L.J. in holding that the appeal must be disallowed.

Judgment reversed.

Solicitors for the plaintiff, *Murray, Hutchins,* and *Stirling.*

Solicitors for the defendant, *Freshfields* and *Williams.*

HIGH COURT OF JUSTICE.

EXCHEQUER DIVISION.

Reported by W. E. Gordon, Esq., Barrister-at-Law.

June 14 *and* 29, 1880.

(Before Pollock, B.)

The Marine Mutual Insurance Association Limited *v.* Young and another.

Marine mutual insurance association—Company, incorporated and registered—Construction of rules of—Policy, form of—Common seal of company and signature of manager—Subscribing names of members unnecessary—Contract between assured and company—Stamp Act (30 *&* 31 *Vict.* c. 23), *s.* 7.

Where the rules of a mutual insurance company provide that a member making default in payment of contributions shall forfeit all claims for losses or average under his policies, but shall remain liable for his contributions, a member making default cannot in an action for contributions counter-claim for the losses and averages sustained by him.

Where a mutual policy is issued duly stamped by a limited company, it is sufficiently signed under the stamp Act (30 *&* 31 *Vict. c.* 23), *s.* 7, *if it is sealed with the seal of the company and authenticated by the manager.*

Further Consideration.

Action brought to recover the sum of 166*l.* 16*s.* 6*d.*, the balance of an account for premiums and calls alleged to be due from the defendants to the plaintiffs upon certain policies of insurance effected on three ships of the defendants called the *Athol, Fanny M. Carvill,* and *Laura and Isabel.*

The plaintiffs were a company, limited by guarantee, and not having a capital divided into shares, which was incorporated and duly registered under the Companies Acts.

The company was established for the mutual insurance of ships belonging to its members, and a person became a member by insuring any ship, or share or shares in a ship, in pursuance of the articles of association and the rules annexed thereto.

The following are the material parts of the policy of insurance, the rules indorsed in the policy, and the articles of association referred to in the judgment of the court:

Now this policy of insurance witnesseth that in consideration of the premises, and of the observance by the said insured of the said rules, the Marine Mutual Insurance Association Limited do hereby agree with the said insured that the members of the said Class 2—Marine Mutual—shall, according to the provisions of the articles of association of the said association, and the rules of the said class, as such rules are endorsed on this policy and subject to the proviso hereinafter contained, be subject and liable to pay and make good, and shall pay and make good, all such losses and damages as are hereinafter expressed, which may happen to the ship hereinafter named, and may attach to this policy, in respect of the sum of 800*l.* hereby insured, which insurance is hereby declared to be upon the ship called the *Athol,* valued at 1000*l.* . . . . Provided always, and it is hereby specially agreed that the association, under all their policies of insurance of the said class, shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class, and their respective executors and administrators liable for the same, and which, under and by virtue of the articles of association and of the rules of the said class, are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class.

Rule 4.—*Liability of members.*—That the members of this class shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships or shares of ships from noon of the 20th day of February 1877, or from the date of entry of each vessel respectively, until noon of the 20th day of February then next, and from that time until noon of the 20th day of February in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of what nature or kind soever which may be sustained or received by their respective ships, or caused or done by them, except for personal injury, loss of life, or when on the voyages, in the trades, or under the circumstances hereinafter particularly excepted.

Rule 4.—*Rate of premiums.*—That in order to provide for payment of claims, the manager shall be entitled, and is hereby empowered to levy contributions and draw for at two months date from 1st March, 1st June, 1st September, and 1st December, one-fourth part of the annual premiums, ... such contributions to form a fund for that purpose. Provided always, that if the losses and expenses for the year exceed the amount of premiums so realised, the deficiency shall be made good by an additional call or calls *pro ratâ* on the premiums paid, to be drawn for in like manner, which the members of this class shall respectively be bound to contribute and pay to the manager. But should the premiums so realised exceed the losses and expenses incurred, then the surplus to be returned in proportion to the amount of premium respectively contributed by them.

Rule 6.—*Payment of premiums.*—That the manager's drafts on any member of this class for his proportion of the annual estimated premium, and for any additional percentage thereon, shall be duly accepted, payable in London, and punctually paid when due; and if any member shall neglect, admit, or refuse to accept any such drafts, or to pay his contributions thereto, he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the manager is hereby authorised and empowered to sue for the amount due from any defaulting member.

Rule 21.—*Renewal of policies.*—That any member

intending not to renew his policy on its expiration at the next succeeding Feb. 20th, shall give to the manager notice in writing of such intention twenty days at least before such expiration; and if such notice shall not be given then such policy shall be renewed, except in cases where the committee may deem it improper to renew the same, when they shall cause a similar notice to be given to the parties concerned; but in either case, when a ship may be at sea on the expiration of the policy, the manager shall, if required by the assured, grant a new one from that date until the ship's arrival at her next port of destination or until arrival at her port of destination in the United Kingdom.

Article 39.—Every engagement or liability of a member of the association in respect of any insurance or protection shall for all purposes relating to enforcing such engagement or liability be deemed to be an engagement or liability by or on the part of such member to the association and not to any other member or members, and all moneys payable thereunder shall be paid to the association.

Article 40.—All claims in respect of insurances shall be made and enforced against the association only, and not against any members thereof, but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent of the funds which the association is able to recover from the members or persons liable for the same, and which are applicable to that purpose.

The policies issued by the plaintiffs were sealed with the common seal of the association, authenticated by the signature of the manager, and the rules indorsed thereon were made subject to the articles of association.

By a duly stamped policy, dated 13th March 1878, the plaintiff insured the defendants' ship *Athol* for 800*l.* from noon of 20th Feb. 1878 to noon of 20th Feb. 1879, and by 5th Feb. 1879 the defendants, while so insured, became liable to the plaintiffs for arrears of contributions, under this and other policies, in the sum of 160*l.* 36*s.* 8*d.*, and the plaintiff's manager thereupon drew drafts upon the defendants, as provided by rule 6 (*sup.*) for contribution, but the defendants dishonoured them.

Previous to the 20th Feb. 1879, while the ship *Athol* was on her homeward voyage, the defendants gave the plaintiffs' manager notice, as required by rule 21, to renew the policy on that ship until arrival at her port of destination in the United Kingdom, but the policy was not renewed nor was a new one issued by the plaintiffs as the defendants were defaulting members within rule 6.

The ship *Athol* arrived at her port of destination on the 11th April 1879, having sustained general and particular average losses during her voyage, which losses, amounting to 197*l.* 7*s.* 4*d.*, the defendants counter-claimed to be entitled to set off against the plaintiffs' claim.

At the trial, before Pollock B., without a jury, it was contended on behalf of the defendants that the policy was void within 30 & 31 Vict. c. 23, s. 7, inasmuch as it did not specify the names of the subscribers or underwriters, and on other grounds which the learned judge reserved for further consideration.

By 30 & 31 Vict. c. 23, s. 7, it is provided that:

No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Amendment Act 1862) shall be valid unless the same is expressed in a policy; and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be admitted, such policy shall be null and void to all intents and purposes.

June 14.—*Tindal Atkinson* (with him, *Meadows White*, Q.C.) for the defendants.—The policy is void, as it is not subscribed in the manner provided by the statute. It merely has the common seal of the association affixed, authenticated by the signature of the manager of the association, and where an agent subscribed a policy "per procuration" of the several members of the association, it was held that the policy had not been subscribed within the meaning of the statute:

Re Arthur Average Association, 34 L. T. Rep. N.S. 388; 3 Ch. Div. 522; 3 Asp. Mar. Law Cas. 245;
Evans v. *Hooper*, 33 L. T. Rep. N. S. 374; 1 Q. B. Div. 45.

Next, the policy merely discloses a contract between the defendants and the members of class 2, whose names are not, but ought to be, set out in the policy. The association does not agree to pay the amount insured in case of loss—it merely covenants that the members of class 2 shall pay and make good any losses sustained by the defendants, and the sum to be so paid and made good is limited to the amount of funds that can be recovered from the members of that class. The funds of the association are in no way made liable, and the covenant only amounts to a guarantee that certain persons, whose names are not specified in the policy, should insure the defendants' ship; and in order to satisfy the provisions of the statute, the names of the members of class 2 ought to be set out. This is not a policy at all:

Re Arthur Average Association; *Ex parte Hargrove*, L. Rep. 10 Ch. App. 542; 32 L. T. Rep. N. S. 713; 2 Asp. Mar. Law Cas. 530 and 570;
Gray v. *Pearson*, L. Rep. 5 C. P. 569; 23 L. T. Rep. N. S. 416.

As to the defendants' right to recover on their counter-claim, rule 21 gives them an unconditional right to have the policy renewed by the plaintiffs.

H. Matthews, Q.C. (with him *Francis Turner*) for the plaintiffs.—If it is decided that a mutual club cannot register itself under the Companies Acts and validly subscribe policies there will be an end to all clubs of this kind. It is stated in Arnould on Marine Insurance, p. 151, that "contrary to an opinion formerly existing, and even expressed on the bench (*Bromley* v. *Williams*, 32 Beav. 177), that a policy was unnecessary to the validity of such insurances, it is now the law that no such insurance is valid unless expressed in a stamped policy, and unless such policy shall specify each of the following particulars, viz., the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured."

Re London Marine Insurance Association, L. Rep. 4 Ch. App. 611; 38 L. J. 681, Ch.; 3 Mar. Law Cas. O.S. 280;
Re The Arthur Average Association, 32 L. T. Rep. N. S. 713; L. Rep. 10 Ch. App. 542; 2 Asp. Mar. Law Cas. 530, 570.

Also, at p. 154, it is said that "all these various companies may now be registered under the Companies Act 1862, and thereby obtain the advantages suitable to each, as provided under that statute. By doing so, they retain all property, and all rights, interests and obligations in connection with property; their rights and liabilities in respect of debts, obligations, and contracts; and the peculiar modifications impressed on their constitution—and their rights and liabilities in connection therewith—by the statute, charter, or deed under which they may be formed. Moreover,

any stipulation or condition in any policy affecting the liability of members, or of the funds of any company, remains in full force and effect, notwithstanding registration of the company under that Act:"

Edwards v. *Aberayron Mutual Shipping Insurance Society Limited*, 34 L. T. Rep. N. S. 457; 1 Q. B. Div. 563; 3 Asp. Mar. Law Cas. 154.

It is true that here the engagement of indemnity is a limited one, and that no individual member can be sued by an assured who has suffered a loss, but the association has an interest in the contract, and can compel payment by the various members in the manner prescribed by the rules and articles of association.

T. Atkinson replied.

Cur. adv. vult.

June 29.—Pollock, B.—This action, which was tried before me at Guildhall without a jury, is brought by the Marine Mutual Insurance Association Limited against the defendants to recover the sum of 160*l.* 16*s.* 6*d.* for calls alleged to be due from the defendants as members of the association in respect of three ships, called the *Athol*, the *Fanny M. Carvill*, and the *Laura and Isabel*, which were insured by the defendants in the plaintiffs' association. The defence set up by the defendants is, that there was no policy sufficient within the provisions of the statute 30 & 31 Vict. c. 23, s. 7, whereby any contract was created between the plaintiffs and the defendants, and that, therefore, the plaintiffs cannot recover in this action.

The policy which created the contract between the plaintiffs and the defendants was, as far as is material to this case, in the following form. [His Lordship, after reading the policy, the rules indorsed thereon, and the articles of association which have been set out above, continued:] The result of this policy, coupled with the rules and the articles of association to which I have referred, appears to me to be to create a good and sufficient contract of insurance between the plaintiffs and the defendants, whereby the defendants are bound to pay calls in the manner pointed out by rule 4, and the plaintiffs on their part become insurers of the ships entered by the defendants in the association, although in the case of loss the defendants can only recover from the plaintiffs to the extent to which the association is able to recover contribution from the members. Such I take to be the true construction of the documents to which I have referred, and I see no ground for holding that the policy is voided by 30 & 31 Vict. c. 23, s. 7.

At common law, any individual or association of individuals might be insurers of ships; but in the beginning of the last century it was thought expedient, partly with the view of preventing the evil which arose from insurance by insufficient persons, and partly to enable the Government to raise money by the sale of a monopoly, to prohibit any partnership or association insuring, except two corporations, which in the year 1720 received charters from the Crown, under the titles of the Royal Exchange Assurance and the London Assurance. This statute was repealed in the year 1824 by 5 Geo. 4, c. 114, but even during its existence there was nothing to prevent mutual insurance associations, or clubs as they were sometimes called, mutually insuring ships belonging to their members, either with or without policies; and the fact that but two companies were allowed to insure was probably one of the reasons which led to the establishment of such mutual associations. In many of these associations no policy was used at all, but the contract was created merely by the printed rules of the association and the entering of his ship by a member.

Since the passing of the Stamp Act (35 Geo. 3, c. 63) a question has arisen whether such an agreement for the insurance of ships could be valid unless a duly stamped policy was drawn up and executed. In *Bromley* v. *Williams* (*sup.*) the Master of the Rolls appears to have considered that no policy was necessary. In the case, however, of the *London Marine Assurance Association* (*sup.*) the contrary was held. To prevent all doubt upon the subject, the Stamp Act (30 & 31 Vict. c. 23,) s. 7, provides that "no contract or agreement for sea insurance shall be valid unless the same is expressed in a policy, and every policy shall specify the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in any case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes." This provision is purely for fiscal purposes, and, looking at the history and existence of mutual insurance associations to which I have already alluded, it does not appear to me that it was intended to, or that by its language it does, interfere with such a policy as the present. There is here a policy which has been properly stamped under this statute; and that part of section 7 which requires that the names of the subscribers or underwriters shall be expressed is, I think, sufficiently complied with by the affixing to the policy of the common seal of the plaintiffs' association, authenticated by the manager.

In the course of the argument, I was referred by the defendants' counsel to the case of *Re Arthur Average Association* (L. Rep. 10 Ch. App. 542; 2 Asp. Mar. Law Cas. 530, 570), but that case has no bearing upon the present. The association there was not registered or incorporated, and the policies being signed only by the managers "per procuration" of the several members, it was held that they were void under 30 Vict. c. 23, s. 7, because they did not specify the names of the subscribers or underwriters. The association had no legal existence. In the present case, the plaintiffs being a limited company, are a corporation, and as such are properly represented by their common seal.

It was further argued, however, for the defendants that the policy by its language disclosed only a contract between the defendants and the other members of the association. This does not appear to me to be a proper construction of the policy coupled with the rules. The contract of assurance is with the association, the association having a right to call upon all the members for contribution, and protecting itself by the provision contained in the policy that the association is to be liable only to the extent of the funds so recovered from the members. This in truth puts the association nearly in the same position as was a joint-stock company in which the company was the contracting party as insurers, and the members of the company were liable to the extent of their shares.

For these reasons I think that the plaintiffs are entitled to my judgment for the amount claimed.

The defendants, however, have set up by way of counter-claim that they are entitled to recover from the plaintiffs the amount of 197*l.* 7*s.* 4*d.* as an average claim upon the ship *Athol*. To this the plaintiffs made answer that the policy upon the *Athol* had run out by effluxion of time, and that the defendants had failed to renew it under rule 21. That there had been such an effluxion of time was admitted by the defendants, but it was said that when the time ran out the ship was at sea, and that the plaintiffs had, by the conduct of their manager and by correspondence, continued to treat the vessel as insured, and that they had waived the compliance by the defendants with the provisions of rule 21. No doubt letters passed between the plaintiff's manager and the defendants which treated the question whether the vessel was insured or not as still open; but this cannot, in my judgment, be taken to amount to a waiver by the plaintiffs of their right to have the premium paid; nor do I think that by such letters they are estopped from setting up this defence to the defendants' counter-claim. In the result, therefore, I find that the plaintiffs are entitled to recover from the defendants upon their claim to the extent of 160*l.* 16*s.* 4*d.*, with costs; and that upon the defendants' counter-claim judgment must be entered for the plaintiffs, with costs.

Judgment accordingly.

Solicitors for the plaintiffs, *Stocken* and *Jupp*.
Solicitor for the defendant, *Thomas Donnithorne*.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 29, *July* 1, 2, *and* 23, 1880.

(Before Lords HATHERLEY, BLACKBURN, and WATSON.)

THE STORMVART MAATSCHAPPY NEDERLAND *v.* THE PENINSULAR AND ORIENTAL COMPANY. THE VOORWARTS; THE KHEDIVE.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Collision—Merchant Shipping Act 1873, *sect.* 17—*Regulations for preventing Collisions at sea, Art.* 16.

The Merchant Shipping Act 1873 (36 & 37 *Vict. c.* 85) *enacts* (*sects.* 17), "*If in any case of collision it is proved to the court before which the case is tried, that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts* 1854 *to* 1873 *has been infringed, the ships by which such regulations has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.*"

Art. 16 *of the regulations made under the Merchant Shipping Act* 1862 *provides*, "*Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or if necessary stop and reverse.*"

The V. and the K., two large steamers, were approaching each other in opposite directions; a wrong manœuvre on the part of the V. made a collision imminent. The captain of the K. starboarded his helm and gave the order to stand by the engines; two minutes afterwards he ordered engines to stop and reverse, and a minute and a half afterwards the collision took place. It was proved that he had acted with ordinary care, skill, and nerve as a seaman, and stopping and reversing at once would not have prevented the collision.

Held (*reversing the judgment of the court below*), *that the C. not having complied with the reyulation, and not having shown any necessity for departure from it, must, under the above section be held to be in fault.*

The Hibernia (31 *L. T. Rep. N. S.* 805) *and* The Fanny M. Carvill (32 *L. T. Rep. N. S.* 646) *approved.*

THIS was an appeal from a judgment of the Court of Appeal (James, Brett, and Cotton, L.JJ.), varying a decision of the judge of the Admiralty Division (Sir R. Phillimore).

The action arose out of a collision between the *Voorwarts*, a large steamer belonging to the appellants, a Dutch company, and the *Khedive*, a still larger vessel belonging to the respondents, by which both were much damaged.

The collision took place about 7.40 p.m. on the 23rd May 1878, in the Straits of Malacca, off the island of Penang, and it appeared from the evidence that the weather was fine, and the vessels first sighted each other at a distance of several miles. The *Voorwarts* was then heading W. half N., and the *Khedive* E.N.E., and they appeared about to pass each other safely, green light to green light; but when they were about half-a-mile apart the *Voorwarts* suddenly ported her helm, and threw herself across the bows of the *Khedive*, and rendered a collision imminent. The captain of the *Khedive* ordered the helm to be put hard a starboard, and the engineer to stand by the engines. Two minutes afterwards he ordered them to stop and reverse, and a minute and a half afterwards the collision took place. The judge of the Admiralty Court, assisted by nautical assessors, held that the *Khedive* had not complied with Art 16 of the regulations for preventing collisions at sea, and therefore held that both vessels were in fault, under sect. 17 of the Merchant Shipping Act 1873.

There were cross appeals to the Court of Appeal, which was also assisted by nautical assessors, and the assessors, in answer to a question put to them, said that the right manœuvre would have been to stop and reverse at once, but that the captain of the *Khedive* in fact gave such orders as a captain of ordinary care, skill, and nerve might fairly as a seaman be excused for giving under the circumstances. The Court of Appeal thereupon found the *Voorwarts* solely to blame for the collision, and from this decision her owners appealed to the House of Lords.

The case is not reported below, except upon a point of practice as to staying proceedings pending an appeal to the House of Lords, in 5 P. Div. 1, and 41 L. T. Rep. N. S. 392.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Milward*, Q.C., *Webster*, Q.C., and *W. G. F. Phillimore* appeared for the appellants.

Butt, Q.C., *Watkins Williams*, Q.C., and *Clarkson* for the respondents.

In addition to the case mentioned in the judgment of their Lordships, the case of *The Magnet* (L. Rep. 4 A. & B. 417; 32 L. T. Rep. N. S. 129) was also referred to.

At the conclusion of the arguments, their Lordships took time to consider their judgments.

July 23.—Their Lordships gave judgment as follows:

Lord BLACKBURN.—My Lords: This was an appeal from a judgment of the Court of Appeal varying a judgment of the Admiralty Division. The *Voorwarts*, a large steamer belonging to the appellants, came into collision with the *Khedive*, a large steamer belonging to the respondents, in the channel that lies north of the island of Penang. Both sustained heavy damage, and each asserted that the misfortune was wholly to be attributed to the misconduct of the other vessel, and that their own vessel was free from blame. The claim and counter-claim were tried before the Judge of the Admiralty, with two nautical assessors. The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth. But he did not think it necessary to say which story was true. For taking the evidence given on behalf of the *Voorwarts* to be honest, he and his assessors came to the conclusion that the conduct of the second officer, who was in charge, seeing a steamer approaching in an opposite direction, relinquishing such charge to the third officer at the very time when his vessel was actually manœuvring, and going below to his dinner, was very reprehensible, and that the *Voorwarts* was to blame for want of a proper look-out, which, looking at the evidence, I understand to mean a proper look-out during the time the third officer was in charge, and for not stopping her speed after the change from red light to green (which, of course, means, even on the supposition that there was such a change on the part of the *Khedive*, and that the evidence on the other side, which denied that there was any such change, was not trustworthy), he then adds: "With respect to the counter-claim of the *Khedive*, we are of opinion that it is unnecessary to consider whether the statements of her witness with respect to the bearings of the lights, especially of the green lights of the *Voorwarts*, be or be not accurate, for we think that the provisions of Art. 16 of the Regulations for Preventing Collisions at Sea apply to the *Khedive* as well as to the *Voorwarts*, and that the *Khedive* ought, in the circumstances, to have stopped and reversed, or at least slackened her speed at a distance and at a time which would have prevented the collision. The policy and principle of the rule in question is clearly to inculcate the necessity of immediately taking the speed off the vessel when in such proximity to another vessel as to render a collision probable. I therefore pronounce both vessels to blame."

Both parties appealed to the Court of Appeal, which also was assisted by nautical assessors. The judges of appeal did inquire into the question which the court below had thought it unnecessary to consider. They came to the conclusion that the facts were more accurately described by the witness for the *Khedive* than by the witness for the *Voorwarts*, and that the vessels were at least three and a half miles apart, were approaching each other, green light to green light, with so large a bearing as to make it certain that if both kept their course they would have passed without any danger of a collision. Brett, L.J., in delivering the judgment of the Court of Appeal, says: "We are of opinion that those vessels continued to approach each other in that way till they were within the vicinity of each other, not farther at the most than a mile from each other. Probably they were somewhat less than a mile, and being in that position, green light to green light, starboard bow to starboard bow, on opposite and parallel courses, at so short a distance as that the *Voorwarts* suddenly put her helm hard aport and so came suddenly towards the other ship, which up to that moment had been in a state of safety. Up to that moment there was no occasion whatever for the other ship to have slowed its speed or altered its manœuvres in any way. The *Khedive* was perfectly justified up to that moment in continuing at full speed, because the vessels were so approaching that there was no danger of collision, if they had kept on; but the master of the *Voorwarts*, from want of look-out probably, and then from fear of suddenly finding himself in the vicinity of another ship, performs the wrong manœuvre—the absolutely wrong manœuvre—he puts his helm hard aport. It was noticed by those gentlemen who advised us that this was not merely caused by his want of look-out, but by his want of presence of mind; but there was also a want of due care in navigation in this case, that a superior officer to him, having been on the deck, at the time the steamers were approaching each other, left it; whereas in their judgment, in which we entirely agree, a senior officer, when ships are approaching in that way, ought not, being on the deck, to have left it. However that may be, there was an absolutely wrong manœuvre by the *Voorwarts*, bringing the ship from a state of safety into one of sudden and imminent danger. The captain of the *Khedive*, on seeing this manœuvre, gave orders to put his own helm hard a-starboard, and at the same moment he gave the order to stand by the engines. He did not at that moment give the order to stop the engines, or to reverse them at full speed. The helm was put hard a-starboard, the engineer did stand by the engines, it was but for the space of a minute, or perhaps somewhat more than a minute, that the captain of the *Khedive* ordered the engines to be stopped and reversed at full speed. Directly that order was given they were stopped and reversed at full speed and they were reversing at full speed at the moment of the collision. The engines of the *Voorwarts* had not been stopped even, but were going full speed ahead until the two ships were in collision. That the *Voorwarts* therefore was to blame, and greatly to blame, cannot be doubted. The question must remain whether those on board the *Khedive* were guilty within the rule that I have endeavoured to enunciate, from a want of ordinary care and skill in what they did. We are advised, and we are of opinion, that up to the time when the *Voorwarts* put her helm hard aport, and brought the ships into sudden danger, there was nothing wrong on the part of those who were in command of the *Khedive*, or of those on board of her. We are advised, and are of opinion that, under the circumstances, and in the position of those two ships, it was quite right that the helm of the *Khedive* should be put hard a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard a-

starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great danger of collision; it is obvious, therefore, that the rule of navigation applied unless there were something which made it necessary for the safety of the navigation that the rule as to stopping and reversing should not be acted upon. Upon that of course we are bound to consult the gentlemen who advise us, and the question which we put to them was 'Was it a right manœuvre, under the circumstances, on the part of the captain of the *Khedive* to order the engineers to stand by the engines, or was the right manœuvre then to order the engines at once to be stopped and reversed?' the answer was as might have been expected, that The right manœuvre would have been to order the engines at once to be stopped and reversed."

My Lords, at your bar there was a lengthened argument on the evidence, the counsel for the appellants urging every argument that could be produced to lead your Lordships to draw the conclusion that the *Voorwarts* was not to blame, to the extent at least to which the Court of Appeal thought she was, or at least that the *Khedive* was not free from blame up to the time when the *Voorwarts* put her helm hard aport. I should not, even if my own judgment would have been the other way, like to differ on a question of fact from those who had the assistance of nautical assessors, but, as far as I am able to form an opinion, I agree with the Court of Appeal. I will indicate the principal reason why I do so. There is a conflict of testimony on this point. The second officer says, that exactly at 7.30, that is about fifteen minutes before the collision, he saw a blue light from the *Khedive*, and almost at the same instant, and just before the third officer relieved him, he had passed the order to port, having just then, as he says, seen the red light about half a point on his starboard bow, and, as he judged, four or five miles off. But it was not on that account that he gave the order to port, but because his vessel had fully a couple of degrees to the west of the course he was steering W.$\frac{1}{2}$N., and he ordered the helm a little bit to port to bring her back to her course. The third officer, who was coming up to relieve him, thought the order to port was not heard, and repeated it loudly. This brought out the captain, who also says he saw the red light, but on his port bow, and the chief officer who was there, but not on duty, also says that he saw the red light on the port bow. It is to be observed that neither the captain nor the chief officer stayed long enough to have more than a glimpse of this red light, but still there were four witnesses who say that they then saw the red light, and if they are to be believed, the head of the *Khedive* must at this time have been more towards the *Voorwarts* than the captain of the *Khedive* had desired, for, when he ran down towards the white light, which he then thought might be the stationary light of a pilot boat, he gave orders that it should be kept half a point on the starboard bow, and he thought this order was obeyed; but I do not myself think it improbable that the vessel did for a short time head a point farther south than was intended. But even if the third officer was right in thinking that at this time the *Khedive*, then at a considerable distance, showed her red light, that would in no way exonerate him from the obligation to keep a good look-out on the *Khedive* lights whilst they were approaching nearer, and it was on the manœuvres of the two ships during the ten minutes or so that elapsed between the time when the third officer was left alone in charge and the time when he gave the order to put her helm hard aport that all depended. The case of the *Khedive*, which the Court of Appeal believed, was, that when the blue light was burnt out the vessels were six or seven miles apart, which is farther apart than the officers of the *Voorwarts* say, and that the head of the *Khedive* was immediately put on her old course E.$\frac{1}{2}$N., whilst they watched the lights of the *Voorwarts* and first saw for an instant the red light of the *Voorwarts* and directly after her green light, the vessels being then about six miles apart and the time about 7.28. Then the helm was put to starboard, and the vessel's head brought to E.N.E., the green light of the *Voorwarts* being seen two and a half to three points on the starboard bow; and then the vessels for ten or twelve minutes continued to run nearly parallel, green light to green light, till the *Voorwarts* suddenly showed her red light, being then half a mile to three-quarters of a mile off. If this is accurate, the conclusion is irresistible that the third officer of the *Voorwarts* had kept no look-out at all during these ten minutes, having taken it for granted that the *Khedive* was continuing with her red light towards him, until he suddenly saw the green light, and then lost his presence of mind and did the very worst thing he could do. The third officer says he did keep a look-out, and that the *Khedive* red light continued visible till a blue light was burnt on board the *Khedive*, that whilst it was burning the lights of the *Khedive* were obscured, and when the light went out he saw the green light, and immediately put his helm hard to port. The *Khedive* did, it is admitted, after its first blue light proved a failure, burn a second blue light, but this was done whilst they were yet uncertain whether the white light of the *Voorwarts* was the moving light of a steamer or the stationary light of a pilot boat, and therefore whilst the vessels were several miles apart. If the third officer speaks true the second blue light was burned when the vessels were within a mile of each other. This I think incredible. I do not know if all the noble and learned Lords who heard the argument agree with me in attaching so much weight to the time when the blue light was shown, but I believe they all agree that this House must act on the opinion of the Court of Appeal, that the *Khedive* was not to blame until after the collision was imminent, or perhaps I should say inevitable.

But there arises a question of great general importance on which the judges of appeal have reversed the judgment of the Court of Admiralty. In what follows I assume the story of the witnesses of the *Khedive* to be the truth, and that everything done by the *Khedive* was right until the *Voorwarts* suddenly ported, being then within three-quarters of a mile. Captain Steward gives this evidence in chief:—He saw the red light. Mr. Burt: How did she bear on your starboard bow at that time? A. About three points.—Q. Did you give any order? A. Yes.—Q. What was it? A. Hard a-starboard.—Q. What would have happened supposing you had hard ported instead? A. We should have come nearly stem on.—Q. In other words, was it in your judgment safe then to

port? A. My professional judgment was that it was not safe to port.—Q. And you gave the order hard a-starboard? A. Hard a-starboard,—Q. Did she keep her red in view, or did you ever see the green again before the collision? A. No, kept the red in view.—Q. Besides ordering hard a-starboard, did you give any other orders? A. Stand by below, stand by the engines.—Q. When was that given? A. At the same time that hard a-starboard was given.—Q. What was your next order? A. About a minute later I gave the order to full speed astern.—Q. Did you judge, at the time you gave the order full speed astern, that the collision could be avoided or not. A. I considered it inevitable then.—Q. When you ordered your helm hard a-starboard, with what view did you give the order? A. With the view of endeavouring to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision.—Q. I presume you knew, when she changed from green to red, what helm she was under? A. Yes.—Q. What was it? A. Evidently hard a-port.—Q. You have said that you gave the order afterwards to reverse your engines, or put them full speed astern: was that order obeyed? A. It was, the telegraph answered immediately.—And afterwards in cross-examination: Q. You say that you ordered hard a-starboard, and you at the same time ordered the engineers to stand by? A. Yes, to stand by.—Q. Is that so, at the same time? A. At the same time.—Q. You had seen then that the *Voorwarts* was porting? A. Yes.—Q. And, according to your account, porting suddenly? A. Porting suddenly. Q. Was that the only order which you then gave to the engines, to stand by? A. That was the first order that I gave to the engines.—Q. Was that the only order you then gave? A. At that moment, yes.—Q. Then your engines continued until a minute later "full speed ahead?" A. Yes, two minutes later.—Q. Then two minutes after you saw she was porting, you continued your engines full speed ahead? A. Yes. —Q. What for? A, In the hopes of going off in parallel courses; my head was going off sharp, and I was in hopes, by continuing on my course, that we should come parallel, or, at any rate, lessen the force of the collision; the further I could get off, and the longer I could keep on, the more likely it was that we should keep clear.—Re-examined by Mr. Butt: Q. One word upon that last question—you say you kept your engines going ahead for a little time after the order to stand by. She was swinging round under her starboard helm? A. Starboard helm.—Q. Will she continue to swing round faster under that starboard helm if you stop her, or if you keep the engines going ahead? A. Keeping the engines going ahead she would swing faster; the greater the speed the faster she obeys the helm.—Q. Whatever the other ship did you did stop and reverse before the collision? A. Yes, a minute.— Q. And you were going astern at the time of the collision? A. Yes.

The evidence I accept as quite accurate. The phrase "a minute" in the examination in chief and "two minutes" in the cross-examination are no discrepancy. The captain had other things to think of than the precise length of time. Allan, who was in the engine-room, and who would have to enter the times in his log, says he looked at the clock in the engine-room, and that by it the order to turn astern full speed was given a minute and a half after the order to stand by the engines, and that the collision was three minutes after the order to stand by the engines.

As I stated before, the judges of appeal had the advantage of having nautical assessors, whose advice they could ask on anything the court thought important. This House has not that advantage, and must act on the answers given to the questions actually asked. The nautical assessors, as appears by what I quoted before, advised the Court of Appeal that the order to put the helm hard a starboard was right, but that the order full speed astern ought to have been given at once, by which I understand them to mean, not merely that to go on full speed was in contravention of the 16th Article of the Regulations for Preventing Collisions at Sea, but that it was bad seamanship in itself; and this was in conformity with the opinion of the Court of Admiralty. But the judges of appeal thought this did not dispose of the case, and they asked and obtained the advice of their assessors on a further question. To avoid any mistake as to what was asked and what was answered, I will read the words of the judgment on this part of the case. After saying that the assessors said that the right manœuvre was not to order the engineer merely to stand by the engines, but the right manœuvre would have been to order the engines at once to be stopped and reversed, Brett, L.J. proceeds: "Therefore, at that moment, the captain of the *Khedive* did not do what was absolutely the right thing. Moreover, if he did break the rule of navigation, by breaking that rule at that moment, there is no doubt that he put the property and the liability of his owners into the greatest jeopardy. We do not desire in the least to encourage the idea that the captain of a steamer, when there is danger of a collision with another, should break from this rule to stop and reverse. It is a most valuable rule, and must be obeyed if it possibly can be, and those who disobey it must be made liable for that disobedience unless they can, under very peculiar circumstances excuse themselves. But, having regard to what I have before stated, we then asked our advisers the following question 'If this order which he gave was not absolutely right under the circumstances (that is the order only that the engineers should stand by the engines), was that such an order as a captain of ordinary care, skill, and nerve might be fairly as a seaman excused for giving under the circumstances in which this captain was placed? Those circumstances, as was well known to those who advised us, were that at a distance of not more than a mile the ships were starboard bow to starboard bow, approaching on opposite courses, so as not to involve risk of collision, and at that distance those on board the *Voorwarts* suddenly put their helm hard aport, so as to bring them suddenly towards the *Khedive*, and so put the *Khedive* into a position of sudden unexpected critical danger. Therefore the question comes to be whether, the captain of the *Khedive* being so suddenly placed in such a critical position, it can be said that he was guilty of a want of ordinary care and skill under such circumstances in hesitating for the space of a minute whether he would order his engines to be reversed full speed. And I cannot help stating that that hesitation might involve this view, the ships being in such a position, if those on board the *Voorwarts* had, from doing the wrong thing, resolved in a moment to do

the right thing, then it might be that the going ahead full speed of the *Khedive* would give them more room to get right again from what they were doing; but still we are advised and are of opinion that he did the wrong thing under the circumstances. But in answer to that last question, those advisers have advised us that the captain of the *Khedive* might be, as a seaman, fairly excused for that hesitation of a minute, and if so, we are of opinion that, although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that hesitation of a moment (I will not say for a moment—for a minute) to do the best thing, he is not to be found guilty of a want of ordinary care and skill and nerve under those difficult circumstances in which he was placed. If that be so, those who conduct the case of the *Khedive* have proved that those on board the *Voorwarts* were guilty of negligence in the legal sense, and have satisfied the court that those in charge of the *Khedive* were not guilty of negligence, or want of ordinary care, skill, and nerve, which contributed to the accident. I must say that those who advised us are of opinion that the vessels, when this manœuvre of the *Voorwarts* was made, were so close that, considering the size of the vessels, considering the speed at which they were both then justifiably going, considering that they were screw ships of the largest calibre, and that they were then so close, the circumstances of stopping and reversing, in the opinion of our advisers, would not have had a material effect on either ship." I may observe that this does not appear to have been the opinion of the judge of the Admiralty and his assessors, for they say that it might have prevented the collision. Brett, L.J. proceeds: "If so, the collision was inevitable when the *Voorwarts* performed her wrong manœuvre, and if so, even if the captain of the *Khedive* was wrong, he would not be wrong in any manner contributing to the accident. But without differing from these gentlemen, we do not think it right to put this decision quite alone upon that view of theirs—rather upon the other; it being manifest that that view of theirs goes a long way to justify the other view, namely, that if this was done at a time when the vessels were so close in their opinion a collision was inevitable. If it were not quite inevitable it is obvious that it was done at a time that brought the captain of the *Khedive* suddenly and without warning into a most critical position of danger. It is upon that ruling only that we desire to base this judgment; and on that rule, and on our decision with regard to that rule we are of opinion that the owners of the *Voorwarts* are solely liable for this collision and that damages must be awarded accordingly." James, L.J. added: "The Lord Justice has communicated to us what the judgment would be, we were well aware of it, and I need not say that that is the judgment of the court. I may perhaps be allowed to add that, if a heavy van drives along the street and make the horse of a carriage unmanageable, I cannot hold that the coachman is to blame if he pulls the wrong rein."

I may observe that the terms in which the question is asked seem to me hardly to do Captain Steward justice. He at once, on seeing the red light, took in the situation. He thought, and was right in thinking, that the *Voorwarts* was crossing his bows, and that within five minutes from that time, if he did nothing, he must come stem on upon her, and probably send her to the bottom. He did not hesitate, but at once made up his mind that the best thing to do was to put his helm hard to starboard with a view to endeavour to bring the ships parallel, or as nearly as possible parallel, to lessen the force of the collision, and in this the nautical assessors (in the Court of Appeal) say he was right; and, as far as I am competent to form an opinion, I should say that if he had not done so the *Voorwarts* would probably have been sunk, and so that by so doing he probably prevented a great loss of life, and diminished the loss of property. He did not reverse his engines, which was an error; but, as I think I must understand the answer of the nautical assessors, that was such an error as a seaman might under such circumstances commit, without proving thereby that he was deficient in care, skill, or nerve; and this the judges of the Court of Appeal thought justified them in reversing the judgment of the Court of Admiralty, and finding the *Khedive* free from blame.

I am sorry to be obliged to say that I come to a different conclusion. I feel how hard it is when, on the view I take of the facts, Captain Steward showed so much skill and nerve, and did so much good, to say that his owners should be made liable to a heavy payment in consequence of a venial error on his part; but the view I take of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85, sect. 17) is such as to compel me to advise your Lordships that this should be done.

In the case of *The River Wear Commissioners* v. *Adamson* (2 App. Cas. 743; 37 L. T, Rep. N. S. 543; 2 Asp. Mar. Law Cas. 145) I expressed my view of the common law in these terms: "The owner of the injured property must bear his own loss, unless he can establish that some other person is in fault and liable to make it good. And he does not establish this against a person merely by showing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner. But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land and a ship on the water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage, and if he can prove that the person who has been guilty of either stood in the relation of servant to another, and that the fault occurred in the course of his employment he establishes a liability against the master also." I should add, to prevent possible misapprehension, that although apart from statute law, the duty which the court casts upon him who has the management and control of a ship at sea is the same as that which the law casts on those who have the management of a carriage on shore, namely, to take reasonable care and to use reasonable skill to prevent it from doing injury, yet that the different nature of the two things makes a great difference in the practical application of the rule. Much greater care is reasonably required from the crew of a ship, who ought to keep a look-out for miles, than from the driver of a carriage, who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes the command of a steamer than from one who drives a carriage.

The earlier part of the judgment of Brett, L.J. expresses the rule of common law to the same effect, though in other language, and I need not say that so far I quite agree with him. And I agree also in what he says that a man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that, when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example James, L.J. gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or reasonable care on his part than if he did the same thing when driving along in the ordinary way, but it would still be evidence.

It was on the application of this last principle that the Court of Appeal reversed the judgment of the Admiralty Court in the case of *The Bywell Castle* (4 P. Div. 219; 41 L. T. Rep. N. S. 747; 4 Asp. Mar. Law Cas. 207). In that case no question arose as to the infringement of any of the statutable directions, and the question was entirely one of degree, how much allowance should be made for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill.

But the Legislature has thought fit from time to time to make enactments as to what vessels shall do; it is obviously desirable that one ship when seeing another should know what it is to be expected that she will do. These directions are to be followed, and, to secure that they will be observed, the Legislature made provisions which have been varied from time to time. That in the Merchant Shipping Act 1854 (17 & 18 Vict, c. 104, s. 298) was in these terms: "If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule," &c., "the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary."

On the construction of this and similarly worded enactments, it had been held in *Tuff* v. *Warman* (5 C. B. N. S. 573; 27 L. J. 322, C. P.) that though the plaintiff had infringed the rules, and by his neglect of duty brought the vessel into danger, yet if the defendant could by reasonable care have avoided the consequences of the plaintiffs' neglect but did not, and so caused the injury, the plaintiff could recover, as under such circumstances the collision was not "occasioned by the non-observance" of the rule. This prevented the statute from producing the effect which those who framed it wished; but nothing was done till attention being apparently called to the subject by the case of *The Fenham* (L. Rep. 3 P. C. 212; 23 L. T. Rep N. S. 392; 3 Mar. Law Cas. O. S. 484), sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) was passed in the following words: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary."

The regulations which come into question in this case are, Art. 16: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or if necessary stop and reverse; and every steamship shall when in a fog go at a moderate speed." Art. 19: "In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." Art. 20: "Nothing in these rules shall exonerate any ship, or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of any neglect of any precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The change made in the language of the enactment cannot have been made without an object, and one object I think must have been to take away what was the *ratio decidendi* in *Tuff* v. *Warman* (*ubi sup.*); and another to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence, as in *The Fenham* (*ubi sup.*). Since that statute was passed there have been two important decisions of the Privy Council upon its construction, *The Hibernia* (31 L. T. Rep. N. S. 805; 2 Asp. Mar. Law Cas. 454) and *The Fanny M. Carvill* (32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 478, 565), which are not reported in the Law Reports. There has not been, as far as I can learn, any case in the Court of Appeal requiring it to consider the case of the statute till the present, (*a*) and most unfortunately the reasons which induced the court in the present case to pass it over as irrelevant are not given.

It is never satisfactory to come to the conclusion that the opinion of another is wrong without appreciating the reasons which led to that opinion. Here your Lordships are forced to do so, for the Court of Appeal has not given those reasons.

In *The Fanny M. Carvill* (*ubi sup.*) it is said in the Privy Council: "In construing the clause in question it is to be observed that the Act of 1873 did not repeal, nor was it a substitute for, the Merchant Shipping Acts of 1854 and 1862. On the contrary, sect. 2 declares that it is to be construed as one with them. Now sect. 298 of the Act of 1854 and sect. 29 of the Act of 1862 provide each that in certain cases of the infringement of the sailing regulations, those guilty of the infringement shall incur certain consequences. But each contains the qualification that the collision shall appear to the court to have been occasioned by the non-observance of the regulation infringed. When, therefore, in sect. 17 of the Act of 1873, the Legislature omitted this qualification, it must be presumed to have done so designedly, and at all events to have intended

(*a*) See *The Condor*, 4 P. Div. 115; 40 L. T. Rep. N. S. 442; 4 Asp. Mar. Law Cas. 115.

that it should be no longer incumbent upon the opposite party to prove that the non observance of the regulations in part contributed to the collision. Nor does it appear to their Lordships that the 17th section of the Act of 1873 can be taken merely to shift the burden of proof by raising a presumption of culpability to be rebutted by proof that the non-observance of the regulations did not in fact contribute to the collision, because the preceding section, the 16th, clearly shows that where the Legislature intended only to raise a presumption capable of being rebutted by such proof, it used apt words to express that intention. Their Lordships, therefore, conceive that, whatever be the true construction of the enactment in question, that which would take the case out of its operation by mere proof that the infringement of the regulation did not in fact contribute to the collision is inadmissible. They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact, often a very nice one, upon conflicting evidence." The rest of the judgment proceeds on a question not raised by the facts in the present case.

But I quite agree in this view of the law, and it renders it unnecessary to consider the last finding of the nautical assessors, on which the Court of Appeal did not act, or to inquire whether they, or the judge of the Admiralty Court, took the right view of the facts. I think further that, where a sudden change of circumstances takes place which brings a regulation into operation, though the thing prescribed by the regulation is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows, or ought to have known, and but for his negligence would have known, of the change of circumstances. But it would be doing Captain Steward great injustice to say that he failed to observe the change of circumstances. He at once took in the situation, and was aware that there was risk of a collision, and that it was imminent if not inevitable, and he acted with great promptitude and skill, so as greatly to alleviate the violence of that inevitable collision. But he did not stop and reverse, nor even slacken his speed, and there he departed from the course prescribed by Art. 16 of the regulations; nor was there anything in the circumstances rendering a departure from this rule necessary in order to avoid immediate danger. Even if it would, in the absence of such a positive rule, be better seamanship to keep way on the ship in order to make her more manageable, which is not clear, the Legislature has thought it better to prescribe the course which must be followed. I feel, though very sorry for it, obliged to advise your Lordships to allow this appeal, and to restore the order of the Admiralty Division.

Lord Watson.—[After going through the evidence, his Lordship continued:]—Assuming it to be proved, as I think it is, that the *Voorwarts* was guilty of fault in unjustifiably steering across the bows of the *Khedive*, the appellants contend that the *Khedive* must also be held to have been in fault, and that the decree of the judge of the Admiralty Division ought therefore to be restored. They do not assert that the officers navigating the *Khedive* were guilty of negligence or fault in the sense of the common law; but they do assert that the *Khedive* infringed Art. 16 of the Regulations for preventing Collisions at Sea, by failing to slacken speed, or stop and reverse at a time when the vessels were in imminent danger of collision; and they maintain that under the provisions of sect. 17 of 36 & 37 Vict. c. 85, the legal consequence of such infringement is that, for the purposes of the present case, the *Khedive* must be deemed to have been in fault.

The experts in the Court of Appeal are of opinion that the absolutely right manœuvre on the part of the captain of the *Khedive* would have been to stop and reverse immediately after the red light of the *Voorwarts* was seen. They are of opinion that the captain did, for the minute and a half after that light became visible, adopt not the better, but the less expedient manœuvre, although they do not think the adoption of the better would have materially affected the collision.

I must now advert to those statutory provisions in respect of which it is contended that the *Khedive* must be deemed to have been in fault. The enactments especially founded on by the appellants are to be found in Art. 16 of the regulations embodied in the Act of 1862 and sect. 17 of the Merchant Shipping Acts Amendment Act of 1873. In construing these enactments I think it may be useful to consider what has been the course of legislation for the avowed purpose of preventing collisions at sea. The Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) enacted certain rules in regard to lights, fog signals, and the courses to be steered by vessels meeting and passing each other, and for enforcing the observance of these statutory rules it was provided by sect. 298 that where, in any case of collision, it appeared to the court that the collision was occasioned by the non-observance of any of them, the owner of the ship by which the rule was infringed should not be entitled to recover any recompense for the damage sustained by his ship, unless it were shown to the satisfaction of the court that the circumstances of the case rendered a departure from the rule necessary. The Legislature had not, as yet, made any regulation touching the speed of meeting vessels. The Amendment Act of 1862 (25 & 26 Vict. c. 63) repealed by sect. 2 and schedule A. the rules, and also sect. 298 of the Act of 1854, and by sect. 25 and schedule C. enacted a new code of regulations for preventing collisions at sea, power being given to Her Majesty to alter or add to them from time to time, on the joint recommendation of the Admiralty and the Board of Trade. Art. 16 of the regulations, which is still in force, provides that "every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or if necessary stop and reverse; and every steamship shall when in a fog go at a moderate pace." By sect. 29 of the Act of 1862 it was enacted that "if in any case of collision it appears to the court before whom the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary." The Amendment Act of 1873 (36 & 37 Vict. c. 85) made no change in the regulation as to speed, but it repealed (sect. 33) sect. 29 of the Act of 1862, and in lieu thereof enacted (sect. 17) as follows: "If in any case of collision it is proved to the court before which

the case is tried that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary."

I think it is impossible, upon a careful consideration of these successive enactments, to avoid the inference that the Legislature did not intend, in certain specified circumstances, to leave mariners to decide for themselves, but, on the contrary, intended to prescribe rules to be observed by all in these circumstances, and that no one was to be excused for non-compliance, or exempted from the statutory consequences of non-compliance with the rules, in circumstances to which they were applicable, unless he could bring himself within a statutory exception. I am also of opinion that in enacting these regulations, and in fencing them with provisions as to the consequence of non-observance, the Legislature was not declaring or even relying upon any known principle of law, but was deliberately creating many new duties, with relative responsibilities, unknown to the common law. It is further apparent that the repeal of sect. 29 of the Act of 1862, and the substitution for it of sect. 17 of the Act of 1873, must have been intended to increase the stringency of the statutory regulations. The interpretation of sect 17 of the more recent Act, so far as required for the decision of the present case, does not appear to me to be attended with difficulty. If a vessel at or about the time of collision with another infringe a statutory rule which was in the circumstances applicable, and if it be not established that a necessity existed for departing from the rule, the vessel so infringing must, in terms of the statute, be held to have been in fault.

Now, on the asumption that the *Khedive* did infringe Art. 16 of the regulations, it has not been suggested, and it certainly is not proved, that the captain of the *Khedive* was constrained to depart from it by any necessity, real or supposed; and if that which I have assumed were conceded, I should have no hesitation in applying the provisions of sect. 17 to the case, and holding that the *Khedive* was in fault.

It therefore becomes necessary to consider whether Art. 16 was or was not infringed by the *Khedive*. Apart from statutory qualifications or exemptions, to which I shall immediately refer, it does not seem doubtful that during the period of a minute and a half which elapsed between the order to "stand by" and the order to "stop and reverse" the *Khedive* was within the rule established by Art. 16, and disobeyed it. At the time the order to "stand by" was given, the two vessels were not only approaching each other "so as to involve risk of collision," but were seen and known to be so by the captain of the *Khedive*. Had it been possible to hold upon the evidence that the period in question was so brief, and the *Voowarts'* sudden change of course so startling, that the captain could not be fairly expected to suppose, and did not realise the fact, that a collision was imminent before he gave the order to "stop and reverse," I should in that case have acquitted the *Khedive* of fault on the ground that Art. 16 could not be reasonably held to apply before the moment at which it was actually obeyed. But the captain's own testimony excludes that inference, because he distinctly avows that he at once saw the risk of the collision, but instead of giving obedience to the rule, he steered so as to diminish the violence of the concussion which he anticipated. Art. 16 is expressed in terms absolute and unqualified: but it is rightly contended for the *Khedive* that it must be read in connection with Art. 19, which runs as follows: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the rules necessary in order to avoid immediate danger." This article undoubtedly introduces certain important qualifications of the rule enacted by Art. 16; but I do not think the case of the *Khedive* can be brought within either of the exceptions which it creates. There is nothing in the case to suggest any danger of navigation, a due regard to which would have led to a disregard of Art. 16. The only existing danger was the very danger to which the rule applies, to prevent which it had been enacted. And there is just as little room for the suggestion that there existed any special circumstances which rendered it necessary for the *Khedive* to continue at full speed, instead of slowing, or stopping, or reversing, in order to avoid immediate danger. I am accordingly of opinion that the *Khedive* being within the rule of Art. 16, and not within any of the statutory exceptions to that rule, infringed it; and seeing that it has not been proved to my satisfaction, that the circumstances of the case made a departure from the rule necessary, I consider myself bound by the provisions of sect. 17 of the act of 1873 to hold that the *Khedive* was in fault.

It was not without hesitation that I ventured at first to differ from the opinions expressed by the learned judges of the Court of Appeal. But fuller consideration of the case has satisfied me that the principle upon which they decided in favour of the *Khedive* is inconsistent with the policy and provisions of the Merchant Shipping Act. The principle, as I understand it, may be thus formulated: When two vessels, A. and B., are approaching near to each other under steam, each steering a proper course, and A. is suddenly, by a wrong manœuvre of B., placed in a position of critical danger, and exposed to the obvious risk of collision, A. shall not be deemed to be in fault by reason of her captain not having given the order to slacken speed, or to stop and reverse, provided it is established to the satisfaction of the court that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order. I have possibly failed to give adequate expression to the principle which is so elaborately expressed in the opinion of Brett, L.J., who in this case delivered the judgment of the Court of Appeal; but I think I am justified in stating that his Lordship did not decide in favour of the *Khedive* because she was not within Art. 16, or because she was within any exception expressed in the statutes, but solely because he held it to be proved that the departure from the rule, in the circumstances in which the captain of the *Khedive* was placed, did not imply such want of care and forethought as would constitute negligence or fault at common law on the part of a seaman of

average skill and nerve. I cannot accept the principle thus affirmed by the Court of Appeal, because it practically substitutes for the statutory definition of fault the old rule of common law, which, in my opinion, the statutory enactments were intended to supersede. The result of adopting the principle must be that, whenever the risk of collision has been occasioned by the faulty manœuvre of one of the two approaching vessels, the other vessel will be exempted from the statutory test of liability. Antecedent fault on the part of one of the colliding vessels must characterise a very considerable proportion of the cases of collisions at sea; and I think it may be assumed that sudden and imminent risk of collision is frequently due to that cause. To abrogate the statutory rule in such cases would be tantamount to defeating the leading purpose of its enactment. It was enacted with a view to obviate the risk and minimise the results of collision; and the more imminent the risk the more imperative is the necessity for implicit obedience to the rule. The argument was very fairly pressed upon us that the Legislature cannot have intended to push the rule to such harsh extremities as to hold that a vessel was in fault whose captain had done all that could be expected of a seaman of ordinary nerve and skill. With that argument I cannot agree. It appears to me that it was the deliberate policy of the Legislature to compel sea captains, when their vessels are in danger of collision, to obey the rule and not to trust to their own nerve and skill; and that it was an essential part of the same policy to admit of no excuse for non-observance of the rule, short of satisfactory evidence, either that the captain was constrained to disobey it by other perils of the sea, or that he adopted a course which, in the circumstances, was better than that prescribed by the rule. And for my own part, I cannot think the Legislature has acted unwisely in applying a uniform statutory test to all such cases, instead of leaving them to be decided by the variable test of "fault," as ascertained in each case with the aid of nautical opinion. The present question does not appear to be directly ruled by any previous decision of the Court of Appeal; and I therefore regret that the Lord Justices did not criticise, or even refer to, the provisions of the Merchant Shipping Acts; because it may be that the grounds upon which their Lordships set aside these enactments as inapplicable to the case of the *Khedive* have not been brought fully under the notice of the House. In the cases of *The Hibernia* (*ubi sup.*) and *The Fanny M. Carvill* (*ubi sup.*) the point did not arise for decision before the Judicial Committee of the Privy Council; and it is very satisfactory to find that in both these cases the view taken by the learned Lords of the policy and effect of the safety clauses of the Merchant Shipping Act was in complete accordance with the judgment which your Lordships propose to pronounce, in which I concur.

Lord Hatherley.—My Lords: The case before us embraces two heads for consideration. The first is, whether there has been any negligence, either by breach of rules or otherwise, on the part of the *Khedive*, the vessel sued by the owners of the *Voorwarts*. The second question is, whether the *Voorwarts* itself was not guilty of violating the regulations of the Merchant Shipping Act, or whether, at all events, it did not contribute to the mischief.

Both the learned judge of the Admiralty Court, assisted by nautical assessors, and the learned judges of the Court of Appeal, also assisted by nautical assessors, were clearly of opinion that as regarded the *Voorwarts* it was in fault in many particulars. I see no reason why their decisions should not be affirmed by your Lordships.

The question came to be what was to be said with reference to the position of the *Khedive*. All seems to have proceeded perfectly smoothly until there was this sudden change of direction on the part of the *Voorwarts*, by putting the helm hard a-port, which brought the vessels nearer to each other at once, and ultimately brought about the collision. The question being put to the nautical assessors, there was no difference of opinion in the court below that the regulations for preventing collisions between steam-vessels at sea, especially Art. 16. had not been observed. That is the rule by which, when there is imminent danger, as there was in this case, of immediate collision, each person in charge of a ship is put under the responsibility of slackening speed, or, if necessary, stopping and reversing the engines. When we come to inquire what was done by the *Khedive* upon the extraordinary act I have described being done on the part of the *Voorwarts*, we find that the captain with great promptness and readiness, first of all starboarded the helm, and then, finding a collision likely to take place, he gave the order to stand by the engines.

The main question which comes before us is reduced to this, whether he should have gone beyond that, and said or done either more or less at that time. This question has been referred as a special question to the nautical assessors by the Court of Appeal, and what the Lords Justices say is this, that although the nautical assessors said that to a certain extent what was proper had been done, yet they went on to say that the captain at the same time ought to have ordered the stopping and immediate reversal of the engines. The question as Brett, L.J. said, was whether there was a necessity established for departing from the rule, and upon the answer given by the nautical assessors the conclusion is that no such necessity was shown. It appears to me that the learned judge has somewhat extended the exceptions from the liability to be deemed in default. He adds to those exceptions which are specified this other exception, "unless the captain can prove to the satisfaction of the judges who have to determine the case that he acted as a resolute seaman with good nerve," and so on. Now I apprehend that really the concluding observations which were made by Lord Watson citing the cases of *The Hibernia* (*ubi sup.*) and *The Fanny M. Carvill* (*ubi sup.*), dispose exactly of this view, which appears to have been taken by the learned Lord Justice. If you can show that you could not adhere to the rule without producing danger, that is one of the specified exceptions. If you can show that there was an absolute necessity for doing what you did, or for omitting what you omitted to do, then again you are exempted; and it is thus left open to you to show that you did not contribute to the mischief. Perhaps it is not astonishing that some little degree of confusion should arise from the numerous dealings with these Acts of Parliament, and the

various changes in their wording. But in a case of immediate danger, where a collision appears to be inevitable, and all depends upon the course of action immediately pursued, nothing can be more important than that those who have charge of the navigation of a vessel should know that, if they depart from the rule which is laid down with sufficient distinctness, they must prove not only to their own satisfaction, but also to the satisfaction of the court which has to decide the question, that what was done was necessary for the purpose of avoiding immediate danger.

Now one remark occurs here, which is this, that these rules must be looked at very much from this point of view; they are general rules to be adopted by all persons having charge of the navigation of vessels, with the exceptions which have been pointed out. This rule is not laid down merely for the sake of the vessel commanded by the man who breaks it, but for the sake of the vessel commanded by the man approaching at a distance, who has no right or reason to suppose that he will break it. If the rule is observed every person will know precisely what he is to do, and will say, "I will carry out my directions entirely with that knowledge which I possess." On the other hand, if the court allows these rules lightly to be departed from, the result will be the very evil which the Act was intended to prevent. As I have just said, these are general rules, laid down to govern any person who has charge of a vessel, both for the sake of the safety of his own vessel and for the sake of the safety of the vessels approaching him. A strong instance of the importance of observing them occurs in this very case. If the rule had been acted upon, from the steady course which the two vessels were holding it would in all probability have led to a successful issue, but the disregard of the rule with reference to the porting of the helm caused the one vessel to steer on to the other, and that very danger was produced which the rule was intended to prevent. Therefore I think that the regulations having been departed from by the *Khedive*, that vessel must be deemed to be in fault, unless the master produces a statutory exculpation and proves it to the satisfaction of the court. That does not appear to have been done in this instance. It follows that the course we must take must be to restore the judgment of the Court of Admiralty, and to reverse that portion of the decree of the Court of Appeal which exempts the *Khedive* from liability. The motion which I should suggest to your Lordships, if you see fit to accede to it, would be, that the decree of the Lords Justices be reversed so far as it exempted the *Khedive* from liability, and so far as it relates to paying the costs of the proceedings below, and that the order of the Court of Admiralty be restored.

Decree of the Court of Appeal reversed so far as it varied the decree of the Court of Admiralty, and the judgment of the Court of Admiralty restored; the appellants to have the costs of the appeal to this House.

Solicitors for the appellants, *Clarkson, Greenwell*, and *Wyles*.

Solicitors for the respondents, *Freshfields* and *Williams*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by FRANK EVANS, J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

June 16, 18, 19, 21, 22, *and Nov.* 30, 1880.

(Before JAMES, COTTON and THESIGER, L.JJ.)

ATLANTIC MUTUAL INSURANCE COMPANY *v.* HUTH.

Ship and Shipping—Authority of master to sell—Cargo in a wrecked ship.

The master of a general ship becomes agent for the sale of the cargo—that is, has an authority to sell, so as to bind the owners of the goods entrusted to him for carriage to their port of destination—only where there is a necessity for that course; and it lies on those who claim title to the cargo as purchasers from the master to prove that he, before selling, used all reasonable efforts to have the goods conveyed to their destination, and that he could not by any means available to him carry the goods, or procure the goods to be carried, to their destination, as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival.

The Jupiter T., an Austrian general ship, was on a voyage from Singapore to New York wrecked on a rock off Cape Padrone, about eight hundred yards from the mainland and about fifty miles in a direct line from Port Elizabeth, the nearest place of importance. She contained a cargo consisting partly of pepper and partly of slabs of tin. The master and crew got ashore the next day. A survey of the ship was made from the shore only, after which the master, acting bonâ fide and on the advice of the Austrian Consul at Port Elizabeth, who, with other persons, had come to Cape Padrone, sold the ship and cargo, as they stood jammed on the rock, by auction. Neither the owner of the ship nor the owner of the cargo had an agent at Port Elizabeth, the master had no money at his command wherewith to hire men or vessels for salving the cargo, and he never went to Port Elizabeth, or made any effort to procure funds to enable him, or attempted to induce others, to salve the cargo. The evidence was conflicting as to whether tenders would have been made for salving the cargo if the master had advertised for such tenders.

Held (affirming the decision of Jessel, M.R.), that no such necessity was shown for the sale as to authorise the master to sell or make him the agent of the owners of the cargo for that purpose.

ABOUT the 2nd March 1875 the Austrian barque *Jupiter T.*, of which L. Ivancich was master, sailed from Singapore to New York laden with a cargo worth about 40,000*l.*, consisting principally of slabs of tin, pepper, gambia, and copal.

On the 19th April 1877 she was wrecked on some rocks off Point Padrone, the eastern pointof Algoa Bay (within the Colony of the Cape of Good Hope), about 800 yards from the mainland and about fifty miles in a direct line from Port Elizabeth, the nearest port and place of importance,

and a two days' journey overland (about eighty miles) from the scene of the wreck. The following day the master and crew got ashore. No reasonable mode of getting the ship off the rocks was suggested, and it was admitted that there never was any prospect or possibility of getting her off.

On the 21st and 22nd April the weather was rough, and the master remained ashore. On the 23rd April the master got on board and recovered the ship's papers. For more than a week the weather remained fine, though it was not very good on the 28th and 29th.

Soon after the 19th April the master communicated with A. Allenburg, the Austrian Consul at Port Elizabeth, but the master never went to Port Elizabeth, nor did he take any steps to procure the salving of the ship or cargo. Neither the shipowner nor the owner of the cargo had an agent at Port Elizabeth, and the master had no money with which to pay for salvage.

Allenburg sent two persons from Port Elizabeth to survey and report on the ship and cargo, and they, without leaving the shore, on the 24th April, made a report in which they recommended that the ship and cargo should be sold. The master also took Allenburg's advice to the same effect, and advertised the ship and cargo for sale.

The ship and cargo were sold by auction on the 30th April to Lamb Brothers, merchants at Port Elizabeth for 9500*l.* The day of the sale was very fine, and many persons, attracted by reports of the value of the cargo, attended the sale.

Lamb Brothers purchased on behalf of themselves and on behalf of other persons who together formed a syndicate. It was found that the sale was made *bonâ fide*. The purchaser, before the 19th June, when the vessel broke up, saved between 14,000*l.* and 15,000*l.* worth of cargo.

There was no general market for tin at or near Port Elizabeth, and about 2489 slabs of tin were sent to England for sale.

On hearing that the ship had stranded the owners of the cargo abandoned all their interests to the plaintiffs (the Atlantic Mutual Insurance Company and several other insurance companies who had insured the cargo), as upon a total loss, and the bills of lading were assigned to them.

The plaintiffs claimed, in the present action, a declaration against the defendants the purchasers and consignees of the cargo, that the tin received by those of the defendants to whom the tin was consigned belonged to the plaintiffs, and that the proceeds of sale of the tin might be paid to the plaintiffs.

The action came on for hearing before Jessel, M.R. on the 13th June, 1879.

Benjamin, Q.C. and *W. G. F. Phillimore* (*Roxburgh*, Q.C. and *C. Stubbs* with them), for the plaintiffs.—The master has no right to sell except in case of extreme necessity. He has no discretion as to selling. There is no question of whether it is wise to sell or better for the interests of all concerned. The master's duty is to save the cargo, or such part as is not perishable, and then to communicate with the owners of the cargo. The tin in this case was not perishable. If it was reasonably possible to salve, it was the master's duty to do so. In the case of a captured cargo which had been recaptured Lord Ellenborough, in directing the jury, said the captain had no right to sell the cargo to enable him to pay the captor's eighth, but was bound to have tried seriously and deliberately every other expedient to raise money before disposing of any part of the goods entrusted to his care. He said also that sale of the cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopelsss. The Court of King's Bench, on a motion for a new trial, affirmed Lord Ellenborough's view:

Underwood v. *Robertson*, 4 Camp. 140.

[Jessel, M.R.—That is law to this day.] If the cargo be perishable, although the voyage is at an end, it is better for the owner that the cargo should be sold than left to perish, and the master in such a case may sell the whole. Necessity alone can justify the sale:

Freeman v. *East India Company*, 5 B. & Ald. 617.

[Jessel, M.R.—If there is a right to sell the cargo there is the right to sell the ship.] Yes. The cargo cannot be sold unless it is perishable without selling the ship. Here the cargo was in a ship which could not have been got off the rocks. The cargo could only be recovered by salving, and it was the master's duty to salve. [Jessel, M.R.—Is there any reported case in which the facts were the same?] No such case has been found, but the principle is covered by the decision in *Cobequid Marine Insurance Company* v. *Barteaux* (32 L. T. Rep. N. S. 510; 2 Asp. Mar. Law Cas. 536; L. Rep. 6 P. C. 319), where it said that the exercise by the master of the power of selling the ship was jealously watched by the court. [Jessel, M.R.—The observations do not seem to apply to the sale of cargo. There are some differences between a sale of the ship and a sale of the cargo.] If the cargo is perishable the master is not bound to tranship, although he has the means of doing so. But if the cargo is not perishable and it can be saved, the master may not sell. [Jessel, M.R.—As far as I know, that question has never arisen in the case of a wreck. It has been said, and I agree, that where the master can bring the cargo home in his own ship, he must endeavour to do so, by every reasonable means; but where a vessel is wrecked, is he bound to bring the cargo home? As I understand Lord Stowell's observations, there is no such duty. The master is not compellable to tranship, and the question is whether the principle of the cases does not all relate to the master's duty to carry out the venture.] If the ship cannot be saved, but the cargo can be saved, the master may please himself whether he will tranship the cargo. The cargo belongs to the owner, and the master is a stranger to it:

The Gratitudine, 3 C. Rob. 240

[Jessel, M.R.—There Lord Stowell says that the character of agent and supercargo is forced on the master by the general policy of the law, unless the law means that valuable property is to be left in his hands without protection, and that in some cases he may exercise the discretion of an authorised agent. And he says that, in emergency, the master must exercise his judgment whether he will tranship or sell.] In the case of perishable cargo there is no choice. If the cargo is not perishable there is a third course—to store and await the owner's orders. [Jessel, M.R.—Lord Stowell says that where the cargo is not perishable the master must, if he can, repair his ship, and proceed with the cargo according to the

original terms of the venture, and that if he cannot raise the money he may sell or hypothecate the cargo; that is, sell part or hypothecate the whole.] Here the power of sale had not arisen, as there was no necessity. It is for the owner to say where the sale of the cargo shall take place, and the master cannot deprive the owner of his discretion. All the cases show that the master cannot change his position of carrier until every other method has been exhausted. [Jessel, M.R.—If a carrier agrees to carry goods by a given coach to a certain place, and the coach, while standing in the inn yard, is burnt, but the luggage is saved, the carrier's duty is to take care of the luggage.] Yes; and where a ship is destroyed the master must take care of the cargo, and not sell it. [Jessel, M.R.—Is it not a question of necessity for change of character, instead of a question of necessity for sale?] Yes. The master may make a bargain for the salving of the ship and cargo, or the cargo alone, and he does so as a carrier. [Jessel, M.R.—Does he not make that bargain, or throw over goods to lighten the ship, in the changed character of agent of the owner forced on him by unexpected circumstances?] No, for if he throws over goods he carries the remainder of the goods on in his original character. [Jessel, M.R.—I do not think that follows. In the case of ransom of a captured ship, after ransom he carries on the goods as agent, that is, as carrier, and something else?] He has no right to change his character without the owner's consent. [Jessel, M.R.—Then the next question is what necessity will justify the sale?] The discretion to sell is not to be exercised till all other means have been exhausted. The master must hypothecate if he can, rather than sell. He must in case of wreck land the goods by salvors. [Jessel, M.R. referred to *Farnworth* v. *Hyde*, 15 L. T. Rep. N. S. 395; Mar. Law Cas. O. S. 187, 429; L. Rep. 2 C. P. 204, 226.] The most extreme necessity only will justify a sale. It is not enough to show imminent peril:

Royal Assurance Company v. *Idle*, 8 Taunt. 755; 3 Brod. & Bing. 151 n.

[Jessel, M.R.—If the goods are in peril, has the master any discretion whether the goods can be salved or not, if he thinks that salving will produce less than sale?] No; but there was no exercise of discretion here. The master never tried to find out whether the cargo could be salved. If money could be found for the purchase, money for salving, which would not have been so large an amount, could have been found. A part of the cargo might have been offered, though the captain had no money. The person who purchased knew the master had not done his duty. The master's right to bargain for salving is unlimited, except that the Court of Admiralty may interfere where an exorbitant price has been paid. [Jessel, M.R.—The evidence shows that, if salving had been effected, the salvors would have wanted 150 per cent. profit, and the Privy Council would think that exorbitant.) If the cargo had not been advertised for sale, but the master had left the people to salve according to a bargain or on their own terms, the cargo would not have been left to perish. In the United States, it has been held that a master has power to sell both ship and cargo, in certain cases of absolute necessity:

Post v. *Jones*, 19 Howard, 150.

It is no defence here for the master to say that all the merchants in Port Elizabeth were not in the habit of salving, and therefore salving could not be got.

Chitty, Q.C. and *Marten*, Q.C. (*Romer* with them) for the defendants.—The circumstances justified the master in going to sale. There was a commercial necessity, and in the absence of fraud the sale is good. According to Lord Stowell's judgment in *The Gratitudine*, the master had passed into a new character, that of agent for sale of the cargo. When the cargo is in imminent peril, the master must exercise a discretion, and adopt that course which a wise and prudent man is bound to take. [Jessel, M.R.—Necessity means absolute necessity in the strict sense of the word—that no other course is reasonably open.] The captain tried to get a salvage company together. [Jessel, M.R.—The common usage is to put out tenders for salvage. If a captain is wrecked on the Goodwins—a very good illustration—he does not try to sell; he makes a bargain with the vessels that come to salve the vessel. It lies on the defendants to prove that salvage at a fair price could not be obtained.] The master may sell an injured ship when there is no prospect of bringing her to the termination of the voyage:

Hunter v. *Parker*, 7 M. & W. 332.

A distinction was there attempted to be drawn between perishable and non-perishable goods. [Jessel, M.R.—I am not sure that pepper is perishable in a commercial sense. It does not spoil in a few days.] "Perishable" means perishable so far as the manner of perishing is concerned. A shilling dropped into the sea would not perish, but it would be lost to all intents and purposes. If the cargo was actually lost, the master could sell. [Jessel, M.R.—That may introduce a new difficulty—whether the master could sell on behalf of the underwriters.] There is no distinction in the cases on the subject. The master then becomes their agent. The master here abandoned the goods. [Jessel, M.R.—That could not give him a right to sell.] It shows the state of the cargo. It was necessary to advertise the sale. People would not have come such great distances for the sake of making tenders to salve. Having advertised the sale, the master was bound to sell; and the evidence clearly shows that selling was the right course to adopt. It is sufficient if the captain exercises his judgment:

Cammell v. *Sewell*, 5 H. & N. 728, 744; 2 L.T. Rep. N. S. 799.

If the master had salved, the terms would have practically amounted to a sale. Salvage would not have been a profitable transaction in this case for the underwriters.

Jessel, M.R.—Now that this case has been fully discussed, it appears to me that very little dispute is possible, either as to facts or as to law. As to fact the case is clear. [His Lordship stated the material facts, and continued:] As far as I know on this point the colonial law does not differ from English law. If it had differed it was the duty of the defendants to prove the difference, and that duty has not been discharged by them; consequently I must assume that there is no difference upon this subject between the law of the colony and the English law.

I have to consider a case of cargo in a wreck.

The cargo consisted chiefly of what might be described as non-perishable goods. There was a small portion of cargo which might or might not be described as perishable according to circumstances, but the bulk of the cargo and the bulk of the value was certainly not perishable. In fact a very large portion consisted of metal, which metal, the tin, is the subject of the present action. Although there was the possibility of the cargo being lost, the probability in the opinion of all concerned was that a considerable portion would be saved. That has a very important bearing upon the question. What was the duty of the master? Upon this point I have not quite so much authority as I have upon other points in the case. There is a statement in one case that it is the duty of the master to employ all reasonable means he can to save the cargo, and with that I entirely concur, but that does not quite conclude the question.

In considering this question we must come back to principle, and see what the relation of the master is to the owner of the cargo. The master is the agent of the shipowner or ship charterer as the case may be, who is the carrier of the goods. He is the agent of the carrier. The carrier of the goods, as such, has a plain duty to perform, namely, to carry the goods to their destination. As a rule the bills of lading except certain perils, including perils of the sea, for which the carrier at common law would be responsible as a carrier, unless he made another bargain; but it is so usual and almost universal to except these perils, that one may say that it has almost become part of the law, and one assumes they are excepted, so that the carriers are not insurers, that is, they are not insurers by express bargain.

Therefore, when the cargo is in a state of peril, the primary duty of the carrier is, if the cargo cannot be forwarded in the vessel, by reason of the wreck of the vessel, to endeavour to save the cargo. I think there can be no question that that is the primary duty of the captain. Then we have, in addition to that duty, the mercantile usage and practice, as proved by the evidence of the defendants, as to the manner in which that duty is to be performed. Now, upon that there can be no possible question. When a vessel is wrecked, the ordinary duty of the master is to do his best to arrange for the salvage of the cargo. That, according to the evidence, is the universal mercantile usage, and it points out what the master is to do in case of wreck. He may take, no doubt, three courses; but as a rule there is only one. As a general rule the salvors come to the master, and he either makes a bargain with them to salve the cargo, or he leaves them to salve, trusting to the amount of their remuneration being afterwards settled by arbitration or by the Admiralty Court.

The next point I have to consider is, by mercantile usage, what kind of bargain he makes, and it appears by the evidence that the usual bargain is for a percentage on the proceeds or value of the cargo, where he makes a bargain at all. He sometimes makes a bargain for a lump sum, and exceptionally, for a portion of the cargo in specie, but that is so exceptional that I think it can be left out of the account. It appears to me to be confined to certain parts of the world, and is done in very rare and extraordinary circumstances. You may take the meaning of the usual course to be, that he bargains for a share or a percentage of the proceeds of the value of the cargo. That share is ascertained upon the arrival of the cargo salved at the nearest port. Sometimes it is sold there, if the place is a market or a place of sale generally, or if the goods are such as we have here, metal, such as cannot be disposed of conveniently abroad, it is forwarded to London, and the value is ascertained either at the port or by sale in London. Of course, before the salvors part with their cargo, they get security that they will be paid their share. In the case of a colonial port like Port Elizabeth there were plenty of merchants who, on the tin being delivered to them, would advance the necessary sum, being remunerated by the charges afterwards to be settled. I am satisfied there would be no difficulty, if the tin were once landed, in obtaining the necessary amount, on behalf of the owners, to satisfy the salvors.

According to the general law, there is one case in which the cargo, although it does not belong to the carrier, may be sold by the carrier or the agent of the carrier. That is a case of necessity. The judges have been very careful about this necessity. They have said that, as a general rule, it must be necessity with an adjectiva. I do not know that necessity is made any stronger by the use of the adjective, but I find in almost all the cases that the judges, being very anxious that the law should not be misunderstood, have used an adjective in describing the kind of necessity. It has been called "stringent necessity," "absolute necessity," "extreme necessity," "unavoidable necessity," and that seems to be necessity itself; but they are all emphatic terms to show what they mean by necessity. Then again, it has been treated in another way, and they say, "Does it mean that otherwise the cargo owners would get nothing?" So that, if the cargo, though not absolutely perishable, though not absolutely liable to destruction, will yet not pay the cost of transmitting it to the port of destination, that is a necessity, because necessity means getting something substantial for the owners of the cargo. If you will get nothing for it, or nothing substantial, that is necessity; but has any judge laid it down as necessity when you can secure the salvage in specie, and for thousands of pounds of cargo? Then the right to bargain for salvage being a right exercisable by the marine carrier, if I may call him so, precludes the necessity for a sale where that right can be reasonably exercised.

I agree you may put an absurd and extreme case. You may say the risk is so great that no human being will salve at all, and that possibly a speculator might be found to give a nominal sum for the cargo. It is not necessary to decide that case, but I should not recommend any master of a ship to sell a cargo for five dollars under any circumstances whatever. It sounds to me rather in the nature of a joke than as a serious case of sale. But when you come to speak of peculiar circumstances, there may be a case where, after a wreck, salvage is not possible and sale is possible, although *primâ facie* the case would not exist; for, where people will buy they will salve, it being cheaper for them to salve, as they pay no purchase money. They only pay in the one case the expense of salvage, and in the other case they pay the expense of salvage *plus* the purchase money; consequently,

as a general rule, where the purchase money is substantial, they prefer to salve, and it is very difficult for me to imagine a case of real necessity because, if there is a conspiracy amongst the persons at any common port not to salve—if there is anything like an arrangement that on no terms will they salve—I do not call that a case of necessity. The master's duty in that case is plain. He may, if he cannot make an arrangement for salvage, leave them to salve on any terms they think fit. I do not think for a moment that, with vessels and appliances at hand, any body of merchants would leave a cargo worth 30,000*l.* or 40,000*l.* to perish if they had the means to save it. I do not think the master in such a case would run any great risk in leaving it to the ordinary rule of salving, and I think those who say that the master was under the necessity to sell must prove that necessity.

Then, in order to find the necessity, as I understand the law the master must use every reasonable means of endeavouring to avoid the necessity. One judge says he must use every means in his power. In the present case the master did nothing of the kind. When the vessel was wrecked he sent for the Austrian consul at Port Elizabeth, and appears to have left the matter in his hands. The Austrian consul seems to have been under the impression (perhaps it is Austrian law, I do not know) that it was a right thing to sell—that is, if the cargo could not be landed at the spot near where the wreck was lying, it should be sold. If, instead of taking a tender at the auction, the master had called for tenders for salvage, it seems to me that the commercial men of the place would have been bidding against each other, and offered to salve the cargo even at less than a quarter. But there are other advantageous terms. The salvors stop when they like, and, when they find they cannot get on, they give notice to the master that they cannot salve any more, and they could have been paid only what they actually saved. They would not be obliged to go on at an expense. They would only have lost the difference, if there were any, between the money laid out and the proportion of the goods saved. It is therefore a more advantageous bargain.

It is said, indeed, and I agree, that there is a jurisdiction in the Admiralty Court to review unconscionable bargains, as there is in equity where unfair bargains, are obtained by taking undue advantage of the distress of the man entering into the bargain; but I am quite sure that no respectable merchant would for a moment say that he would be deterred from entering into salvage operations by reason of that wholesome jurisdiction, because he would not for a moment wish to take undue advantage of the distress of the master of the vessel, and it is only undue advantage that is interfered with by the Admiralty Court. The policy of the Admiralty Court always has been, and no doubt always will be, on the side of liberality towards salvors, in order to induce persons who sometimes risk their lives, and always risk their property, to enter into these adventures for the purpose of saving the property of the shipowners or carriers with the prospect of a handsome remuneration.

It appears to me, therefore, looking at it in this way, to be quite clear that a bargain for salvage might have been made, and not merely have the defendants not shown impossibility, but this evidence proves possibility. The only thing against it is this, it is not usual at Port Elizabeth. I hope it will be so in future. I hope in future they will think at Port Elizabeth that it is the duty of the master to save the cargo for the owners—that that is his primary duty, and that it is the duty of the merchants and boat owners, and others to use the means at their disposal for the purpose of aiding the master to perform his duty. I am satisfied that they did not think that they were doing wrong, that they purchased *bonâ fide*—that is, in the sense of believing that the master was entitled to sell, and not with a view of injuring the ship or cargo in any way. That being so, I must make the order which is asked for.

The defendants appealed.

Chitty, Q.C. and *Marten*, Q.C. (*Romer* with them) for the appellants.—There is no doubt that a master may sell cargo in case of necessity:

Australian Steam Navigation Company v. *Morse*, 27 L. T. Rep. N. S. 357; L. Rep. 4 P. C. 222; 1 Asp. Mar. Law Cas. 407.

The case cited was approved by Brett, L.J., in

Acatos v. *Burns*, L. Rep. 3 Ex Div. 282, 291a.

The master could not communicate with the owners, and had to exercise the discretion which he possessed whether he should salve or sell:

The Gratitudine, 3 C. Rob. 240.

"Necessity," in respect of hypothecation by the master is analogous to its meaning in other parts of the law:

The Karnak, 21 L. T. Rep. N. S. 159; L. Rep. 2 P. C. 505; 3 Mar. Law Cas. O. S. 103, 276.

There seems to be no authority on the question when there has been a total abandonment. [Thesiger, L.J. referred to *Royal Assurance Company* v. *Idle*, 3 Brod. & B. 151; 8 Taunt. 723; *Read* v. *Bonham*, 3 Brod. & B. 147.] A difficulty in raising money to obtain salvage is a material circumstance in an inquiry whether there has been necessity.

The Australia, Swa. 480;
The Margaret Mitchell, Swa. 332, 337.

The course, suggested, by the Master of the Rolls of trusting to the chance of some one offering to salve, could not have been adopted with justice to the owners of the perishable part of the cargo.

Roxburgh, Q.C. and Dr. *W. G. F. Phillimore* (*Benjamin*, Q.C. and *C. Stubbs* with them) for the respondents.—The master can sell only in cases of extreme necessity:

Hayman v. *Molton*, 5 Esp. 65;
Freeman v. *East India Company*, 5 B. & Ald. 617;
Acatos v. *Burns*. *sup.*;
The Segredo, 1 Spinks, 36.

The American authorities are to the same effect:

Hall v. *Franklin Insurance Company*, 9 Pickering, 466;
3 Kent's Com. 237.

[Thesiger, L.J.—If the master must either sell or obtain salvage service, and a competent person advises a sale, is not that a case of necessity? James, L.J.—What ought the master to have done?] He ought to have advertised the loss in order to induce persons to attempt salvage in the ordinary way, trusting to getting a fair allowance from the Admiralty Court if no agreement could be come to.

The powers of a master are ample as to entering

into salvage contracts; he may apply part of the cargo in payment for such service:

Marvin on Wreck and Salvage, 140.

If the master had entered into an equitable contract with the salvors, the owners might have got it set aside:

The Theodore, Swa. 351;
The Firefly, Ib. 240.

Salvage was possible, and there was such negligence about the sale as to throw a doubt on the *bona fides* of the contracting parties.

Chitty, in reply, referred to

The Glasgow, Swa. 145;
Arnould on Marine Insurance, 5th edit. 324, 359;
Abbott on Merchant Shipping, 12th edit. 212.

Cur. adv. vult.

After the adjournment, Thesiger. L.J, died, and the parties agreed to accept the judgment of James and Cotton, L.JJ., without prejudice to the right of any party to appeal to the House of Lords if dissatisfied with the judgment of the Court of Appeal.

On the 30th Nov. 1880 the following judgment of James and Cotton, L.JJ., was delivered by

Cotton, L.J. [after stating the material facts]:—The question which we have to determine is, whether under the circumstances the master had power to bind the owners of the cargo by a sale. There is no decision or direct authority as to the power of the master of a wrecked vessel to sell the cargo while in the wreck. The cases in which the right of the purchasers of cargo from the master has come in question, have been where the cargo has been on shore.

The case of *Idle* v. *Royal Exchange Assurance Company* (8 Taunt. 755) was indeed pressed upon us as a case of the sale of a vessel and of the cargo while still on board it. In that case there had been such a sale, but the only point which arose and was decided (the sale of cargo not being questioned by the owners) was the right to recover on a policy of insurance of the freight—which depended on the question whether the master had properly abandoned the voyage. Undoubtedly there are expressions in the judgment which favour the appellants' contention in the present case, but it appears from a note to *Read* v. *Bonham* (3 Brod. & Bing. 151) that when the case came on in error a *venire de novo* was ordered, on the ground that it did not appear from the special verdict that the sale was necessary. This cannot be treated as an authority in favour of the appellants.

The rule, laid down in the cases in which sales of cargo have been questioned is, that the master becomes agent for sale of the cargo, that is, has authority to sell so as to bind the owners of the goods entrusted to him for a different purpose—namely, carriage to their port of destination—only where there is a necessity for that course, and that it lies on those who claim title to cargo as purchasers from the captain to prove that this necessity clearly existed; further, that it is not sufficient to prove that the master thought he was doing the best for all concerned, or even that the course adopted was, so far as can be ascertained, the best for all concerned: (see *Tronson* v. *Dent*, 8 Moore P. C. Cases, 419; *Acatos* v. *Burns*, *sup.*) The principle is that the master is authorised by the owners only to convey the goods to the port of discharge; and that nothing but necessity can justify or authorise him to adopt any other course of action. We do not enter into the question whether what will justify a sale is to be called extreme, or stringent, or the strongest necessity, or commercial necessity. In our opinion, purchasers of cargo from a master cannot justify the sale unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination, and that he could not, by any means available to him, carry the goods or procure the goods to be carried to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination.

Here the sale was of the ship and cargo as an entirety, and a large and valuable part of the cargo was tin, which, if saved from the wreck, would have been practically uninjured, and certainly capable of being sent on in a merchantable state. The question therefore is, whether it is established that the master could not, with the means available to him, have landed or procured to be landed at least this portion of the cargo.

The owner of neither ship nor cargo had any agent at Port Elizabeth, and the captain had no money at his command to enable him to hire men or vessels, and other appliances necessary to save the cargo. The appellants rely on the evidence given by divers witnesses to the effect that no person or firm in Port Elizabeth would, without security (which the master could not give), have supplied him with the funds necessary to save the cargo from the wreck. There were also several witnesses who said that in their opinion, if the master had advertised for persons to save the cargo, no tenders would have been obtained.

But there are witnesses who express a somewhat different opinion. One of them says that, if an interest in the cargo saved had been offered, funds would probably have been forthcoming: and another says that his firm would have worked the salvage if the percentage offered had been sufficent to tempt them, and suggests half the cargo salvage as a percentage which he would have required. It is true, he says, that the percentage would have been so large that he did not think the captain would have been justified in giving it. But this is only his opinion as to what it would have been advisable for him, under the circumstances, to do, and this is not the question on which the decision of the present case must depend. The captain never went to Port Elizabeth, and made no effort to procure funds to enable him to save the cargo, or to induce others to undertake the salvage. The purchasers showed that they were willing to try to save the cargo, and to pay 9500*l.* on the terms of being entitled to the wreck and cargo saved, and the competition at the sale, and the circumstances that, immediately on the fact of the wreck being known at Port Elizabeth, several firms sent representatives to the wreck, in our opinion, show that the merchants of Port Elizabeth were not deficient in speculative enterprise.

It is, in our opinion, under these circumstances, impossible to hold that it is established that the captain could not have induced some person to

undertake the salvage of the cargo. Certainly, the master did not use all means within his power, or make any effort either to procure funds for enabling him to save the cargo, or to induce others to save the cargo. For both reasons we are of opinion that it is not shown that there was such necessity for the sale as would authorise the master to sell or make him the agent of the owners for that purpose.

We have dealt with the case as if the sale had been of cargo only and the cargo all belonged to the same owner. In fact the sale was of wreck and cargo, and this ship was a general ship in which the different portions of the cargo belonged to different owners. What was in substance sold was the chance of recovering the cargo, and the chances of recovering the several portions thereof were very different. It is difficult to see how, as against the owners of the goods practically not perishable, the master could, under any circumstances, justify the sale, in one mass, of the chances of saving both the perishable and non-perishable portions of the cargo and the vessel. In our opinion the appeal fails and must be dismissed.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

Solicitors for the defendants, *Hollams, Son,* and *Coward.*

Monday, March 14, 1881.

Before James, Brett, and Cotton, L.JJ.)

The Margaret.

APPEAL FROM PROBATE. DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Collision—Cause of damage—Contributory negligence—Both to blame—Practice of Admiralty Division—Division of damages—36 & 37 Vict. c. 66, *sect.* 25, *sub-sect.* 9—*Thames Conservancy Rules.*

Where a plaintiff by his negligence causes a collision which would not have caused damage except for the negligence of the defendant he is not disentitled to recover damages altogether, but is by the practice of the Admiralty Division only allowed to recover half the loss he has sustained.

In cases of collision between ships a mere contact without damage gives no right of action; the cause of action is the damage sustained by one ship through the negligence of those on board another.

A breach of the Thames Conservancy Rules which causes damage to others navigating the river, is evidence of negligence on the part of those guilty of the breach, and is not merely an act rendering the guilty party liable to the penalty provided by the rules.

This was an appeal from a judgment of Sir Robert Phillimore, by which he had, on the 9th June 1880, found the dumb barge *E. Wo* alone to blame for a collision which took place between the barge and the schooner *Margaret* in the river Thames on the 19th Oct. 1879.

The case is reported in the court below (42 L. T. Rep. N. S. 663; 5 P. Div. 238; 4 Asp. Mar. Law Cas. 276), where the circumstances of the collision and the rules and bye-laws relied on are fully set out.

March 22.—The appeal came on for hearing.

Butt, Q.C. and *F. W. Raikes* (with them *Bucknill*) for the appellants.—There is no evidence that the *E. Wo* would have come into contact with the *Margaret* at all had it not been for the improper position of the anchor of the latter vessel, and if so, the *Margaret* was the sole cause both of the collision and the injury. Moreover, a mere touching is no evidence of negligence in a crowded river, any more than it is for one person to rub against another in walking along a crowded street. But even if the court should be of opinion that we had no right to be where we were, such negligence does not disentitle us to recover for damages, which were solely caused by the negligence and improper conduct of the *Margaret.* A trespasser can, under certain circumstances, recover damages for injuries caused solely by the wrongful act of the owner of the property:

Lynch v. *Nurdin,* 1 Q. B. 29.

A collision, without any damage occurring, is no cause of action. There is no such thing as a verdict for nominal damages caused by a collision, and even at common law, though "a trespasser is liable to an action for the injury which he does . . . . he does not forfeit his right of action for an injury sustained:"

Barnes v. *Ward,* 19 L. J. 195, C. P.; 9 C. B. 392.

Here we have done no damage, and therefore no action or counter-claim can lie against us, but we have sustained serious damage by the defendant's default to comply with the bye-laws, and therefore he is liable to us. [Brett, L.J.—In ordinary cases, the cause of the collision and the cause of the damage are identical, and therefore the question usually is, did the defendant contribute to the accident? But your contention is that the question should be, strictly speaking, did the defendant contribute to the cause of damage?] Yes; moreover, in the Admiralty Court, and now in all causes of maritime collision (S. C. J. Act 1873, s. 25, sub-sect. 9), contributory negligence is no defence to the whole cause of action, as, even if proved, it only results in reducing the damages by one half, and therefore one of the cases (*Sills* v. *Brown,* 9 C. & P. 601) on which the learned judge of the court below appeared to rely is not really in point here. In the other case, that of *The Gipsy King* (2 W. Rob. 537, 5 Notes of Cases 282), the question which the court had to decide was whether the defence of compulsory pilotage was made out, and therefore any observations of the learned judge who tried the case on the question now before the court are mere *obiter dicta.* As to the fact of a penalty being prescribed by rule 72 of the Thames Bye-laws (42 L. T. Rep. N. S. 663; 4, Asp. Mar. Law Cas. 276), for such a breach as that of which the *Margaret* was guilty, that cannot possibly prevent a party injured from recovering in a civil proceeding; if it did there would be no civil proceedings at all for collision in the Thames, as the rules of navigation for preventing collisions at sea made under the statute are not in force, but similar ones which are prescribed by those bye-laws. The court must decide not what was the cause of the collision, but what was the cause of the damage; the amount of the damage is referred to the registrar and merchants, but they must be told on what basis they are to assess it. In this case, there being no counter-claim or cross

action, the *Margaret* having sustained no damage, we are unable to get before the registrar at all. But the case very frequently arises where, though one party is liable to pay for the damages arising out of a collision, the party who has sustained damage may, by his subsequent conduct, have enhanced it; whether he has done so or not is a question for the court, and not for the registrar and merchants, and that shows that the real question is the cause of the damage, not merely the cause of the collision.

Milward, Q.C. and *E. C. Clarkson*, Q.C. for the respondents (after receiving an intimation that the court was of opinion that the barge was negligently navigated).—If there had been no collision there would have been no damage, and therefore no cause of action; the collision was caused by the negligent navigation of the barge, and therefore damage ensuing, though it would, had the *Margaret* sustained damage, have given a right of action, gave no such right to the *E. Wo*, by whose negligence alone the collision was caused:

The Gipsy King (*ubi sup.*).

[Cotton, L.J.—Is not the claim of the *E. Wo* for damage sustained by her coming into contact with your anchor, which was improperly placed? Brett, L.J.—If the effect of the collision had been to drive the anchor, placed in the position in which it was, into the *Margaret* instead of into the barge, could you have recovered?] The *E. Wo* would not have touched the anchor if she had been properly navigated, and therefore the position of the anchor was not the cause of the accident, but the negligent navigation of the *E. Wo*, and the *E. Wo* has therefore no right to say that "part of that mischief would not have arisen if you had not been guilty of some negligence;" here the immediate cause of the accident was the negligent navigation of the *E. Wo*, and the position of the anchor of the *Margaret* did not contribute to it, and therefore the *E. Wo* has no cause of action:

Greenland v. *Chaplin*, 5 Ex. 243; 19 L. J. 293, Ex.

The question in a collision action is whether the servants of the plaintiff by their improper conduct substantially contributed to the occurrence causing the injury:

Sills v. *Brown*, 9 C. & P. 601.

[Brett, L.J.—If the anchor had not been where it was there would have been no occurrence causing injury] There would have been a collision, and that is the occurrence causing the injury; "the collision is the primary cause of the damage, and" the court will not "look further, with a view to ascertain how much of the damage was occasioned by the anchor, or by any other part of the vessel;"

The Gipsy King, 5 Notes of Cases, 282, at p. 292; 2 Will. Rob. 537, at p. 547.

Butt, Q.C. in reply.—It is no answer to say that a collision, a mere contact, would have happened in any case; the damage which is the cause of action was solely and exclusively caused by the negligence of the defendant's servants.

James, L.J.—We have no doubt that this barge was negligently navigated. We must consider in this case what the nature of the action was, and the point before us would hardly arise if the cause of action were pleaded fully. The action is by the owners of the barge, who say, "Your anchor was in an improper place, and by reason of that my barge came into contact with it; it made a hole in my barge, water came in, and did a great deal of damage." That is the cause of action. The damage was done immediately by the contact of the improperly placed anchor with the barge. Would it have been a conclusive answer to say, "True it is I had my anchor improperly placed, and true it is it came into contact with your barge, and, if the anchor had not been there, no damage could have been done; but you are the person who led to the wrong, because, if you had not been improperly navigated, the collision would not have happened and the damage would not have occurred, and therefore it was you who caused the damage." It appears to me that that cannot be a justifiable defence. The defence as pleaded would be, "True it is my negligence caused your damage, but your negligence led to my negligence causing it." There can only be what is termed "contributory" negligence where there is negligence which contributes substantially to the cause of action. Where there is negligence which does so contribute, both parties are equally at fault, and both parties, through their own fault, cause the damage, and where this is the case, by the Admiralty rule, the damages are divided. The decision of Dr. Lushington, to which attention has been called (*The Gipsy King*, 5 Notes of Cases, 282; 2 W. Rob. 537), was on the point whether, where the damage actually was done by the cause that was alleged, and there was negligence about the anchor, that negligence would have made the ship liable in a case where a pilot was on board by compulsion of law. What was said in the judgment of that case on the point now before us was but an *obiter dictum* of the learned judge, for whom we have all respect, on a matter that does not seem to have arisen before him. On the true principle, the question in our opinion is, whether the negligence of one party or of both parties causes the whole damage, and not whether it may contribute to and enlarge the amount of damages.

Brett, L.J.—It seems to me that it was the duty of the court below to determine what was the legal liability of the parties, and in order to do that the court has to deal with the cause of action, and to determine whether there is any liability on the part of the defendant with regard to the cause of action, and if so what is the legal character of that liability. Now the cause of action in collision cases is not merely the fact of the ships having come into contact with one another—for that is no cause of action—but that damage, in the sense of injury, was caused to the property of the plaintiff by reason of the collision. Usually, however, it is sufficient for the court to find that there was a collision in point of fact, and that that collision or impact was caused by the negligence of the defendant. In 999 cases out of 1000 that is sufficient, because there has been some damage done; but strictly, in order to establish a cause of action, the court must find not only that there was a collision, and that it was the result of the negligence of the defendant, but also that some damage was done; then the liability of the defendants is made out, and a cause of action is established.

But in the Court of Admiralty that by itself

did not establish what was the extent of the liability of the defendant. If it be asserted that the plaintiff was guilty of contributory negligence, what is the question the court has to decide? To my mind, strictly stated, it is whether the party has by negligence of his own contributed to the injury which is the cause of action, and not merely to the collision, as in a case like this, where it may be that, though both parties have not contributed to the collision itself, yet they have contributed to the injury, so that the act of one of them causes some damage to the other. Then the liability of the defendant is not entirely removed, but the damages are to be divided according to the Admiralty rule. Then where liability is sought to be imputed to the defendant, it signifies not whether the plaintiff or the defendant is guilty of the contributory negligence.

In this case you have the fact that the collision was caused by the negligence of the barge, and I cannot see myself that the impact of the two vessels together was contributed to by anything done on the part of the schooner. There would, however, have been no damage at all, and no cause of action at all so far as the *E. Wo* was concerned, but for the fact of the anchor being placed as it was, which was a wrongful act. The *Margaret* is therefore to blame, and had not the *E. Wo* been also to blame the schooner would have been liable for the whole of the damage done. But the *E. Wo* was to blame for navigating as she did, and by reason of this negligence on her part she came into contact with the anchor of the *Margaret*, and contributed to the damage. The barge and the schooner were both wrong, and therefore, according to the practice of the Court of Admiralty, the damages must be equally divided. The actual decision in the case which has been cited (*The Gipsy King, ubi sup.*) shows that the anchor there was found, as a fact, to have been properly catted, and therefore a statement by the learned judge as to what might have been the liabilities of the parties if it had been improperly placed are of necessity mere *obiter dicta*.

Cotton, L.J.—I entirely concur in the judgments already given, and will only add that it appears to me that the case is this. The *E. Wo* says (1) Your anchor caused the damage; (2) Your anchor was wrongly placed where it caused the damage. Those two facts being proved the plaintiff is entitled to recover, but the plaintiff was also in default for navigating negligently so as to come into contact with the *Margaret* and contribute to the damage, and therefore by the Admiralty Division must therefore be reversed, and, as in our opinion both vessels are to blame for the collision, the plaintiff will be entitled to recover half the damages sustained, the amount of the damage being referred to the registrar and merchants. No costs will be allowed either in the court below or on appeal.

Solicitors for appellant, owner of the *E. Wo*, *Cattarns, Jehu*, and *Hughes*.

Solicitors for respondent, owner of the *Margaret*, *J. T. Davies*.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, Esq., Barrister-at-law.

Friday, Nov. 19, 1880.

(Before Baggallay, Brett, and Cotton, L.JJ.

Rivaz *v.* Gerussi and others.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Open policy — Fraudulent declaration of goods at less than their value— Concealment—Materiality—Action to set aside policies on ground of fraud.

In marine insurance it is not sufficient to disclose the facts material to the risks considered in their own nature, but all should be disclosed which would effect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act.

Defendants effected two open policies of insurance on goods to arrive, and declared goods on these policies, after arrival, at less than the true value. Defendants afterwards effected two more open policies to follow the previous policies.

In an action by an underwriter to set aside the two later policies on the ground of fraud, the jury found that the declarations of value made on the earlier policies were false and fraudulent, and were material to the subscription of the later policies, that plaintiff was induced by these declarations to subscribe the later policies, that defendants concealed the amounts which had been on risk and insured by the earlier policies, and that the matters so concealed were material.

Held, that there was evidence to support the findings of the jury, that plaintiff was entitled to have the policies set aside, and defendants were not entitled to a return of the premium which they had paid.

Judgments of Field, J., and of the Queen's Bench Division, affirmed.

The plaintiff, suing on behalf of himself and other underwriters, sought to have two policies of marine insurance cancelled and set aside under the following circumstances.

One of the defendants carried on business at Patras under the name of M. Gerussi; the other defendants carried on business in London under the name of Gerussi Brothers and Co. M. Gerussi used in the ordinary course of business to consign shipments of fruit from Greece and the Ionian Islands to Gerussi Brothers and Co. for sale.

The following policies were effected at Lloyd's by the defendants to cover fruit and produce from Greece and the Ionian Islands to London or Liverpool by any steamer or steamers in which such might be shipped from time to time, and which were to be declared and valued as interest might appear: (1) a policy dated 3rd Sept. 1875 for 25,000*l.*; the slip was signed 24th Aug. 1875: (2) a policy dated 1st Oct. 1875 for 20,000*l.* to follow and succeed the first policy; the slip was signed on 18th Sept. 1875; (3) a policy dated 7th Oct. 1875 for 20,000*l.* to follow and succeed the second policy; the slip was signed on 1st Oct. 1875; (4) a policy dated 3rd Nov. 1875 for 20,000*l.* to follow and succeed the third policy; the slip was signed on 5th Oct. 1875. The plaintiff subscribed all these four policies.

On the 5th Nov. 1875 the steamer *Vindamora*, having on board a shipment of fruit from M. Gerussi at Patras, consigned to Gerussi

Brothers and Co. in London, was sunk, and the cargo lost. The defendants made claim in respect of this loss of 12,500*l.* on the third policy (that of 7th Oct.), that being the amount alleged by them to be open on that policy, and 5270*l.* on the fourth policy (that of 3rd Nov.) In consequence of these claims the present action was brought.

The statement of claim alleged that in investigating the claims made by the defendants it was discovered that the declarations and valuations made on the policies in respect of previous shipments were false and fictitious, and that previous to the loss of the *Vindamora* the said policies had been filled and exhausted by previous shipments insured by the said policies for very large amounts, which shipments had arrived safely, and that the defendants had fraudulently concealed and abstained from declaring the amounts which had been so previously insured by the said policies, and had declared some of such shipments at a less sum than the true value thereof, and at a less sum than the value at which the same respectively had been at risk on and insured by the said policies during the respective voyages; that during the currency of the first and second policies, and before the third and fourth policies were effected, the defendants had systematically concealed and omitted to declare on the two first mentioned policies the value of the interests from time to time insured thereby, and which arrived safely, and that the third and fourth policies were effected for the purpose of continuing such wrongful and fraudulent practices; that at the time of effecting the third and fourth policies the defendants concealed the improper declarations herein before mentioned from the underwriters, and when the plaintiff and the other underwriters underwrote such last-mentioned policies respectively they were entirely ignorant of the facts relating to such declarations, and they would not have underwritten the said policies if they had known the said facts.

The plaintiffs claimed:

1. That it may be declared that the policies of the 7th Oct. and the 3rd Nov. respectively were obtained by fraud and concealment of material facts, and that such policies may be respectively set aside and cancelled, or that an account may be taken of the shipments which have been at risk and insured by the said policies of the 3rd Sept., the 1st Oct., the 7th Oct., and the 3rd Nov. respectively, and of the values which ought to have been declared in respect thereof and that the declarations on the said policies respectively may be varied or rectified accordingly.

2. That the defendants may be restrained from dealing with or transferring the policy of the 3rd Nov. 1875.

3. Such further and other relief as the circumstances of the case may require.

The trial took place before Field, J. in London, during the Michaelmas sittings 1879. The following five questions were left to the jury, and were all answered in the affirmative.

1. Did the defendants declare any of the shipments prior to the *Vindamora*, at less sums respectively than the values at which the same shipments had been at risk and insured by their policies?

2. Did they make such declarations falsely and fraudulently, and were such declarations material to the subscriptions of the said policies, and were the plaintiffs induced thereby to subscribe them?

3. Did the defendants conceal and abstain from declaring the amounts which had been on risk and insured by their policies?

4. Was it material to the risk taken by the underwriters to be informed of the matters so concealed and abstained from being declared?

5. Were the policies of 7th Oct. and 3rd Nov. taken out by the defendants with the fraudulent intention of declaring goods upon them at less than the value at which they ought to have been declared?

There was also a finding that risk had been incurred to the extent of 72,659*l.* on the four policies.

On these findings Field, J. gave judgment for the plaintiff.

A rule for a new trial was discharged by the Divisional Court (Cockburn, C.J., and Field and Manisty, JJ.).

The defendants appealed from both these decisions.

The *Attorney-General* (Sir H. James) and *Benjamin*, Q.C. (*Romer* with them) for the defendants.—There is no evidence to support the findings that the declarations were material, and that the underwriters were induced by them to subscribe the policies. Although any fraudulent misrepresentation will vitiate a policy, mere concealment has not that effect, unless it is a concealment or a material fact:

Ionides v. *Pender*, 2 Asp. Mar. Law Cas. 266; 30 L. T. Rep. N. S. 547; L. Rep. 9 Q. B. 531.

The true doctrine as to concealment is that laid down in 2 Duer on Insurance, p. 390: "Those facts only are necessary to be disclosed which, as material to the risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider." [Brett, L.J.—in delivering the judgment of the Court of Queen's Bench in *Ionides* v. *Pender* (*ubi sup.*), Blackburn, J., dissented from that proposition, and added: "But the rule laid down in Parsons on Insurance (vol. 1, p. 495), that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and considerations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by Duer are in contravention of it."] The declarations on the earlier policies could not be material with regard to the later policies:

Stephens v. *Australasian Insurance Company*, 1 Asp. Mar. Law Cas. 458; 27 L. T. Rep. N.S. 585; L. Rep. 8 C. P. 18.

There was no misrepresentation at the time of effecting the later policies, and this distinguishes the present case from *Sibbald* v. *Hill* (2 Dow. 263). The fifth finding of the jury is immaterial, for a mere intention to commit a fraud cannot vitiate a policy. This is the reason why in fire policies it is expressly stipulated that a fraudulent claim shall prevent the insured from recovering. Therefore, there has not been either such fraudulent misrepresentation as to vitiate the policies or concealment of any material fact.

Butt, Q.C., *Webster*, Q.C., *J. C. Matthew*, and *Lindsay*, for the plaintiffs, were not called on.

Baggallay, L.J.—This is an action brought by an underwriter, who seeks to have it declared that two policies of marine insurance, which are open policies on shipments to be afterwards declared, were obtained by fraud and the concealment of a material fact, and to have them set aside. In the view which I take of the case it is

unnecessary to consider the alternative claim made by the plaintiff. A series of policies was obtained to cover fruit and other produce, to be brought from Greece and the Ionian Islands, in the year 1875. There were four open policies: the first was dated 3rd Sept. 1875, and the second 1st Oct.; the two subsequent policies, which are the subject of the present action, were dated 7th Oct. and 3rd Nov., being based upon slips which were signed on the 1st and 5th Oct. respectively. On 5th Nov. 1875 the steamer *Vindamora* was sunk in the Thames, and her cargo was lost. In respect of this loss a claim was made on the last two policies, which led to the present action. It was the practice of the defendants to make declarations on policies for a less amount than the amount for which they ought to have made them; that is to say, the earlier policies were exhausted to a larger extent than appeared for the earlier policies extended to larger sums than appeared from the defendants' declarations. It appears from the findings of the jury that the declarations actually made were brought to the notice of the underwriters. The second finding shows that the underwriters knew of the declarations which had been made on the previous policies at the time when they subscribed the two later policies. That finding is, that the declarations were false and fraudulent, and were material to the subscription of the later policies, and that the underwriters were induced by them to subscribe those policies. The third finding is, that the defendants concealed and abstained from declaring the amounts which had been at risk and insured by the previous policies; and the fourth finding is, that what was so concealed was material. Therefore there was non-disclosure of facts which were found by the jury to be material to guide an underwriter as to whether he would accept the risk or not, and as to whether he would demand a higher premium. This being so, I cannot say that there has not been non-disclosure of a material fact within the intent and meaning of the decisions.

Brett, L.J.—The question which we have to decide is, whether these policies should not be declared to be invalid on the ground that there had been fraud and a concealment of a material fact. The question is the same as would have arisen if the present defendants, on a loss occurring after the 1st Oct., had sought to recover the amount of the insurance money from the present plaintiffs. The concealment alleged was this: there were two policies on produce coming from abroad on ship or ships to be declared, and these two policies were to succeed other named policies; there were improper declarations of the value of the produce shipped, which were not only improper in the sense of being incorrect, but were also fraudulent, for after the arrival of the ships the defendants declared on a smaller value than they ought to have declared on. The object of the defendants was, having paid the premium on these former policies, to make them cover too much, so that apparently there was more to run out on the earlier policies than there really was. Thus the underwriters (assuming the alleged state of things on the former policies to be made known to them) would be naturally led to suppose that, inasmuch as declarations must first be made on the former policies, the two later policies could not be made effective until there had been shipments to a certain amount upon the other policies, and that to a considerable sum, whereas there was a very small sum upon the former policies to be realised, so that the two later policies would be called into effect much sooner than the underwriters would be induced to anticipate. The jury have found that there has been concealment of a matter calculated to affect the minds of reasonable underwriters, as to whether they would insure or not, and as to the amount of the premium. It was argued on behalf of the defendants that there was no evidence that knowledge as to the matter so concealed could be material, because it is said that it did not affect the risk of the voyage, and a passage from Duer was cited to show that a fact, the concealment of which would avoid the policy, must be a fact which might add to or diminish that kind of risk. There is a decision of the House of Lords which is quite contrary to that proposition (*Sibbald* v. *Hill*, 2 Dow. 263); the same argument was used there unsuccessfully. I think the true proposition is that laid down in Phillips on Insurance, sect. 531, which it seems to me must be expanded, not in compliance with the passage which has been cited from Duer, but as explained in 1 Parsons on Insurance, p. 495. Blackburn, J., in *Ionides* v. *Pender* (*ubi sup.*), also appears to have been of opinion that Duer was wrong on English law, and Phillips and Parsons were right, and this view is in accordance with the decision of the House of Lords already referred to. Therefore, the real question seems to be this: can we say that it is an unreasonable finding that reasonable underwriters could be governed by the amount of the declarations on the former policies? It seems to me that, so far from the finding being unreasonable, the matter is one which would govern the decision of any reasonable underwriter. Therefore a fact was concealed, which the jury within the rule of law could find to be material. Also the concealment was fraudulent, for the defendants knew that the knowledge of this matter was important, and they kept it back. Therefore there ought to be no return of the premium, and the verdict and judgment are right.

Cotton, L.J.—I understand the findings of the jury to involve that the plaintiffs knew the amount which had been declared on the previous policies, and the question which has to be decided is this, can the subsequent policies be maintained? It is contended on behalf of the defendants that there can be no concealment which would vitiate the policies unless facts are concealed "which, as material to the risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider." No doubt the law is so laid down by Duer in the passage which has been referred to in the argument, but that view is not adopted by the House of Lords in *Sibbald* v. *Hill* (*ubi sup.*), nor by the Court of Queen's Bench in *Ionides* v. *Pender* (*ubi sup.*). Here it is found that the underwriters were induced to enter into the subsequent policies by the declarations which were made as to the shipments which had been insured by the previous policies. I think we should not question the finding of the jury, which shows that it was a material fact to be known what was the real amount which was running on the previous policies. We cannot say that there was nothing on which they could find this. I agree therefore that the verdict and judgment are right.

Judgment affirmed.

Solicitors for plaintiff, *Waltons, Bubb,* and *Walton.*

Solicitors for defendants, *Hollams, Son* and *Coward.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by H. D. BONSEY, Esq., Barrister-at-Law.

Saturday, March, 1881.

(Before GROVE, J.)

BATTHYANY *v.* BOUCH.

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 55—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 3—*Agreement to transfer a ship—Action thereupon by registered owner.*

The plaintiff brought an action against the defendant upon a written agreement whereby the plaintiff agreed to sell and the defendants to buy a yacht for 2600*l.*, *and claimed specific performance of the agreement, or in the alternative* 2600*l.*, *and damages for breach of the agreement.*

The defendant in his statement of defence alleged that the agreement was not a bill of sale, nor was it registered as required by the Merchant Shipping Act of 1854, *and pleaded the statute in bar of the action.*

The plaintiff demurred to this part of the statement of defence on the ground that an agreement for the sale of a ship does not require to be registered.

Held, that sect. 55 *of the Merchant Shipping Act of* 1854 *applies to the actual instrument by which a ship is transferred, and not to an agreement to transfer; and therefore the agreement need not be registered, and may be enforced by the registered owner.*

Demurrer allowed.

THIS was a demurrer to a part of the defendant's statement of defence.

The statement of claim was as follows:

1. On or about the 29th Feb. 1880 it was agreed in writing by and between the plaintiff and defendant that the plaintiff should sell to the defendant, and the defendant should buy of the plaintiff a certain yacht, known as the *Kriemhilda,* whereof the plaintiff was the registered owner, at and for the price of 2600*l.*, on condition that the said defendant should be at liberty to rescind the said agreement should the yacht prove unsound.

2. The plaintiff says that he has always been ready and willing to perform the said agreement on his part, and did all things necessary to be done on his part to entitle him to have the said agreement carried out by the said defendant.

3. The said defendant waived his right to a survey, and took possession of the said yacht, and put his crew on board.

4. Afterwards the said defendant neglected and refused to retain possession of the said yacht, and neglected and refused to carry out the said agreement, and neglected and refused to pay the said price and denied and repudiated his liability to carry out the said agreement, and the plaintiff claims (1) A decree of specific performance; (2) In the alternative 2600*l.*; (3) Damages for breach of the agreement; (4) Such further or other relief as the nature of the case may require.

The first paragraph of the statement of defence is all that is material to the present case, and was as follows:

1. The defendant does not admit that the plaintiff was the registered owner of the said yacht, or that any agreement in writing was ever entered into. If any agreement in writing was entered into it was the plaintiff by the imposition of the new condition next hereinafter mentioned, and not the defendant, who prevented such agreement from being carried out. In any case such agreement was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht as required by the Merchant Shipping Act of 1854, and on these grounds and so far as it relates to any such agreement the defendant pleads this statute in bar of this action

The plaintiff demurred to the last sentence of the first paragraph of the statement of defence on the ground that the agreement for the sale of a ship does not require to be registered, and on the ground that the Merchant Shipping Act of 1854 does not contain any provisions requiring special description of a ship to be inserted in an agreement for the sale of a ship, and does not contain any provisions which can be pleaded in bar to the action.

Gainsford Bruce, for the plaintiff, in support of the demurrer.—I admit at once that in order to pass the property in a ship a registered bill of sale is necessary, but in this case it is only an agreement to do that which when done must be done by bill of sale. The 55th section (*a*) of the Merchant Shipping Act of 1854 obviously applies to the actual transfer of the ship, not to an executory agreement for the sale of a ship. If it did apply, it would come to this, that you could never have an agreement for the sale of a ship. I believe under the former Acts which were much more stringent than these, it was held that you could not have an executory agreement for the sale of a ship without a form in accordance with the Act. The *Liverpool Borough Bank* v. *Turner* (1 J. & H. 159; 30 L. J. 379, Ch.; 29 L. J. 827. Ch.), was decided upon the 66th section (*b*) of the Act of 1854, which relates to mortgages. [GROVE, J.—Does any case go to the length of saying that an agreement to mortgage must be registered?] I think the case of the *Liverpool Borough Bank* v. *Turner* does go the length of that; but there is a difference between an agreement to transfer and an agreement to mortgage. The words of the former statute 8 & 9 Vict. c. 89, s. 34, are very different from the present. In that section are the words, "Otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity," and these words are omitted

(*a*) 17 & 18 Vict. c. 104, s. 55, "A registered ship or any share therein when disposed of to persons qualified to be owners of British ships shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked E. in the schedule hereto or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of and be attested by one or more witnesses."

(*b*) 17 & 18 Vict. c. 104, s. 66: "A registered ship or any share therein may be made a security for a loan or other valuable consideration, and the instrument creating such security, hereinafter termed 'a mortgage,' shall be in the form marked L. in the schedule hereto or as near thereto as circumstances permit, and on the production of such instrument the registrar of the port at which the ship is registered shall record the same in the register book."

from the Act of 1854. All the cases which can be cited in support of the defendant's contention are cases decided on the prior Acts, except the case of the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*), and that was on a question of mortgage, and on a different section of the Act, and there is a substantial difference between the two sections. Although the Act has been in force since 1854 there is no case deciding that a contract for the sale of a ship is invalid unless by bill of sale and registered, and certainly the words of the 55th section standing alone would not convey that meaning. But I submit that the Act of 1862 puts the matter beyond all doubt. That Act was partly passed in consequence of the case of the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*), and in order to get rid of the effect of that decision. The 3rd section (*a*) of that Act gives a definition of the expression "beneficial interest." He also cited

Stapleton v. *Haymen*, 2 H. & C. 918.

Cohen, Q.C, and *Assheton Cross* for the defendant.—The difficulty in the way of Mr. Bruce's argument with reference to the 3rd section of the Act of 1862 is that the section only provides that "equities may be enforced against registered owners and mortgagees," but does not provide for the case of equities being enforced by registered owners. Here it is the registered owner who is seeking to obtain specific performance, and not a person against a registered owner; the reason is that before a person can enforce the performance of a contract for the purchase of a ship he must show that he is qualified to be the owner. As against the registered owner, the contract could be enforced. That I admit. Beneficial interest means the interests of persons who are not registered owners. There is no need of the State to protect the beneficial interests of the registered owner. [GROVE, J.—According to your argument, no agreement can be made for the sale of a ship without all the necessary formalities of a bill of sale.] Yes, it can, because trusts are recognised, and the registered owner having agreed to sell the ship is a trustee for the purchaser. [GROVE, J.—That is, the contract of sale is unilateral, which seems strange.] But by the provisions of the statute that is so. There is no distinction between transfers and mortgages. The words "beneficial interests" in sect. 33 of the Act of 1854 apply to all beneficial interests of persons who are not registered owners. Equities will only be enforced by persons who have beneficial interests against registered owners, and cannot be enforced by registered owners. They cited

Hughes v. *Morris*, 21 L. J. 761, Ch.;
Duncan v. *Tindal*, 13 C. B. 258;
McCalmont v. *Rankin*, 22 L. J. 554, Ch.;
Union Bank of London v. *Lenanton*, 3 C. P. Div. 243; 30 L. T. R. 698; 3 Asp. Mar. Law Cas. 500.

Gainsford Bruce in reply.—If sect. 55 of the Act of 1854 stood alone I should succeed, and the only authority cited against me is on another section and different words. The case of the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*) is really no longer binding, in consequence of the Act of 1862. [GROVE, J.—There are some strong dicta in that case to show that the learned judges who decided it thought there was no difference between mortgages and transfers.] But the case was actually decided on the section relating to mortgages, and then the Act of 1862 was passed for the express purpose of getting rid of that decision. There is a substantial difference between sect. 55 and sect. 66 of the Act of 1854. Every contract by way of mortgage comes within sect. 66, because it is a security; but it by no means follows that, under the other, which says that you shall transfer a ship without certain formalities, you cannot therefore agree to transfer without the same formality. An agreement to mortgage is a security, but an agreement to transfer is not really a transfer in equity; it only gives the parties a right to enforce the transfer. Sect. 100 of the Act of 1854 shows that beneficial interests are not limited, as Mr. Cohen contends, but are general, and it clearly recognises beneficial interest apart from legal ownership.

GROVE, J.—This demurrer arises in this way. The statement of claim alleges that it was agreed in writing between the plaintiff and defendant that the plaintiff should sell to the defendant, and the defendant should buy of the plaintiff a certain yacht whereof the plaintiff was the registered owner, for the price of 2600*l.*; and that the defendant refused to carry out this agreement. In answer to the statement of claim, the only part of the statement of defence to which I need allude is the first paragraph, and that part of it only which says that "In any case such an agreement was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act of 1854, and on these grounds, and so far as it relates to any such agreement, the defendant pleads this statement in bar of this action." That part of the statement of defence is demurred to on the ground "that an agreement for the sale of a ship does not require to be registered, and on the ground that the Merchant Shipping Act of 1854 does not contain any provisions requiring any special description of a ship to be inserted in an agreement for the sale of a ship, and does not contain any provisions which can be pleaded in bar to the action."

I shall not decide here what portion of relief the plaintiff is entitled to. I have not to decide that. What I have to decide is, whether that part of the statement of defence affords a valid defence to the action. I am of opinion that it does not, and that this demurrer must be allowed.

The main section relied on for the defendant is the 55th section of the Merchant Shipping Act of 1854: "A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale, &c." The first part only of the section is material, and certainly reading that section by itself, I should have no doubt whatever in saying that it applied to the actual instrument by which the ship was to be transferred and not an agreement to transfer. It would never have occurred to me that it prohibited

(*a*) 25 & 26 Vict. c. 63, s. 3: "It is hereby declared that the expression 'beneficial interest,' whenever used in the second part of the principal Act includes interests arising under contract and other equitable interests; and the intention of the said Act is that without prejudice to . . . . equities may be enforced against owners and mortgagees of ship in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property."

persons from entering into an agreement, the one to sell and the other to buy a ship, but that it related solely to the instrument of transfer.

But the case does not depend upon the section standing alone if it did I should have felt no doubt about the case. Upon another section, the 66th, which relates to mortgages there has been a decision in the case of *The Liverpool Borough Bank* v. *Turner* (*ubi sup.*) by two very distinguished judges, Lord Hatherley (then Wood, V.C.) and Lord Campbell, and they decided substantially on these grounds, that the words in the Act of 1854, relating to mortgages, were not inconsistent with those in the previous statutes, on which it had been held that a mortgage was void in law and in equity, unless the conditions of the statute were complied with. They held that contracts came within the statute. Now, that judgment would be binding on me if I was deciding a question on sect. 16; whatever my own opinion might be I should be absolutely bound by that decision.

But then there are two reasons alleged why it is not binding upon me. One is that it is not a decision on sect. 55 but on sect. 66 which relates to mortgages and not transfers of ships. The 66th section is, so far as is material, as follows: "A registered ship, or any share therein, may be made a security for a loan or other valuable consideration, and the instrument creating such security hereinafter termed a mortgage, shall be in the form. &c." In *The Liverpool Borough Bank* v. *Turner* (*ubi sup.*), Wood, V.C., and subsequently Lord Campbell, on appeal, held that under that section a registered British ship could not be made security for a loan except by mortgage, and that must be registered. But then it is said that decision only applies to sect. 66, and that there is a material and substantial difference between that section and sect. 55. There is some difference, no doubt, but I was particularly affected by the expressions of Wood, V.C., in his judgment in the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*), with reference to it being the same whether the ship was sold or mortgaged; and Lord Campbell, though he does not speak so emphatically, says something to the same effect. By that I am not bound, as the decision was not upon the subject of transfer, though of course I should pay great attention to the opinions of judges of such high authority. If I can find a rational distinction between the two sections, it is my duty to exercise my own discretion.

I am of opinion that there is a distinction, and one quite sufficient to induce me to think that I am not bound by the *obiter dicta* in the case of the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*). There is a difference, as has been pointed out by Mr. Bruce, between a security and a transfer. The section which relates to transfer does not say that anything should be included in the word "transfer" beyond that which it really amounts to; but the word "security" *ex vi termini*, includes equitable and legal mortgages. The learned judges, who seem to have put sales and securities on the same ground, did so without having it argued. All they had their minds directed to was sect. 66, and their attention was not drawn to the difference of the words and meaning between that section and sect. 55; if it had been I do not feel sure that they would have come to the same conclusion. There has been an expression of doubt thrown upon the case of the *Liverpool Borough Bank* v. *Turner* (*ubi sup.*) by a judge of high authority (Pollock, C.B. in the case of *Stapleton* v. *Haymen* (*ubi sup.*).

But there has been a subsequent statute passed —the Merchant Shipping Act Amendment Act of 1862 (25 & 26 Vict. c. 63)—in part at all events to remedy the decision in that case, at least, there is a good deal to show that the Act was passed with that object. Now, in the case of the *Liverpool Borough Bank* v. *Turner* beneficial interests were considered by Wood, V.C. to be only those which applied to aliens and foreigners; but by the Act of 1862 it is enacted thus: It is hereby declared that the expression 'beneficial interest' whenever used in the second part of the principal Act includes interests arising under contracts, and other equitable interests; and the intention of the said Act is that without prejudice to . . . . . equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." Therefore, whenever beneficial interests are mentioned in the second part of the Act of 1854, they expressly include interests arising under contracts.

Mr. Cohen says that is true, but the second part of the section merely enables persons who have rights against registered owners to enforce them, but does not enable registered owners to enforce rights against other persons; that is, there is no correlative right given to registered owners. It would certainly be a very unusual thing if an Act provided that the parties to a contract should not have correlative rights, and, although I will not go so far as to assert there are no such cases, I certainly cannot call any to mind at the present time. All Mr. Cohen says is that the Statute of Frauds is an instance of that; but the Statute of Frauds only provides a legal mode of giving evidence of a contract; it does not create the contract, and therefore does not apply to this question at all.

Then the question is, are the words of the statute so peremptory that, although no reason can be shown for them, I must act upon them? I do not think that is so. In the first part of the section there is a direct recognition of beneficial interests, where mentioned in the former Act, and I think it is not true that those beneficial interests only apply to persons claiming against the registered owner. This appears from sect. 100: "Whenever any person is beneficially interested otherwise than by way of mortgage in any ship or share therein registered in the name of some other person as owner, the person so interested shall, as well as the registered owner, be subject to all pecuniary penalties imposed by this or by any other Act on owners of ships or shares therein, so, nevertheless, that proceedings may be taken for the enforcement of such pecuniary penalties against both or either of the aforesaid parties with or without joining the other of them." That evidently treats a person who is beneficially interested in the same category as the owner, and therefore I think that in the first part of sect. 3 of the Act of 1862 beneficial interest applies whether as owner or against an owner.

It would certainly be a very startling thing if

the construction which the defendant seeks to put upon the statute were to be given to it, for there could be no dealing with a ship at all. Persons could never agree to transfer a ship until they had actually transferred it; or in other words, they could not agree at all, and this would certainly be a very strong view to take where the words of the statute themselves import no such meaning. Therefore, I think the demurrer must be allowed.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Deacon, Son,* and *Gibson.*

Solicitors for the defendant, *Norris, Allens,* and *Carter,* agents for *Simpson* and *North,* Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Monday, July 19, 1880.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE SINQUASI.

Damage—Compulsory pilotage—Tug and tow.

The person in charge of a ship in tow is not bound to direct every movement of the vessel towing, but may allow the towing vessel a discretion as to the way in which other vessels are to be passed.

Where a collision is caused by a tug executing a wrong manœuvre, the fact that the person in charge of the ship was a pilot employed by compulsion of law, and gave no orders, does not relieve the owners of the ship in tow from liability. (a)

THIS was an action instituted by the Company of Proprietors of the Regent's Canal against the owners of the sailing-vessel *Sinquasi,* for damages done by that vessel on the afternoon of the 4th Oct. 1879, whilst proceeding up the river Thames in tow of a steam-tug, to a jetty or pier of the plaintiffs at the entrance of the canal.

The defendants relied exclusively on the fact that, at the time of the collision, the *Sinquasi* was "in charge of a duly licensed Trinity pilot, whose employment at the time and place was compulsory by law," and that "the said collision, and the damage consequent thereon, were caused solely and exclusively by some neglect or default on the part of the said pilot . . . . and not otherwise."

On the 19th July, the cause came on for trial before Sir R. Phillimore and Trinity Masters.

The pilot, by whose default the accident was alleged to have occurred, was called as a witness by the plaintiffs, and he stated that whilst coming up the river from Gravesend, where he had taken charge of the *Sinquasi,* he had given orders to the tug when he thought it necessary, but that he allowed her to pursue her own course in clearing passing vessels, so long as that course was a correct one; that in Limehouse Reach, in consequence of the number of craft, the navigation became difficult, and that, without orders, the tug, on approaching the Regent's Canal basin, ported to pass to the northward of some vessels, thereby towing the *Sinquasi* towards the pier at the entrance of the basin; that he was obliged to port the helm of the *Sinquasi* to follow the tug and clear the craft, and that, though as soon as possible afterwards he starboarded, the *Sinquasi* did not answer her starboard helm in time to clear the pier. He further stated that it was not necessary for the tug to have ported at all.

Butt, Q.C. and *E. C. Clarkson* for the plaintiffs.—The error which caused this collision was that of the master of the tug. The pilot committed no error; it is not his duty to be continually telling the tug not to alter her helm, he has only to give directions when it is desirable to alter it. The tug master, during the time of his employment, stands to the owner of the vessel in tow in the relation of servant to master, as much as a sailor on the look-out or at the helm does, and therefore the owners are liable for his mistake or default.

Myburgh and *Wood Hill* for defendants.—The duty of a pilot is to direct the navigation of the ship, and to give orders how to pass each particular obstruction. It was a neglect of duty on his part not to give directions to the tug how to pass the vessels, and he cannot get rid of the consequences of his neglect by saying that it is not his custom to give such directions. By allowing the master of the tug to pursue such course as he thought best in passing other vessels, he delegated his authority in directing the navigation of the ship to the tug master, and was therefore responsible for his acts as much as if they were his own. Moreover, if the tug was wrong to port, the *Sinquasi* was wrong also; he ought at once to have countermanded the manœuvre, which he did not do till they were past the craft, and therefore he adopted the act of the tug master:

The Duke of Sussex, 1 Notes of Cas. 161; 1 W. Rob. 270.

E. C. Clarkson in reply.—The master of the tug is bound to use reasonable care and skill. The pilot has a right to expect it from him, and that he will, in the absence of express orders, use that care and skill:

The Robert Dixon, 5 P. Div. 54; 42 L. T. Rep. N. S 344; Asp. Mar Law Cas. 246.

An ordinary helmsman has, for the purpose of keeping a ship on her course, constantly to be moving the helm without special directions; but if, in the absence of orders, he altered the course and caused a collision, the owners would be liable.

Sir ROBERT PHILLIMORE.—This is a case arising out of a collision which took place between twelve and one o'clock in the afternoon on the 4th Oct. 1879. The barque *Sinquasi,* the vessel proceeded against in this action, was going up the river Thames in tow of a steam-tug called the *Warrior,* and struck the jetty or pier of the plaintiffs, and did considerable damage. The owners of the *Sinquasi* admit that that vessel came into collision with the pier-head of the plaintiffs, and did other damage complained of, but they contend that the *Sinquasi* did the damage through the negligence of a Trinity House pilot, whose employment was compulsory by law, and that

(a) The case of *The Gipsy King* (5 Notes of Cases p. 288) was not cited in the course of the argument. It is there stated by Dr. Lushington "that, if the course pursued by the steam-tug is in conformity with the direction of the pilot, or *not against* his directions, and a collision takes place, the pilot is responsible, and not the owners of the steam-tug, which ought to obey the pilot."

therefore such pilot was alone to blame for the collision. Now the question mainly turns upon the conduct of the tug towing the *Sinquasi* in porting her helm and going to the north of the dumb barge and two sailing barges which were going up the river. A great deal of argument has been expended upon the fact of whether there was room sufficient for the tug and the *Sinquasi* to have gone between the dumb barge and the sailing barges. It is admitted that, if there was sufficient room to pass between the barges, it was the duty of the tug to tow between them, and we are of opinion that there was sufficient room. Upon this point the evidence of Allen, another pilot, was material. He was rowing across the river from north to south, and had a full opportunity of seeing what passed, and he swore positively that there was plenty of room between the barges. This statement is confirmed by the persons who were on the pier-head. It is denied by the witnesses for the defendants, but we have more confidence in the witnesses produced by the plaintiffs. It was therefore a wrong manœvvre on the part of the tug to port, and this was primarily the cause of the collision. It has been said that the pilot delegated his authority, not in terms but in conduct, to the master of the tug. We are not of that opinion. It is not necessary, in our judgment, that the pilot should be giving orders perpetually for every movement of the helm of the tug. When the tug suddenly ported without the order of the pilot the *Sinquasi* had no option but to follow her. The tug was the servant of the *Sinquasi*, and the *Sinquasi* is responsible for what the tug did. We believe the pilot starboarded as soon as he could after clearing the dumb barge. The *Sinquasi*, having regard to her length, could not recover herself in time to prevent the collision. In the opinion of the court the *Sinquasi* is to blame for the collision, which was not caused by any default of the pilot.

Solicitors for the plaintiff, *Jenkinson* and *Olivers*.
Solicitors for the defendants, *T. Cooper* and *Co.*

Wednesday, July 28, 1880.

(Before Sir R. PHILLIMORE and TRINITY MASTERS).

THE ROSALIE.

Collision—Vessel hove to—Vessel close hauled on the starboard tack—Regulations for preventing Collisions at Sea, Art. 12.

Where a vessel hove to with her tiller lashed a-lee, and with the wind on the port side, forereaching one and a half knots an hour, is crossing another vessel close-hauled on the starboard tack and a collision occurs, the first vessel is to blame for not keeping out of the way under Art. 12 *of the Regulations; but the second is also to blame if she sees, or ought to see, that the first vessel is not taking steps to keep out of the way, and fails to take any steps in her power to avoid the collision.*

THIS was an action brought by George Strowger, the owner, and others the crew of the fishing dandy *Young Alonzo*, of Lowestoft, of 27 tons register, against Messrs. Cory and Sons, of Cardiff, the owners of the *Rosalie*, a three-masted schooner of 219 tons register for the recovery of damages arising out of a collision between the said two vessels.

The facts were as follows:—About 8.30 on the 28th March 1880 the *Young Alonzo* left Plymouth on a mackerel fishing voyage, and after sailing about a mile outside the breakwater was hove to on the port tack under double-reefed mainsail forecloth jib forsail, and storm mizen, with her sheets hauled a-weather; and her tiller lashed three parts down, and so remained waiting for the weather to moderate. The wind was blowing strongly from the east, the weather was fine and clear, and the tide was ebbing, and at 11.20 the *Young Alonzo* heading S.E. had forereached at the rate of about one and a half or two knots an hour. to about six miles south of the breakwater. About this time the *Rosalie*, on a voyage from Newport to Caen, was approaching the same place close-hauled on the starboard tack heading N.N.E., and proceeding at the rate of five knots an hour. The crew of the *Young Alonzo* did not see the *Rosalie* until she was about a cable's length distant on the starboard side, when they hailed without effect, and the *Rosalie* struck the *Young Alonzo* amidships on the starboard side, and sunk her immediately, with her nets and gear and the crew's effects. The crew of the *Rosalie* saw the *Young Alonzo* about a mile off, but having the wind on the starboard side took no steps to avoid collision until it was inevitable, when they put the helm of the *Rosalie* hard down at about a ship's length distant and proceeded to lower her fore-and-aft sails which apparently dropped about the time she struck the *Young Alonzo*. The crew of the *Rosalie* had not observed that there was no one at the tiller of the *Young Alonzo*.

Art. 12 of the Regulations for Preventing Collisions at Sea is as follows:

> When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side.

J. P. Aspinall (with him *F. W. Raikes*), for the plaintiff.—Art. 12 of the Sailing Rules does not apply to the case of a vessel hove to. When a vessel is hove to, and it is or ought to be clear to another that she is so—as it must have been in this case, in broad clear daylight, if a proper look-out was being kept on the *Rosalie*—it is the duty of that other vessel to keep out of the way. In *The James* (Swab. 55), the *Confucius* was lying to close-hauled on the port tack, her helm lashed a-starboard, and the *James* was also lying to close-hauled on the starboard tack, her helm a-port—each vessel being a little on the port bow of the other, a collision ensued by which the port bow of the *Confucius* was stove in and she sank. In that case it was held that the *Confucius* was to blame for not having ported her helm in time, and the *James* for not having thrown back her headyards when the collision was probable, and the damage was therefore divided. As the Sailing Rules do not apply to vessels hove to, the *James* contains the rule of law on the subject, and, although prior in date to the Sailing Rules, has not been affected by them. In *The Underwriter* (L. Rep. 2 App. Cas. 386; 36 L, T. Rep. N. S. p. 155; 3 Asp. Mar. Law Cas. p. 361) it was decided by the Judicial Committee of the Privy Council that a vessel on the starboard tack close-hauled approaching another apparently on the port tack is nevertheless bound to keep out of the way so soon as she ascertains that the other vessel is unmanageable and unable to obey the

ordinary rule of the road at sea. This collision occurred in broad daylight, and the *Rosalie* ought to have seen at a great distance that the *Young Alonzo* had no one at the tiller, and that she was hove to from the position of her sails.

E. C. Clarkson (with him *Myburgh*) for the defendants.—It is absurd to say that the *Young Alonzo* travelling at the rate of two knots an hour was hove to. This case is clearly under Art. 12, and however the case of *The James* might have influenced this case before the Sailing Rules were published it does not apply now. By Art. 12 the *Young Alonzo* ought to have ported, and is solely to blame for not having done so. Had the *Rosalie* done anything else than keep her course she would have rendered herself to blame if a collision had ensued. In *The London* (6 N. of Cas. 29; Pritchard's Digest, vol. 1, p. 185) it is reported that when two vessels are in danger of collision in broad daylight, one of them lying to dead with her head to windward, if the other, in order to avoid a collision, should there be a possibility of avoiding it, does more than she is bound to do, the court will view that with great approbation. In this case the *Rosalie* was right in keeping her course, and any other manœuvre on her part would have been a subject for the approbation of the court, but she was not bound to do anything. As for *The Underwriter* (*ubi sup.*), in that case the vessel with which the *Underwriter* collided was not hove to, but was tacking and missed stays, the court finding that tacking was a proper manœuvre, considering her position with relation to the *Underwriter*, so that in her case the other vessel was wholly unmanageable, while in this case the *Young Alonzo* could have been manœuvred almost immediately. This is an essential difference between the two cases. Besides, in *The Underwriter*, the Privy Council found in circumstances exactly similar to those in this case that the proper manœuvre was for a vessel to starboard her helm and bring her head to the wind, and this was exactly what the *Rosalie* did.

J. P. Aspinall in reply,

Sir R. PHILLIMORE.—This is a case of collision between two vessels, the *Rosalie* and the *Young Alonzo*, which happened in Plymouth Sound on the 27th March last between six and seven miles to the south of the breakwater. The question is, which of these vessels or whether both are to blame. First of all it is clear to us that the *Young Alonzo* was hove to; and, secondly, that the *Rosalie* was close-hauled on the starboard tack. I am of opinion that Art. 12 of the Sailing Rules applies to this case. It says: "When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side." The *Young Alonzo* had the wind on her port side, and the *Rosalie* had the wind on her starboard side. The *Young Alonzo* ought to have released her tiller, and I am therefore of opinion that the *Young Alonzo* is to blame. Then there is the question of the *Rosalie*. She might have done something under the circumstances to avoid the collision, and ought to have seen the state of affairs on board the *Young Alonzo* in time to do something. She ought to have seen that there was no one at the tiller of the *Young Alonzo* when at a considerable distance, and might then have either ported and brought her own head to the wind, which was considered to be the proper manœuvre in the case of the *Underwriter*, or she might have starboarded and gone under the stem of the *Young Alonzo*. She did nothing. Under these circumstances I find both vessels to blame.

Solicitor for the plaintiffs, *H. C. Coote*.
Solicitors for the defendants, *Ingledew* and *Ince*.

Feb. 16 *and* 17, 1881.

(Before Sir R. PHILLIMORE.)

THE LONGFORD.

Salvage—Incidence—Specie—Cargo.

Salvage is payable out of ship, freight, and cargo at risk without distinction as to the nature of the cargo.

Specie contributes towards salvage in the same proportion as ship, freight, and other cargo. (*a*)

THIS was a consolidated action of salvage brought by the owners, masters, and crew of four steamtugs, the *Mersey King*, the *Knight of Malta*, the *Rover*, and the *Royal Alfred*, belonging to the port of Liverpool, against the City of Dublin Steam Packet Company, the owners of the *Longford*, a paddle steamer of 476 tons register, with engines of 300-horse power nominal, and against the owners of her cargo and freight.

Three different actions were commenced by the *Mersey King* and the *Knight of Malta*, and by the *Rover*, and by the *Royal Alfred* respectively, but after delivery of statement of claim they were consolidated, leave being reserved for the *Royal Alfred* to appear separately by one counsel at the trial.

At the time of the circumstances on which the action was grounded, the *Longford* was on a voyage from Dublin to Liverpool with a crew of twenty-six hands, 136 passengers, 50,000*l.* in specie, and a cargo of general goods and live stock. The value of the *Longford* was agreed upon as 14,000*l.*, and of her total cargo 58,000*l.*, and the value of the tugs was about 5000*l.* each

The specie on board the *Longford* was the property of the Bank of Ireland, who in conjunction with the Corporation of the Royal Exchange Assurance, the underwriters and insurers of it, delivered a separate statement of defence in respect thereto.

The plaintiffs alleged that on Aug. 17, 1880, the *Longford* was in the river Mersey making for her berth at the north end of the Liverpool Landing Stage, when she struck the stem of the s.s. *Baltic* which was lying at anchor in the river, with her starboard sponson, and continued grazing the *Baltic* with her starboard quarter till she got clear. This caused such serious damage to the *Longford* that she began to make water rapidly. The plaintiffs' tugs thereupon proceeded to the *Longford*, and the *Royal Alfred* was made fast on her starboard quarter, about forty passengers immediately got on board the *Royal Alfred*, and the *Longford* and the *Royal Alfred*, with the other tugs attending, reached the landing stage. The *Longford*, however, was here admittedly found to

(*a*) This decision is apparently in accordance with the ruling in the Admiralty Courts of the United States. See Parsons on Shipping II. p. 295. (*Warder* v. *La Belle Creloe*, 1 Peters Adm. 31, 46; *The T. P. Leathers*, 1 New C. Adm. 421; Marvin on Wreck and Salvage 174.—ED.)

be sinking, and was ordered away from the stage, and the four tugs then made fast on either bow and quarter, and towed the *Longford* to the dock wall and skilfully manœuvred so as to lay her alongside the dock wall, where she sank in shallow water, about twenty minutes after the collision.

The defendants, the owners of the *Longford* and her cargo and freight, other than the specie, pleaded that after the collision,

3. Whilst the *Longford* was proceeding to the stage, the plaintiffs' tugs put off, and approaching the *Longford*, hampered her movements, and finally the *Mersey King* improperly threw herself across the bows of the *Longford*, which had to stop her engines to avoid a collision. The other tugs then took up such positions that it was impossible for the *Longford*, which was under perfect command, to go ahead without risk of a collision.

5. With the way the *Longford* had upon her, and without any assistance from the tugs or any of them, the *Longford*, shortly after the collision, reached the stage, her starboard bow touching or nearly touching the stage. A rope was thrown from the *Longford* to the stage, and was hauled on the stage for the purpose of being made fast, but some one hailed the captain to take the *Longford* to the Dock Wall, and the captain determined to do so; it being then reported to him by the engineer that the *Longford* was making water, and he would have been able to do so without assistance if he had not been hampered by the tugs.

9. As to the specie, the defendants, the owners of the *Longford*, and of her general cargo and freight, say that the said specie was and is the property of the Bank of Ireland, and at the time of the alleged services was in charge of a clerk of the said bank, and that the defendants, the owners of the *Longford*, are in no way responsible for the keeping or delivery of the said specie, and that the said specie having been taken on shore by the said clerk before the arrest of the *Longford*, and before the undertaking to put in bail in any of the said actions, the said defendants and the bail are not liable to the plaintiffs or any of them in respect of the said specie, or any part thereof.

The plaintiffs thereupon proceeded against the owners of the specie by way of monition, and cited the Bank of Ireland to appear and defend the suit, and the Bank of Ireland and the Corporation of the Royal Exchange Assurance then appeared and filed a separate statement of defence, which also alleged that the *Longford*, if she had not been hampered by the tugs, could and would with her own engines have reached either the landing stage or the dock wall, and then proceeded:

6. The clerk in charge of the said 50,000*l.* landed therewith from the *Longford* without aid or assistance from any of the tugs or their crews; nor did he, nor did anyone authorised in that behalf, request or accept any aid, service, or assistance of any kind soever, either to, or for, or in respect of the said 50,000*l.*, or the protection, landing, or delivery thereof, or for or on behalf of himself or of these defendants from the said tugs or their crews, or any or either of them:

and they further said that the said gold was never in danger of loss or damage, and

10. Alternatively these defendants say, that if any services were rendered by the said tugs (which they deny), they were not salvage services in fact, nor were they nor any of them efficacious as such, because if the alleged services had not been rendered, no other or further or more serious consequences or damages could or would have ensued than did in fact ensue after and notwithstanding the rendering (if any) of the alleged services.

The case came on for trial before Sir R. Phillimore on Feb. 16, 1880. and it appeared in evidence that in the collision with the *Baltic* a large hole, extending below the water's edge, was cut in the side of the *Longford* abaft the starboard sponson, and another large hole in the starboard quarter; that the rope from the *Royal Alfred* was made fast by the mate of the *Longford* before reaching the stage; that the clerk left the *Longford* with the specie at the stage, together with a few passengers, and that the *Longford*, after being towed to the dock wall, settled down about twenty minutes after the collision, the rest of the passengers and the cattle being then removed by the tugs.

The further material facts of the case appear in the judgment.

Butt, Q.C. (*Kennedy* with him) for the tugs *Mersey King*, *Knight of Malta*, and *Rover*, contended that the services did not indeed take up any length of time, but that if they were efficient, the fact that they were rapidly rendered should rather increase than diminish the reward. No distinction could be drawn between the gold and the rest of the cargo. Even if it could be fished up if lost, still there was great risk of its being lost. If a thing is once sunk so that it will cost anything to get it up again, it is totally lost in law, and the salvors are entitled to reward.

E. C. Clarkson, for the *Royal Alfred*, contended that the services could only have been rendered by steam power.

Dr. *Deane* (*Gainsford Bruce* with him), for the *Longford* and her general cargo and freight, contended that it was unnecessary for the plaintiffs to have commenced three actions, that if the *Longford* wanted any assistance four tugs were too many, and that if there were any services they were trifling.

Cohen, Q.C. (*Pollard* with him), for the specie, contended that it appeared from the evidence that the *Longford* was capable of reaching the stage without assistance, and that the services consisted in towing the *Longford* from the stage to the dock wall. There were two questions: first, what should be awarded *in toto*; and, secondly, what ought to be awarded in respect of the ship and what for the cargo and what for the specie. If the cargo salved is a perishable cargo, a larger amount is awarded in respect of it than if it is not perishable. In this case, if the ship had sunk, the gold could have been recovered by divers at a trifling expense. If the court makes any award in respect of life salvage, the gold is liable to contribute towards it in the same proportion as the ship; but with respect to the saving of property, a separate award must be made for the specie, and it ought not to contribute for its full value. It was not exposed to any substantial risk; the only risk was the cost of recovering it if it had sunk, and the award must be made on that risk, and not as if it were a perishable cargo worth 50,000*l.* Further, the ship and the cargo must each pay its own share, the ship for itself and the cargo for itself, and the cargo cannot be called on to pay any of the ship's share:

The Pyrennee, B. & L. 189.

In *The Emma* (2 W. Rob. 319; 3 Notes of Cases, 114), Dr. Lushington says: "With respect to silver and bullion, it is true that a distinction is wisely and properly permitted, and this upon the consideration that it is more easily rescued and preserved than more bulky articles of merchandise."

Butt, Q.C.—The words in *The Emma* are purely *obiter dicta*. The *Emma* was a timber laden ship

and there was no bullion in the case, and Dr. Lushington would never have uttered them if he had had before him the previously decided case of *The Jonge Bastiaan* (5 C. Rob. 322), in which a vessel was warped off a rock by a smack, and placed in such a position that the master was able to take away certain bullion, but subsequently sunk, and was weighed up and salved by other smacks. At the trial, it was contended for the owners that the bullion which the master had taken away with him should not contribute, but the court overruled that objection, and pronounced for a salvage of the whole property. In *The Vesta* (2 Hagg. 193) it is clearly laid down that "the difference of danger to which property is exposed would be a difficult criterion to apply in most cases. The buoyancy of articles may vary in the river and on the sea, and on the high seas the consequence may not be very different to the owner whether the articles sink or float away . . . Suppose a casket of jewels on board which could be saved with great facility, it could not in such a case be contended that the salvors could only be entitled to a small gratuity for carrying it on shore. To uphold such a notion would lead to preference in saving one part of a cargo before another. The more usual rule has been to make a valuation on ship and cargo."

Cohen, Q.C. in reply.—*The Jonge Bastiaan* and *The Vesta* (*ubi sup.*) do not establish an universal rule. Here the specie was not on the high seas, and would certainly have been recovered immediately from the *Longford* had that vessel gone down at the moment of collision. *The Emma* is sufficient to show that there is a practice to draw a distinction between bullion and other cargo. The more general rule is to order ship and cargo to contribute in the same proportion; but where the court sees fit, it can do otherwise, and it is unjust that bullion should in such a case as this contribute like other cargo.

Sir R. PHILLIMORE.—This is a case of salvage service rendered in August last in the river Mersey to the steamship *Longford*, of 1000 tons gross and 476 net register. The *Longford* was on a voyage from Dublin to Liverpool, laden with a general cargo, passengers, and live stock. It appears that at the time of the day on which the service was rendered the *Longford* had, by careless and bad navigation, impaled herself on the stem of the *Baltic*, in consequence of which she received a wound of a very serious character in her side and was most seriously injured.

Perhaps the best course to adopt in this part of the judgment would be to refer to the log, which contains this entry:—"On the 16th of August sailed with passengers, cargo, and cattle, wind east, fresh breeze; passed the Collingwood Dock at 7.20 a.m. on the 17th; proceeded to landing stage, weather hazy, and while swinging to the tide, passing between two large steamers, our ship did not come round so quickly as I expected, when we fouled the White Star steamer *Baltic* at anchor in mid-river, her stem damaging our plates on the starboard side; ship commenced to fill with water; kept the engines at full speed to reach the dock wall. The tug *Mersey King* took our rope and towed us to the wall of the Prince's Dock, steamer *Rover* taking passengers and luggage; *Mersey King*, *Royal Alfred*, and *Rover* taking cattle. About this time passengers commenced to jump on board the tugs." There is no doubt, therefore, that this vessel was in the most imminent danger of sinking. She steamed across the river to the Prince's Landing Stage, and she was attended by four tugs of about the same size—the *Rover*, the *Mersey King*, the *Knight of Malta*, and the *Royal Alfred*. When she got over to the other side, at the north end of the landing stage, she was towed by the *Mersey King* ahead of her to the dock wall, where she was beached and sank.

Now the merit of this service consisted in its promptitude, and not in the length of its duration. It may be well that a very great reward should be given to merit, nothwithstanding the short duration of the service, if it appears that the vessel was in danger. It is said in this case that more tugs were employed than were needed, but it may be more easy to say this after the danger is over than at a time when such a calculation cannot be made with nicety. It appears to me that these tugs are entitled to equal shares in the award.

There were 162 lives on board, 182 cattle, and specie to the amount of 50,000*l.*, and the value of the whole amounted to 72,000*l.* There was undoubtedly in this case a salvage service rendered to both life and property. The defences originally set up were two: that the tugs, instead of assisting, hampered the vessel; and that the *Mersey King* improperly placed herself across the bows of the *Longford*. Both these defences required proof, and the defendants have failed to prove them. The court, therefore, has to consider what is the proper amount of salvage remuneration to be awarded.

Now there has been much discussion as to whether the 50,000*l.* in specie, which was on board the *Longford*, ought to contribute towards the amount awarded by the court in respect of this service in the same proportion as the ship and the rest of the cargo. It appears that the specie being in bags and otherwise protected from loss, was not exposed to the same peril of being entirely lost as it would have been if the circumstances had been different. Among the authorities cited as to the proportion in which bullion ought to contribute to the award was a dictum of Dr. Lushington, in the case of *The Emma* (*ubi sup.*). In that case salvage services had been rendered to a ship and her cargo, but as regards the ship the salvage had been settled out of court, and the only property proceeded against was the cargo, and in the judgment of Dr. Lushington, as reported in 2 W. Rob. 319, there is the following passage: "Now in this class of cases the ordinary usage of the court, which is well known to every person who has practised in it, is to take the whole value of the ship and cargo and assess the amount of the remuneration upon the whole, each paying its due proportion. I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been permitted to aver that the services were of greater importance to the ship than they were to the cargo, and therefore that the ship should bear the lesser burthen, or *vice versâ*. Such a distinction, if acknowledged, would in many cases lead to intricate litigation and to questions of great nicety, which it would be exceedingly difficult for the court to adjust. With respect to silver and bullion, it is true that a distinction is wisely and properly permitted, and this upon the consideration that it is more easily rescued and pre-

served than more bulky articles of merchandise." The case of *The Emma* is not, however, the only authority on the question, for during the argument the attention of the court has been drawn to other cases material to the point, and especially to the case of *The Jonge Bastiaan* (*ubi sup.*), decided by Lord Stowell in 1804, where salvage services have been rendered to a derelict vessel, a portion of the cargo of which had been composed of bullion, and the same contention was raised as in the present case, but was not sustained by the court.

From a consideration of these cases it is clear to me that, if in the case of silver or bullion any such exception as that referred to in the case of *The Emma*, existed in practice, some mention would have been made either of such exception or of any authorities tending to support it. The cases, however, as reported, contain nothing to lead to the conclusion that specie salved is not in the same position as any other salved cargo. It appears to me that the court would be involved in great difficulty if it admitted any other principle in these cases than that every description of property salved must, whatever be its nature, contribute equally in proportion to its value towards payment of the amount of salvage remuneration awarded. It must be understood that I make my judgment in this case under that principle. The defendants must contribute to the award I am about to make in proportion to the value of the salved property belonging to them respectively.

I shall award 1200*l.* as the entire amount of salvage remuneration, to be equally divided among the four steam-tugs. In other words the owners, master, and crew of each steam-tug will be entitled to 400*l.*

E. C. Clarkson, for the plaintiffs, the owners of the *Royal Alfred*, applied for costs, on the ground that the statements of claim delivered by the other plaintiffs entirely ignored the services of the *Royal Alfred*, and it became necessary in consequence for the *Royal Alfred* to appear separately. Otherwise the claim of the *Royal Alfred* might have been entirely thrown out. If the court only allowed one set of costs, the owners of the *Royal Alfred* ought to receive a fourth share. The other plaintiffs would in any case have been obliged to call the witnesses called by the *Royal Alfred*, and their expenses ought to be allowed.

Dr. *Deane*, for the *Longford*, argued that the defendants ought only to pay one set of costs.

Butt, Q.C., for the other plaintiffs, contended that the claim of the *Royal Alfred* might have been consolidated in the same way as the others. The owners of the *Royal Alfred* never communicated with the other plaintiffs, and the only result of introducing the *Royal Alfred* into the pleadings of the other plaintiffs would have been to make them embarrassing. He admitted that it would have been necessary to call the witnesses called by the *Royal Alfred* in any case.

Sir R. PHILLIMORE.—It appears to me that, if the owners of the *Royal Alfred* had sent their instructions and stated their case to the solicitors employed by the other tugs, all these actions might have been consolidated. I shall allow the *Royal Alfred* only those costs which would have been incurred had the actions been so consolidated.

Solicitors for the plaintiffs, the owners, &c., of the steam-tugs *Mersey King*, *Knight of Malta*, and *Rover*. *Bateson* and *Co.*, Liverpool.

Solicitors for the plaintiffs, the owners, &c., of the steam-tug *Royal Alfred*, *Hill* and *Dickinson*, Liverpool.

Solicitors for all the defendants, *Simpson* and *North*, Liverpool.

NISI PRIUS.

QUEEN'S BENCH DIVISION.

Reported by J. RICHARDS KELLY, Esq., Barrister-at-Law.

March 28 *and April* 4, 1881.

(Sittings in London before WATKIN WILLIAMS, J.)

PIRIE AND CO. *v.* MIDDLE DOCK COMPANY.

Shipping—General average—Damage by water to extinguish fire—Loss of freight.

Where a cargo of coals is shipped to be carried to S., and there delivered on payment of freight, and a fire breaks out spontaneously in the coals, and portions are thrown overboard, and the remainder so wetted and damaged by water poured upon them to extinguish the fire, that they have to be discharged, and sold at a port of refuge, and the freight upon them is wholly lost: The shipowner is entitled to a contribution in general average for the lost freight, and there is no claim on account of the cargo; first, because there is no loss on account of it; secondly, because the vice in it is the cause of the sacrifice.

The right to general average is not founded upon contract, or the relations created by contract, but upon a rule of the common law and upon the principle of the ancient maritime law.

THE facts of the case, proved and admitted at the trial, were as follows:—By a charter-party entered into on May the 13th 1877 between the plaintiffs, merchants in London, and the defendants, the owners of the vessel *Attila*, it was agreed, amongst other things, that that ship should proceed to the river Tyne and load a cargo of coal for the plaintiffs, and then proceed to Singapore or Penang as ordered, there to discharge the cargo, certain perils excepted. Freight was to be paid on the quantity delivered. A cargo of 1430 tons having been loaded at Newcastle, the *Attila* sailed thence on July 16th. She was properly ventilated fore and aft, and during the voyage the hatches were taken off as often as possible. On Nov. the 16th, when inside the Straits of Sunda, seventy or eighty miles from Anjer, the captain found that smoke was coming out of the forward ventilator. On removing the main-hatch he found smoke rising at three different places, and, being alarmed for the safety of his ship and cargo, he caused a large quantity of water to be poured down the hold. In order, if possible, to get at the seat of fire, a portion of the cargo, amounting to some fifty tons, was jettisoned. Though water was poured on the coals continuously for three days, smoke continued to rise from the hold up to the time of the arrival of the *Attila* at Batavia, which was at 5 p.m. on the 18th. On the following day the captain commenced to discharge the cargo into lighters, and on the vessel being then surveyed, the surveyors, who were appointed by the British Consul at Batavia, recommended that

the vessel should be towed into the inner roadstead, and the cargo at once discharged. This was done, and the fire-engine was kept constantly at work for the first half of the twenty days occupied in so discharging the coals. It was found to be utterly impossible to reship the cargo for Singapore or Penang, and it was therefore sold at Batavia, in accordance with the recommendation of the surveyors, realising 1149*l.* 3*s.* 8*d.* Of this sum the defendants paid to the plaintiffs 500*l.*, and offered before action brought to pay a further sum of 352*l.* 4*s.* An average statement was prepared at Batavia, but not acted upon, as, by the charter-party, the average had to be settled in London, according to the custom at Lloyd's. The average staters in London, employed by the defendants to prepare the statement on behalf of the underwriters of the ship and freight, claimed in general average on behalf of the shipowner the sum of 667*l.* 15*s.* 8*d.*, being one half of the estimated amount of the freight which the ship would have earned if she had carried the cargo to its destination, and they charged that amount in the statement of general average as arising from, and in consequence of the damage done to the cargo by the means adopted to extinguish the fire, viz.: the saturation of the cargo by water. This made a general average contribution, payable by the cargo, of 339*l.* 1*s.* 2*d.* The underwriters on cargo were not satisfied with this adjustment, and the average adjusters then employed by them excluded altogether the loss of freight from the general average column. The present action was brought by the plaintiffs to recover the balance of the proceeds of the sale of the cargo at Batavia, which the defendants claimed by way of set-off, to retain as representing the contribution by the cargo in general average for the loss of their freight.

Cohen, Q.C., and *A. L. Smith* were counsel for the plaintiffs.

Butt, Q.C. and *Barnes* for the defendants.

April 4.—Watkin Williams. J. delivered a written judgment to the following effect:—The action was brought by the plaintiffs, who are merchants in London, against the defendants, who are the owners of the ship *Atilla*, to recover the net proceeds of certain cargo sold by them in a damaged state at a port of refuge. The defendants did not dispute their liability to account to the plaintiffs for the proceds of the cargo, and they had in fact paid to the plaintiffs a large portion of the amount, but they claimed to be entitled to retain the amount now in dispute on account of a set-off or counter-claim for a general average contribution from the cargo for the loss of freight, under the following circumstances: On the 30th May 1877, by a charter-party, it was agreed between the defendants, owners of the ship *Atilla*, and the plaintiffs as merchants, that the vessel should load a cargo of coals in the Tyne, and proceed therewith to Singapore, and there discharge the cargo, certain perils excepted, the freight to be paid on the quantity at the rate of 20*l.* per keel, "average claims, if any, to be settled in London according to the usage of Lloyds." The vessel loaded a full cargo of coals in bulk according to the charter-party, and set sail on the 16th July. Nothing of importance occurred upon the voyage until the 16th Nov., when an unusual sulphurous smell was observed coming up the ventilator forward. The hatches were taken off, and the hold was found to be full of smoke, and, on further examination, the coals were found to be on fire on the starboard side and after part of main hatch. The crew threw water on the spot, and discharged cargo overboard to endeavour to get at the seat of the fire. The same proceeding was continued on the 17th, and on the 19th the vessel was towed into Batavia. The jettison of cargo and the pouring of water upon it continued more or less during the whole time. Both these expedients were adopted for the purpose of saving the ship and cargo, which were in great peril of total destruction, from the fire; and the ship and a large portion of the cargo were in fact saved by the operation. Upon the arrival at Batavia, a survey was held upon the ship and cargo, and the surveyors recommended that the entire cargo should be discharged. A considerable portion of the cargo was found to have been completely charred and burnt, and the remainder so damaged by the saturation with water, that it was practically impossible to forward it to its destination; and the surveyors recommended as the best course that the cargo should be all sold, and it accordingly was sold, and realised net the sum of 1149*l.* 3*s.* 8*d.* This was, in fact, the best and only practicable course to be adopted.

It must be taken as a fact that a certain portion of the coal was entirely destroyed, also that the fire was not general, but confined to a particular part, that the ship and whole adventure was in imminent peril of being destroyed by fire, and that the jettison of a portion of the cargo and the saturation of other portion saved the ship and a large portion of the cargo from destruction, and that the adventure came to an end at Batavia under the circumstances above described.

It was admitted by the counsel on both sides that the whole of the freight — that of the cargo which was destroyed by fire and that which was jettisoned, as well as that of the cargo which was saved, but which was too much damaged to be forwarded to its destination —was totally lost. Under these circumstances the plaintiffs, the merchants, claim to be entitled to the net proceeds of the cargo, and the defendants, not disputing the plaintiffs' general right to receive such proceeds, claim the right to deduct therefrom a contribution in general average towards the lost freight of so much of the saved cargo as was damaged by water, but excluding that damaged by fire.

Two average statements were prepared, one by Messrs. Davidson, Son, and Lindley, on behalf of the shipowners, and another by Messrs. Manley, Hopkins, and Son, on behalf of the merchants, each professedly made up according to the usage of Lloyd's in London. Each of these statements treated the case as one giving rise to claims for general average. The values of the saved ship and cargo were inserted as contributories towards the general average claims, and amongst the claims for contribution were inserted the value of the jettisoned cargo, the towage of the ship into Batavia, the expense of discharging the cargo, and a number of other items usual in such cases. Each of the average staters also included in their statement the cargo itself, as an interest entitled to claim contribution; but both concurred in not carrying forward any actual claim, upon the ground that, for the reason presently stated, there

was no loss. The reason was as follows: The cargo realised at Batavia net the sum of 1149*l.* 3*s.* 8*d.*, after payment of all charges and expenses, not, of course, including freight, because, *ex hypothesi*, no freight was due. If the cargo had reached its destination, it would have sold for 2151*l.* 17*s.* 3*d.*, but the charges, including freight, would have amounted to 1335*l.* 11*s.* 4*d.*, leaving a net balance only of 816*l.* 5*s.* 11*d.*, on which account both the average staters treated the case as one of no loss upon cargo. Up to this point both average staters agree, and there is no reason to doubt that so far the statements are in accordance with usage at Lloyd's.

We now come to the disputed item. Messrs. Davidson, Son, and Lindley inserted amongst the claims for contribution in the general average column the sum of 667*l.* 15*s.* 8*d.* on account of the freight of the cargo damaged exclusively by the water, and in consequence sold at Batavia. Messrs. Manley, Hopkins, and Son excluded altogether the loss of freight from the general average column.

Mr. Cohen, for the merchants, contended that this was not a case for general average at all, that this was not a voluntary sacrifice of cargo and freight, to save the adventure, but that the water was poured on to the coals to preserve as much as possible of them from the impending destruction by fire, which had commenced through spontaneous combustion, and must have inevitably destroyed the whole quantity if it had not been wetted. He contended that in substance the cargo was practically lost past redemption, and that what was preserved was in the nature of salvage or wreck. And he contended further that if the lost freight was a subject for contribution in the general average, then the merchant was entitled to claim a contribution in respect of the cargo, the freight of which was then brought in, because, by the very hypothesis, the freight was only lost because the cargo was lost; and he cited *Shepherd* v. *Kottgen* (3 Asp. Mar. L.C. 544; 37 L. T. Rep. N.S. 618; L. Rep. 2 C.P. Div. 585) and *Johnson* v. *Chapman* (19 C.B. N.S. 563.)

Mr. Butt, for the shipowner, contended that the case was clearly one of general average, and that in fact both average staters had so treated it; that if the contention on the other side was well founded, the jettison of the cargo was no more a general average loss than the loss of freight and upon the same principle, that if the principle contended for were to prevail, general average would in most cases be abolished altogether, because in the majority of cases the ship and the whole adventure were in imminent danger of being immediately lost at the time when the sacrifice is made which averts the peril. He cited Parsons on Marine Insurance, chap. 5, sect. 2, where the views of Mr. Benecke are criticised and disapproved of. With respect to the cargo, he said it was not necessary to dispute the principle contended for, and he pointed out that both average staters had acted upon it in their statements, but had carried nothing out into the general average column, because there was no loss in fact.

There is also the further possible view that, if the cargo is considered to have suffered alone through the damage by water, the cargo may nevertheless be not entitled to claim a contribution in the general average, because it was through its own inherent vice the real cause of the whole misfortune and sacrifice.

Mr. Lindley, who was called as a witness for the owners, stated that he had never known a similar case in his experience, and, so far as he was aware, there was no usage of Lloyd's applicable to the case.

I have therefore to determine the question according to general principles of law. In my judgment the shipowners are entitled under the above circumstances to a contribution in the general average for the loss of the freight, in respect of which they make their claim, for the following reasons.

It is material to bear in mind that the claim in this case is not one made by the owner of destroyed cargo against the shipowner, and resisted by the latter upon the ground either that the cargo was in fault, or that there was no real sacrifice by reason of the cargo having been already inevitably lost, but a claim by the shipowner to be entitled as against the merchant whose goods had been saved, to bring into the general average the freight alleged to have been sacrificed by an operation which saved the ship and a large part of the cargo, and at the same time caused the total loss of the freight.

This may also be a convenient place to mention that the lost freight, if it becomes a subject of contribution in the general average, bears its own share of the loss with the other contributing interests.

It seems to me that the only question in the case is whether the operation of pouring the water upon the coals under the above circumstances, and so rendering them unfit to be forwarded to their destination—causing a total loss of the freight to be earned by their delivery at their destination—can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average.

In order to solve this question, it is necessary to consider what are the true principles upon which the right to a general average contribution is founded.

This right and its correlative obligation are not founded upon any contract, nor do they arise out of any relation created by contract between the parties: they spring from a rule of law applicable to all persons who chance to have interests on board of a ship at sea exposed to some common danger, threatening the safety of the whole. It is a law founded upon justice, public policy, and convenience, and rests, as Mr. Parsons says in his Maritime Law, vol. 1, p. 286, upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force. It formed part of the ancient marine law of Europe. It was incorporated into the Roman civil law from the code of Rhodes. This ancient code, which was the prevailing law at least a thousand years before the Christian era, is probably all lost with the exception of this one article, which is preserved in the Digest in the form of a rubric in the following terms: "De lege Rhodiâ de jactu. Lege Rhodiâ cavetur, ut, si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est." "Concerning the Rhodian law of jettison. By the Rhodian law care is taken that, if for the sake of lightening the ship a jettison of merchandise is made, that which is given

for all shall be made good by a contribution of all." This says Parsons (Maritime Law, p. 286), is the foundation of the law of general average, and all besides this consists only of the rules which have been devised to carry this principle into its proper effect in the great variety of cases and through the many consequences which belong to its application. This principle of law must, in my judgment, be regarded as incorporated in and forming part of the unwritten common law of England. The principle is thus laid down by Malyne in the "Lex Mercatoria," published in 1656, and Molloy in his work, "De Jure Maritimo," published in 1744: "Ships being freighted at sea are often subject to storms and other accidents in which by the ancient laws and customs of the sea, in extreme necessity the goods, wares, guns, and whatsoever else shall be thought fit, may in such extremity be flung overboard. The ship arriving in safety, the remainder must come into the average, not only those goods which pay freight, but all those that have obtained safety and preservation by such ejection, even money, jewels, and such like are not exempted." And Molloy goes on to say that "King William the Conqueror and Henry I. ratified this law concerning goods cast overboard by mariners in a storm in imitation of the ancient Rhodian law 'De jactu.'" This is confirmed also by Bracton, lib. 2, fol. 41 b. n. 3; also by Selden in his work "De Dominio Maris," chap. 24, p. 428. It is further confirmed by a statement in 1 Rymer Fœdera, 3rd ed. p. 240, that Edward I. in 1285 sent to the Cinque Ports letters patent declaring what goods were liable to contribution; yet this law does not appear in any statute or written ordinance of English law. Emerigon, in his famous treatise published in 1783, in writing upon this subject, says, "The ancient laws of the seas are the sources whence those should draw who wish to recur to principles. These include rules so much the more sure that they are derived from the nature of things, and these rules form a part of the Law of Nations. They belong consequently to every age and every country." I consider, therefore, that in solving the present question, which is stated never to have been before decided, I am bound to resort to the principles of the maritime law as expressed in the maxim from the code of Rhodes and as expounded in the various works of authority upon the subject.

Let us see what are the contentions put forward in the present case on the part of the merchants who resist the claim to the general average.

First, it is said that the act of destruction of cargo and the consequent loss of freight was not a general average operation at all, because it was brought about or rendered necessary by the spontaneous combustion and inherent vice of the cargo itself, and was therefore a particular average and not a general average act, and for this the judgment of Willes, J. in *Johnson* v. *Chapman* (*sup.*) was cited. In that case cotton had been shipped in a damp state, and in consequence and without external accident burst into a flame, and was on that account thrown overboard, and it was held that the merchant had no claim to contribution on account of the jettison. The application of the principle of that case to the present involves a complete fallacy. All that that case decides is that if the owner of the interest sacrificed was himself in fault, and was the cause of the danger which necessitated the sacrifice, he must bear the loss himself, and could not throw it as a general average on the whole adventure, or, as it has been expressed in one of the decisions, he cannot take advantage of his own wrong. This is strictly in accordance with the maritime law, and had been laid down in several previous decisions. See the cases of *Worms* v. *Storey* (11 Exch. 427), *Schloss* v. *Heriot* (1 Mar. L. C. O. S. 335: 8 L. T. Rep. N. S. 246; 14 C. B. N. S. 59), *The Norway* (2 Mar. L. C. O. S. 168, 254; 13 L. T. Rep. N. S. 50; Brown & Lush, 377), *Robinson* v. *Price* (13 Asp. Mar. L. C. 321, 407; 36 L. T. Rep. N. S. 354; L. Rep. 2 Q. B. Div. 91). In truth, if the principle of *Johnson* v. *Chapman* (*sup.*) has any application to the present question, it is entirely opposed to the contention of the merchant, because he is endeavouring through the fault of the cargo to escape from the claim of the shipowner, who was not in fault, to a contribution on the loss of his freight.

The next contention on the part of the merchants was that this was not a case of general average, because there was in fact no sacrifice of cargo and its incidental freight, inasmuch as the cargo having taken fire, was practically already lost past redemption, and the sacrifice was committed, not for the safety of the adventure, but for the sole benefit of the cargo, and to lessen its destruction; and for this proposition was cited the great authority of Mr. Benecke, and also the practice and custom of British average adjusters, as found in the case of *Stewart* v. *The West India and Pacific Steamship Company* (27 L. T. Rep. N. S. 820; 8 L. Rep. Q. B. 88). Benecke says: "If the master's situation were such that but for the voluntary destruction of a part of a vessel or furniture the whole would certainly unavoidably have been lost, he could not claim a restitution, because a thing cannot be said to have been sacrificed which had already ceased to be of any value." Again, Baily on General Average (2nd edit. p. 40), in referring to this rule of the average stater says: "Damage done to cargo by pouring water down upon it, in order to extinguish a fire which has not touched the goods, is excluded from general average." The contention in support of the disallowance is that it is a moral certainty that the fire would consume the cargo if it be not extinguished by throwing water on the cargo, and so the cargo is in no worse position, although the rest of the adventure be saved by the operation. Mr. Baily in the work referred to (pp. 81, 82), in expressing his dissent from this practice, says: "In defence of this practice no valid reason can be urged; it is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss and on a fanciful distinction between the degree of danger existing in the case of fire and the degree existing when a vessel is on her beam ends or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense." Parsons, in his work on Insurance (vol. ii. p. 287), in commenting on the above passage in Benecke says: "We cannot think that this passage in Benecke rests upon any good reason, and if applied in the terms in which he expresses it, it would exclude nearly all the cases which are regarded both in law and in practice as general average ones. Indeed, these cases may be generally described as cases in which

ship and cargo are exposed to a common peril, by which the whole would be certainly and unavoidably lost unless a part be sacrificed to save the rest, and this sacrifice being made, the residue or a part of it is saved."

There can be no doubt that, according to the universally accepted principles of general average, the following conditions must concur in order to give rise to a claim for contribution: 1. There must be a common danger. 2. There must be a necessity for the sacrifice. 3. The sacrifice must be voluntary. 4. It must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost and consequently of no value. 5. There must be a saving of the imperilled property through the sacrifice.

The question in a case like the present arises from the necessity of drawing the line, marking the logical distinction between the necessity for the sacrifice on the one side, and the hopelessness of saving the sacrificed property on the other.

Emerigon says, chap. xii. s. 29, "It is not enough that a jettison has been made; that measure must have been forced on those resorting to it by the fear of perishing, and a panic terror will not excuse the captain who has had recourse to jettison, without being forced to it by real danger." On the other hand, in a case in the American courts (*Crockett* v. *Dodge*, 3 Fair. 190), a vessel laden with lime was hauled out into the stream and scuttled because the lime was on fire. The lime was destroyed at once, and the ship was saved, but it was held that the ship did not contribute for the lime, because the lime could not possibly be preserved, and the ship was saved by only hastening its destruction. It has been decided in America in the case of *Nelson* v. *Belmont* (5 Duer 310), and in the case of *Nimick* v. *Holmes* (25 Pennsylv. 366), that where a cargo is on fire, and water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for. Lowrie, J., in the latter case, said, the danger is a common one, and the cost of the remedy must be common. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus effected by water in order to save the rest. In the case of *Stewart* v. *West India and Pacific Steamship Company* (*sup.*) in 1872, in which a quantity of bark had been injured by pouring water down the hold to extinguish an accidental fire, Cockburn, C.J., and Mellor and Quain, JJ., expressed their opinion that, according to the common law, the case was one of general average, but the parties having agreed that average was to be adjusted according to British customs, and the case finding that it was the custom at Lloyd's not to treat such a loss as one of general average, the decision was necessarily against the claim. However, in a subsequent case in the year 1878 (*Achard* v. *Ring*, 2 Asp. Mar. Law Cas. 422; 31 L. T. Rep. N. S. 647), the existence of this custom was challenged, and upon a trial before a special jury in London, the custom was negatived, and the principle of the common law and of the maritime law, as recognised by all commercial nations, was applied to the case, and the plaintiffs recovered a contribution in general average for damage done to their goods by the scuttling of the ship to extinguish a fire; and since that time this custom and practice has been discontinued and finally abandoned at Lloyd's. The still more recent case of *Attwood* v. *Sellar* (4 Asp. Mar. Law Cas. 153; 41 L. T. Rep. N. S. 83; 4 Q. B. Div. 342) dealt a further blow to the supposed British customs and usages which were said to differ and distinguish the law of general average in England from that universally accepted; and it may now be considered as fairly established that this important branch of our commercial law is governed by the principles of the common law of England, embracing within it the principles of the general maritime law.

Applying these principles to the facts of this case, I find that the ship and the whole adventure were in imminent danger of destruction from the fire which had broken out in one part of the cargo of coals; that it was prudent and necessary to throw over a portion of the coals to get at the seat of the fire, and to pour down water, both upon the burning coals and also upon all the rest of the coals, including those that were distant from the fire, as well as those adjoining it, for the purpose of arresting and extinguishing the fire and saving the ship and cargo; and also that all the operations were prudent and necessary with the same view, and that the water was poured down with this purpose and intention, and that the operation was successful in saving the ship and a very large portion of the cargo; and, further, that the operation involved a voluntary sacrifice for the benefit and safety of the adventure of a certain portion of the freight, viz, so much as related to cargo damaged by water, and not within the immediate reach of the fire, and which was too much damaged by water to be forwarded to its destination so as to earn freight. These conclusions, upon the principles above stated, establish the claim of the owners of the freight to a contribution in general average from the owners of the other interests, and entitle the defendants to judgment.

Solicitors for the plaintiffs, *Parker* and *Clarke*.

Solicitors for the defendants, *W. A. Crump* and *Son*.

HOUSE OF LORDS.

Reported by C. E. Malden, Esq., Barrister-at-Law.

Nov. 16, 17, 23, 24, 1880, *and Jan.* 13, 1881.

(Before the Lord Chancellor (Selborne), Lords Blackburn and Watson.)

Dahl and Co. *v.* Nelson. Donkin, and Co.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Charter-party — Construction — "So near thereto as she may safely get"—Physical obstruction—Liability of charterer.

The primary obligation of a ship under charter is to proceed, if possible, to the place named in the charter-party; but it is not necessary, in order to free the ship from this obligation, and to substitute an alternative destination, that she should be prevented by a permanent physical obstruction, if the obstruction is such as to cause a delay so unreasonable as to make the prosecution of the voyage impossible from a mercantile point of view.

Where by a charter-party it is provided that a ship shall carry a cargo of timber from the Baltic to the Surrey Commercial Docks, "or so near

thereto as she may safely get and lie always afloat," and shall deliver the same on payment of freight, "the cargo to be received at port of discharge as fast as steamer can deliver," and when she arrives in the Thames the Surrey Commercial Docks are so crowded that she cannot be received in them, and it appears from the evidence that she cannot be admitted for many weeks, the delay is so great as to make it unreasonable for the ship to wait for admission into the docks, so that the alternative in the charter-party comes into operation, and the voyage is at an end when the ship is moored in the river ready to discharge her cargo, and the charterers' liability begins from that date.

THIS was an appeal from a judgment of the Court of Appeal (James, Brett, and Cotton, L JJ.), reversing a judgment of Jessel, M.R.

The case is reported in 4 Asp. Mar. Law Cas. 172; 41 L. T. Rep. N. S. 365; and L. Rep. 12 Ch. Div. 568.

The action was brought by the respondents, who were the owners of the steamship *Euxine*, against the appellants, who were timber merchants in London, to recover demurrage and other charges in respect of the ship under circumstances which appear from the head-note above, and from the judgment of Lord Blackburn.

The action was tried before the Master of the Rolls, who gave judgment for the defendants, but his judgment was reversed, as above mentioned.

In the court below the plaintiffs contended that there was a custom of the timber trade in the port of London for the merchants to provide berths for the discharge of cargoes, but this contention was abandoned on the appeal to the House of Lords.

C. Russell, Q.C., *A. L. Smith*, and *R. T. Reid* appeared for the appellants, and argued that the ship had never reached the place named in the charter-party from no fault of the charterer, and consequently the voyage was never completed so as to make the demurrage payable. The words in the charter-party apply only to a permanent physical obstruction. The master was bound to go into the dock if it was not actually unsafe to do so.

Benjamin, Q.C, *Cohen*, Q.C., and *Rigby*, for the respondents, argued that the ship had in fact arrived when she had got as near the dock as it was practically possible to bring her. The delay was unreasonable in a business sense, and if one party must suffer it should be the charterer, who ought to have provided a proper place for discharging the cargo.

A. L. Smith was heard in reply.

In addition to the cases referred to in the judgments, the following were also cited in argument:

Rodgers v. *Forrester*, 2 Camp. 483;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 299; 42 L. T. Rep. N. S. 845;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244; 34 L. T. Rep. N. S. 526;
Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46; 27 L. T. Rep. N. S. 710;
Ashcroft v. *The Crow Orchard Colliery Company*, 2 Asp. Mar. Law Cas. 397; L. Rep. 9 Q. B. 540; 31 L. T. Rep. N. S. 266;
Davies v. *McVeagh*, 4 Asp. Mar. Law Cas. 149; 4 Ex. Div. 265; 41 L. T. Rep. N. S. 308;
The Alhambra, 4 Asp. Mar. Law Cas. 334; L. Rep. 5 P. Div. 256; 43 L. T. Rep. N. S. 31; subsequently reversed on appeal;
Atkinson v. *Ritchie*, 10 East, 530;
Blight v. *Page*, 3 B. & B. 295, note;
Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190; L. Rep. 4 Q. B. 127; 19 L. T. Rep. N. S. 634; affirmed on appeal, 3 Mar. Law Cas. O. S. 468; L. Rep. 5 Q. B. 544; 23 L. T. Rep. N. S. 165;
The Mersey Docks, &c. Board v. *Gibbs*, 2 Mar. Law Cas. O. S. 353; L. Rep. 1 H. of L. 93; 14 L. T. Rep. N. S. 677.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Jan. 13.—Their Lordships gave judgment as follows:

Lord BLACKBURN.—My Lords: The question in this case is, whether the defendants have broken the contract into which they have entered with the plaintiffs, and the first matter to be considered is, what was that contract? It is contained in a charter-party, dated on June 21st, 1877, in a printed form, filled up in writing, made between the plaintiffs, owners of the *Euxine* steamship, and the defendants, by which it is agreed that the *Euxine* should proceed to a port named, and there load from the defendants a full cargo of deals. This was done, and there is no dispute about that part of the contract. The charter-party then proceeds that the *Euxine*, "being so loaded, shall therewith proceed to London Surrey Commercial Docks, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight," at a specified rate, certain perils mentioned always excepted. The other provisions which are material are as follows: "The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above; and ten days on demurrage, over and above the said laying days, at 30*l.* per day, payable day by day, it being agreed upon that, for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge in lien on said cargo; the cargo to be brought to and taken from alongside the ship at merchants' risk and expense." The *Euxine* was not delayed on her voyage by any of the excepted perils referred to in the charter-party, but, on her arrival at the entrance of the Surrey Commercial Dock, she was refused admittance.

The plaintiffs tried to prove that there was a custom in London as regarded this trade such as should be tacitly incorporated in the written contract; but in this they failed, and consequently the liabilities which the parties have by the contract taken upon themselves must depend upon what is the true construction of the charter-party. The plaintiffs contended in the court below that, by such a charter-party as this, the merchant undertook to procure the ship admission into the dock. Neither the Master of the Rolls, nor the judges in the Court of Appeal, took this view of the charter-party, and it was not much urged at your Lordships' bar. I think it is clear that it is untenable.

The legal effect of the contract, in my opinion, so far as regards the shipowner, is, that he bound himself that his ship should, unless prevented by some of the excepted perils, proceed to the discharging place agreed on in the charter-party. That was in this case the Surrey Commercial Dock, which must, I think, mean inside the dock, with an alternative, "or so

near thereto as she may safely get, and lie always afloat." The first part of the alternative has not been fulfilled. The question in the cause is, whether the second part of the alternative has been fulfilled or not. The legal effect, as regards the obligation on the merchant, is that he bound himself, on the ship arriving at the place where she is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, she got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship might not get safely further than the entrance of the dock, and was entitled to require the merchant to take delivery in the river, which is what, it is said by the plaintiffs, has happened in this case, the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that instead she should go into some other dock. If the ship had been permitted to get into the dock and lie there, but had been unable to get to a discharging berth, the merchant might have brought lighters to her and taken delivery in the middle of the dock. Whether he was bound to do so or not I do not say, for it is not necessary to decide what would have been the rights and liabilities of the parties if she had been admitted inside the dock gate, as this did not in fact happen.

I will only observe that, though in the printed form it is said, "and ten days on demurrage over and above the said laying days," there are no laying days provided in this charter-party in the sense in which I understand these words, and the ten days on demurrage could only begin after the ship had been at the place where the merchant ought to have taken delivery long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charter-party within which the merchant has engaged that the ship should at all events be discharged. which is what I understand by laying days. I think, therefore, that the cases, such as *Brown* v. *Johnson* (10 M. & W. 331), deciding when laying days commenced, have no direct bearing on such a charter-party as this.

Both parties agreed in naming the Surrey Commercial Docks in the charter-party as the dock to which the steamer was to go. I can see nothing amounting to a contract, either on the one side or the other, to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charter-party had left it free to the merchant to select a dock, it might well be that he was bound to select one into which admittance could be procured. *Ogden* v. *Graham* (1 B. & S. 773; 31 L. J. 26, Q. B.) is an authority in favour of that position. And in *Samuel* v. *The Royal Exchange Insurance Company* (8 B. & C. 119), where the merchant directed the shipowner to proceed to the King's Dock at Deptford, and the ship arrived near the dock gates while there was much ice, but the merchant was not able to procure an order to admit it for some days, Lord Tenterden, C.J. ruled that, if the ship remained there waiting for an order to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case.

But where, as in this case, the dock was named from the beginning by both parties, the refusal of the dock authorities to let the ship inside the dock gates was the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appeared from the evidence that before the charter-party was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in London, as near as might be to the dock and deliver there, and that the merchant should take the cargo there and pay the freight, they would have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form, "or so near thereto as she may safely get," and be bound by whatever the legal effect of that might be.

The facts on this part of the case were that it was the practice of the Surrey Commercial Dock Company to give orders for the admission of steamers to their dock to discharge there, which were in practice generally on the application of the charterer or his representative made either before or after the arrival of the steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order she was as soon as practicable admitted into the dock. The company in practice limited the number of orders to so many steamers as they at that time thought they could accommodate with discharging berths. On the 16th July Messrs. Dahl, having probably heard by telegraph that the *Euxine* was about to start, applied for an order for her admission. The superintendent of the docks, Mr. Ross (who died before the trial), wrote the two following letters: "July 19, 1877. Gentlemen, referring to the inclosed orders for steamships *Euxine* and *Chatsworth*, I beg to inform you that on looking over ths list of Gravesend orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessel to be discharged elsewhere." "July 25, 1877. Gentlemen, I much regret to be again compelled to return the inclosed order for the *Euxine* from Soderhamn, but on going round the docks to-day I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat despatch." On the arrival of the *Euxine*, the ship's agent applied to the dock company to take her in, but was refused,

the company having declined to give the order for her admission previously. It appeared in the evidence that there was plenty of room in the dock for the ship to lie afloat inside the dock, but that the company would not admit her until they saw a prospect of being able to give her a discharging birth within a reasonable time. The legal advisers of the defendant thought (whether correctly or not, it is not necessary to decide) that, if once admitted within the dock gate, the merchants would be answerable for all subsequent delay, and the defendant pressed Mr. Griffin, the secretary of the dock company, not to let the *Euxine* enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on Aug. 7th, sent a telegram to the superintendent in those terms: "Can you give *Euxine* immediate discharging berth? If not, on no account admit steamer into dock." This was relied on by the plaintiffs as proving that the defendant hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. Griffin, the dock secretary, that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for, though there was plenty of room for them to lie without discharging, until there was a prospect of giving them discharging berths; and that he refused to admit the *Euxine* on Aug. 7th because he could not then give her a discharging berth, and not on account of the defendant's request; and, on being asked the question expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time. The dock authorities, it seems to me, acted very prudently and properly in what they did, but even if they were wrong the defendant was not responsible for this. Though the secretary must have known at the time he gave his evidence when, as it really turned out, a steamer arriving on the 7th Aug. could have had a discharging berth, neither side asked that question. He does say that if it had been admitted into the dock to lie afloat, it would, in the then state of the traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth; and, as demurrage was at 30*l.* a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the defendant that the steamer should not be admitted within the dock gate, when he believed, whether rightly or wrongly, that the doing so would fix him with the cost of the delay, is evidence that he believed that the delay would be important. The plaintiffs' legal advisers wrote to the defendant the following letter, and received the following answer: "Aug. 7th, 1877.—We are instructed to inform you that the ship *Euxine*, chartered by you, is ready to discharge. The Surrey Commercial Docks Company have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay days begin to-morrow. Should she not be discharged by you with the usual despatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing to-morrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship." "*Re Euxine*, Aug. 8th, 1877.—Our legal advisers tell us to say in reply to your favour of yesterday that the ship is chartered for the Surrey Commercial Docks, and that when the vessel is there we will be prepared to fulfil your clients' contract with us, and take delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock, at the time of his arrival, is full and cannot take him in. He must wait till there is room." Some attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights. It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charter-party to proceed to the Surrey Commercial Dock by merely proceeding to the gate of that dock; but if, under the circumstances, she had, on Aug. 7th, fulfilled the alternative of proceeding "as near thereto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense, and there was no reason why he should not have to bear all the damage occasioned by his refusal to comply with the request to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do.

Two questions arose on these points: First, whether the *Euxine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties; that was a question of fact to be determined on the evidence. Secondly, whether, supposing that fact to be found in favour of the plaintiffs, the *Euxine* had got as near thereto as she might safely get, within the meaning of the contract; that was question of law, depending on the construction of the written contract.

As far as regards the question of law, it is not material when, or by whom the question was first raised, your Lordships having to decide it according to law. But as regards the question of fact depending on the evidence it might be material when it was raised, for if the point had not been raised at all by the plaintiffs, it would have been possible enough that the defendants refrained from calling further evidence which would have altered the case. But in fact it appears, by the shorthand-writer's note, that this was distinctly stated in the opening as part of the plaintiff's case, so that there was ample opportunity for the defendant to produce whatever evidence he could to show that the delay in the present case would not have been unreasonable.

I certainly understand from his judgment that the Master of the Rolls thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship, or by some other matter. In this the judges of the Court of Appeal all agreed with him, and so do I. But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the judges of the Court of Appeal differ from him. I think it far the most difficult ques-

tion in this cause, but I agree with the judges of appeal.

Had the words in the charter-party been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it would have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if a ship cannot get at all it cannot get safely. And there is no authority for putting any other construction on these words.

It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction, either in the text-books or in any decision in our reports before *Shield* v. *Wilkins* (5 Ex. 304) as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause, so as to avoid disputes. Since 1850 there have been a few cases, all of which, I believe, were cited in the argument, but the decision in *Shield* v. *Wilkins* (*ubi sup.*) had no bearing on this case.

In *Schilizzi* v. *Derry* (4 E. & B. 873; 25 L. T. Rep. O. S. 66) the ship under the charter-party was bound to proceed to Galatz or Ibrail, or so near thereto as she might safely get, and load a cargo of grain. The ship having arrived at the Sulina mouth of the Danube, which is ninety miles below Galatz, and still farther from Ibrail, the master found the water on the bar unusually low, so that he could not safely cross the bar until it rose, and gave notice that he required the merchant to load his cargo there, a place where it was neither customary or reasonable to load cargo. The decision as far as regards this point was that, as Lord Campbell, C.J. said, "The meaning of the charter-party must be that the ship is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the Dardenelles, had completed her voyage to Galatz?" In *Metcalfe* v. *The Britannia Ironworks Company* (3 Asp. Mar. Law Cas. 313; 1 Q. B. Div. 613; 35 L. T. Rep. N. S. 796; affirmed on appeal 3 Asp. Mar. Law Cas. 407; 2 Q. B. Div. 243; 36 L. T. Rep. N. S. 451) it was actually contended that the shipowner, who had contracted that his ship would go to Taganrog, or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at Kertch, 300 miles from Taganrog, and that the ship had completed her voyage because she was obstructed in entering the sea of Azof; but the court, both below and in the court of error, agreed with the prior decision in *Schilizzi* v. *Derry* (*ubi sup.*). I think it plain that neither of those decisions touch the present case. Whether the language which Lord Campbell used is quite the most accurate to express his idea may be doubted, but in the case at bar it was both reasonable and customary to unload ships in that part of the river to which the *Euxine* had come, and the docks adjoining.

In *Parker* v. *Winlow* (7 E. & B. 942), and *Bastifell* v. *Lloyd* (1 H. & C. 388; 31 L. J. 413, Ex.) where the charter-party was to proceed to a wharf in a tidal harbour, which could not be reached during the neap tides, or as near as she might safely get, it was held that, the ship arriving during the low tides, the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf, if it could be reached in the ordinary course of navigation, and that the shipowner took on himself the risk of delay from the ordinary course of navigation. The delay in the case at bar was not in the ordinary course of navigation.

Hillstrom v. *Gibson* (3 Mar. Law Cas. O. S. 302, 362; 8 Court of Sess. Cases, 3rd series, 463) in Scotland, and *Capper* v. *Wallace* (4 Asp. Mar. Law Cas. 223; L. Rep. 5 Q. B. Div. 163; 42 L. T. Rep. N. S. 130) were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that, as the quantity of cargo which the ship had to discharge to enable her to lie always afloat at Glagow was small, it was reasonable for her to discharge as she did, and she was bound to do so. Nothing was decided in that case as to the alternative. The Court of Queen's Bench in the latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her, as being the nearest to which she could safely get, or was bound to go farther, depended on whether it was reasonable in all the circumstances to lighten her to the necessary extent, which they thought was not the case.

These are all the cases which were cited in the argument, and, as far as I know, all the cases which exist, in which anything has been said as to the construction of this clause. And I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed.

The question whether a prevention causing delay for any time, however long, but which would terminate, would amount to a prevention within the meaning of the clause, is a much more difficult question. There is no authority directly bearing on the construction of this clause, except *Capper* v. *Wallace*, which was decided after the decision of the Court of Appeal in the present case, and adds no weight to it; but there are decisions so far analogous that they establish the principle on which the Court of Appeal acted, and which, I think, they applied rightly.

It is quite true that the words of the contract are "as she may safely get;" and nothing is said expressly about getting without unreasonable delay; but in *Moss* v. *Smith* (9 C. B. 94), Maule, J., speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says: "It may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total; for in matters of business a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Though the par-

ticular case was a policy of insurance, Maule, J. speaks generally of mercantile contracts.

And on this principle it was held in *Geipel* v. *Smith* (1 Asp. Mar. Law Cas. 268; L. Rep. 7 Q. B. 404; 26 L. T. Rep. N. S. 361), by the whole court, and in *Jackson* v. *The Union Marine Insurance Company* (2 Asp. Mar. Law Cas. 435; L. Rep. 8 C. P. 572), by a majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber (2 Asp. Mar. Law Cas. 435, 441; L. Rep. 10 C. P. 125; 31 L. T. Rep. N.S. 789), that a delay in carrying out a charter-party caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end. I said, in *Geipel* v. *Smith* (*ubi sup.*): "Very different considerations arise where the cargo is already on board, or, as in *Hadley* v. *Clarke* (8 T. R. 259), is already on the voyage; but while the contract still remains executory, I think time is so far of the essence of the contract as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it." I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo. But in this case the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause that would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation, when the cargo is on board.

There was a dissenting minority in *Jackson* v. *The Union Marine Insurance Company* (*ubi sup.*), and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and to decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Bramwell, B., in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add.

The only remaining question is whether the evidence in this case is such as to lead your Lordships to concur in the finding of fact by all the judges in the Court of Appeal, that the delay would have been in this case so great as to make it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of reasonable or unreasonable must always be a question of more or less, and therefore of uncertainty, but that, I think, cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract, and the damage to each party caused by the delay; and if the result be to lead those who have to decide the question to think (to adopt the language of the Master of the Rolls) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable. In the present case it was agreed in the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by Cotton, L.J., that this cast the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the Surrey Commercial Docks, it certainly showed that both parties knew that a prompt despatch was of great consequence to the steamer, and 30*l.* per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to show that a prompt despatch was to a great extent the object of the contract. It does not appear distinctly how long it would have taken to unload the steamer with lighters in the river, nor what it would have cost the merchant, but it does appear that the steamer was willing to go into the Millwall Dock, where she could have been discharged at the same cost as in the Surrey Dock, in about the same time. The defendant refused to assent to this, and I do not think he was bound to assent. He refused because he thought, not that the cargo would be worse, but that the value of it would be diminished so as to make him a loser by about 120*l.* Assuming this to be so, he required the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks. and five weeks at 30*l.* a day would represent a loss to the shipowner of more than 1000*l.* I cannot think that reasonable. The result is, that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: This is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment. [His Lordship went through the facts of the case, and continued:] Various questions were argued in the courts below, but the only issue raised between the parties in this appeal is, whether the *Euxine*, on 7th Aug. 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charter-party. It is not maintained by the respondents, the owners of the *Euxine*, that the vessel had proceeded to the Surrey Commercial Docks. On the contrary, their contention is that it had become impossible, in the sense of the charter-party, for her to obtain admission to the dock, and, consequently, that she must be held to have completed her voyage whenever she reached her moorings at the Deptford Buoys, seeing that she was then as near to the dock as she could safely get and lie afloat. The appellants, on the other hand, contend that, by the conditions of the charter-party, the *Euxine* was bound to proceed to her primary destination, unless prevented by some permanent physical obstacle. They further maintain that the circumstances which occasioned the exclusion of the *Euxine* did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was therefore bound to wait, at owner's risk, until the obstruction was removed, and then to enter the dock for the purpose of discharge. Both parties seemed to concede, and I think it may be taken as settled law, that when, by the terms of a charter-party, a loaded ship is destined to a particular dock, or as

near thereto as she may safely get, the first of these alternatives constitutes a primary obligation, and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense "impossible" to do so. It is only in the case of her entrance into such dock being barred by such "impossibility" that the owners can require the charterers to take delivery of her cargo at a place outside the dock. When a vessel in the course of her voyage is stopped by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near thereunto as she could safely get," and therefore cannot claim to have completed the voyage in terms of the second alternative. See *Schilizzi* v. *Derry* (*ubi sup.*), also *Metcalfe* v. *The Britannia Ironworks Company* (*ubi sup.*). It was observed by Lord Campbell, C.J., in the former of these cases, that the meaning of these words in the charter-party, "so near the port of lading as the ship may safely get," must be that she "should get within the ambit of the port, though she may not be able to enter it." In the present case, it does not admit of dispute that the *Euxine*, when lying at the Deptford Buoys, was as near to the Surrey Commercial Docks as she could safely get, if it be assumed that it had become, within the meaning of the charter-party, "impossible" for her to get into the dock. The appellants maintained that there can be no impossibility within the meaning of the contract, unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charter-party, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the appellants' contention. The exclusion of the *Euxine* from the Surrey Docks in Aug. 1877, was owing to a rule made by the statutory authorities entrusted with the administration and control of the docks. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel, or to her being summarily turned out of the dock, if she did get into it, does in reality constitute a physical obstacle.

The controversy between the parties appears to me accordingly to be narrowed to this issue—whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible within the meaning of the charter-party, for her to get into the Surrey Commercial Docks.

In providing alternative destinations, the charter party does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms express any distinction between the alternatives; and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and on the presumption that both parties would, from considerations of common interest, have agreed to that effect if they had made it a matter of express contract.

The question before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to mean an obstacle which will remain for ever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary. It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charter-party; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their common interests, and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it; and when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend, for they had neither thought nor intention regarding it, but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on the 7th Aug., unless it be established that the delay which would have taken place before she was admitted to the Surrey Docks would have been so great that the parties, had they anticipated and provided against its occurrence on the 21st June 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view of Brett, L.J., that the shipowner must bring his ship to the primary destination named in the charter-party, "unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable."

None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearing upon the question before the House. Most of these authorities related to the question whether had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterer's risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay days stipulated in her charter-party, it might in that event have been plausibly contended that the *Euxine* fell within the principle

of decision in *Burmester* v. *Hodgson* (2 Camp. 483), and not within the rule established in *Randall* v. *Lynch* (2 Camp. 352). But it does not appear to me to be necessary to decide the point, because the *Euxine* never did get into dock; and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

The cases of *Parker* v. *Winlo* (*ubi sup.*) and *Bastifell* v. *Lloyd* (*ubi sup.*) come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowledge, that the primary place of discharge specified in the charter party was a tidal port, was bound to take the risk of the tides being unfavourable when his vessel arrived, and to complete the voyage by proceeding to that place at spring tides. It appears to me to be a reasonable inference from these decisions that no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a particular port or dock, and not lasting beyond ten days or a fortnight, is to be regarded as permanent obstruction; but that the ship must wait, and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

In *Geipel* v. *Smith* (*ubi sup.*) and *Jackson* v. *Union Marine Insurance Company* (*ubi sup.*) certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to her place of loading after the blockade was raised, and for the other after her repairs were completed. In *Geipel* v. *Smith* the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench being satisfied that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charter-party was thereby discharged. In *Jackson* v. *Union Marine Insurance Company*, the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charter-party remained in force notwithstanding the mishap that had befallen the ship, and that the plaintiff was entitled to demand either specific performance or damages from the charterer. At the trial of the cause the jury, in answer to questions put to them by the presiding judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the cargo agreed upon at the end of such time; and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict was entered for the defendants, leave to move being reserved to the plaintiff; and the case was thereafter argued on a rule before the Court of Common Pleas, under an agreement that the defendants should be at liberty to argue that the findings of the jury were against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the plaintiff was accordingly entitled to recover under his policy on freight. And upon appeal the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. It was precisely the same question which arose from decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charter-party could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but, seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether, I conceive that, *à fortiori*, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination.

That leaves only the question of fact, whether the state of the Surrey Commercial Docks in Aug. 1877 was such as would have unreasonably delayed the discharge of the *Euxine* within that dock. Had I been called upon to decide that question in the first instance, I should have had great difficulty in coming to any conclusion satisfactory to my own mind. I agree that the question is sufficiently raised by the pleadings, and that it was in view of the parties, and was actually discussed in the course of the argument which is interwoven with the evidence in this case, although it is not noticed in the judgment of the Master of the Rolls. But I cannot resist the impression that in their anxiety to prove or disprove the alleged custom of the port, which has now been eliminated from the case, the parties have omitted to direct their evidence to many points upon which it would have been, in my opinion, desirable that a judge unacquainted with the port of London should receive information. In the absence of such information I have done my best to sift the evidence, and the result is that I am not disposed to differ from the Court of Appeal. I think it may be taken as proved that the block occasioned by the great demand for steamship berthage in Aug. and Sept. 1877, although that was rapidly becoming the normal condition of the Surrey Docks in the preceding months of June and July, was due not to ordinary but to exceptional causes. And, seeing that on the 4th Aug. the authorities could not undertake within a month, or any other given time, to admit the *Euxine* into the dock, and even on the 23rd Aug. they were not in a position to give a more definite and satisfactory undertaking, it appears to me to be safe to conclude that the length of time for which the *Euxine* must have waited in the port of London in order to dis-

charge in the Surrey Docks would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charter-party, could reasonably have contemplated. I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

The Lord Chancellor (Selbourne) concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Plews, Irvine,* and *Hodges.*

Solicitors for the respondents, *Druce, Sons,* and *Jackson.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

June 1 *and* 30, 1880, *and March* 7, 1881.

(Before Bramwell, Baggallay, and Brett, L.JJ.)

Burnand and others *v.* Rodocanachi, Son, and Company.

Marine insurance—Valued policy—War risks—Money paid to the United States under the Geneva Award—Compensation to American subjects in respect of loss exceeding insurance—Rights of underwriters—Effect of American Act of Congress.

Plaintiffs, underwriters in England, underwrote a valued policy, including war risks, on cargo belonging to defendants, shipped on board a United States vessel. The real value of the cargo was more than the amount named in the policy. The cargo was destroyed by the Confederate cruiser Alabama, *and plaintiffs paid the amount named in the policy to defendants as for an actual total loss.*

In pursuance of the Geneva Award, made under the Treaty of Washington, the British Government paid a sum of money to the United States Government in respect of losses caused by the Alabama. *An act of Congress was passed establishing a court for the distribution of this money. The Act provided that no claim should be allowed for loss in respect to which the party injured had received compensation from insurers, but that if such compensation was not equal to the loss suffered, allowance might be made for the difference; that no claim should be allowed in favour of any insurer, either in his own right or as assignee or otherwise, unless he showed that his losses by war risks exceeded his gains in respect of war risks; and that no claim should be allowed in favour of any person not entitled at the time of loss to the protection of the United States.*

Defendants claimed under this Act, and recovered for the difference between their actual loss and the amount insured.

Plaintiffs sued defendants for the amount so recovered.

Held (by Bramwell and Brett, L.JJ., Baggallay, L.J. dissenting, and reversing Lord Coleridge, C.J.), that, although the value in the policy was conclusive as between the parties, the sum awarded by the United States court to defendants was not part of the salvage of the cargo insured, and therefore defendants did not hold it as trustees for the underwriters, and plaintiffs were not entitled to recover.

Action by the plaintiffs, English underwriters, against the defendants, owners of a cargo shipped on board a United States vessel, on which the plaintiffs had underwritten a valued policy including war risks, and which had subsequently been destroyed by the Confederate cruiser *Alabama.*

The nature of the plaintiffs' claim, the facts of the case, and the material clauses in the Act of Congress under which the defendants had received compensation, are fully stated in the judgment of Lord Coleridge, C.J., before whom the action was tried without a jury on the 1st June 1880.

Butt, Q.C., *Cohen,* Q.C., and *J. C. Mathew* for the plaintiffs.

The *Attorney-General* (Sir Henry James) and Hon. *A. E. Gathorne Hardy* for the defendants.

Cur. adv. vult.

June 30, 1880.—Lord Coleridge, C.J.—In this case 15,000*l.* has been paid by the plaintiffs to the defendants on a valued policy effected with the plaintiffs at a premium covering the war risks, the subject of the insurance. The cargo of the ship *Lamplighter,* a cargo of tobacco, was totally destroyed by the *Alabama.* The loss of the cargo of the *Lamplighter* formed one of the items of the claim made by the United States against Great Britain, which claim was dealt with by the Treaty of Washington in May 1871, and by the award subsequently made at Geneva, under that treaty. When the sum awarded under that arbitration had been paid by Great Britain to the United States, it was dealt with, and payments were made out of it to claimants by a court constituted under an Act of Congress passed in 1874, the provisions of which Act undoubtedly bound the court and the suitors in it. In that court the defendants were suitors, and were awarded by the court a sum of many thousand pounds under the provisions of the 12th section of the Act of Congress, which it is important to set out in full. It provides that "No claim shall be admissible or allowed by said court for any loss or damage for or in respect to which the party injured, his assignees or legal representatives, shall have received compensation or indemnity from any insurance company, insurer or otherwise; but if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered allowance may be made for the difference. And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights, gains, or advantages, or for wages of officers or seamen for a longer time than one year next after the breaking up of a voyage by the Acts aforesaid; and no claim shall be admissible or allowed by said court by or on behalf of any insurance company or insurer either in its or his own right, or as assignee or otherwise in the right of a person or party insured as aforesaid, unless such claimant shall show to the satisfaction of said court that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in

respect to such war risks, and in case of any such allowance the same shall not be greater than such excess of loss; and no claim shall be admissible or allowed by said court arising in favour of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States; and no claim shall be admissible or allowed by said court arising in favour of any person not entitled at the time of his loss to the protection of the United States in the premises, nor arising in favour of any person who did not at all times during the late rebellion bear true allegiance to the United States."

Two things are clear from the facts as applied to this section: (1) that the defendants got their money from the court on the proof, or allegation at least, that their actual loss in respect of the cargo of the *Lamplighter* exceeded the compensation or indemnity paid them by the plaintiffs under the policy; and (2) that the money could not have been obtained from the court either by the plaintiffs suing in their own name, or by the defendants suing on the plaintiffs' behalf; and the question is, now that the defendants have obtained the money under these circumstances, can the plaintiffs recover it from them? in other words, have the defendants obtained the money under circumstances which make them in respect of it trustees for the plaintiffs?

Two points arise: (1) Is the value in the policy which has been paid absolutely conclusive, in case of actual total loss, between the parties to the policy? (2) Was the payment of their money to the defendants more than a free gift, a pure act of grace on the part of the United States?

As to the first question, there has been an actual total loss, a positive complete destruction of the thing insured; and I think that, in this case, the valuation in the policy is conclusive between the parties. They have by agreement settled the value, and not left it open to future inquiry and dispute as between themselves (*Shawe* v. *Felton*, 2 East, 109); per Lord Abinger, delivering judgment in *Young* v. *Turing* (2 M. & G. at p. 601). It is conclusive between the parties in respect of all rights and obligations which arise upon the policy (*Bruce* v. *Jones*, 1 Mar. Law Cas. O. S. 280; 7 L. T. Rep. N. S. 748; 1 H. & C. 769; 32 L. J. 132, Ex.), and (a very strong case on this point, though perhaps not so strong upon the other) *North of England Insurance Association* v. *Armstrong* (3 Mar. Law Cas. O. S. 330; 21 L. T. Rep. N.S. 882; L. Rep. 5 Q.B. 244). Even the cases which it is said show the valuation not to be for all purposes conclusive, are, when looked at carefully, and their principle considered, no exceptions to the general rule. *Irving* v. *Manning* (6 C. B. 391) shows, indeed, that, in ascertaining whether or not there has been in fact a constructive total loss, the valuation in the policy is to be disregarded on principles of sense and justice; but where the fact of the constructive total loss is *aliunde* established, the valuation in the policy fixes conclusively the sum which the insurers are to pay. If, then, there was in this case any right in the defendants, it arose out of the subject matter of the insurance, and the valuation in the policy was conclusive between the plaintiffs and defendants.

But, secondly, was there any right? Was the awarding of the money by the United States court merely a free gift of the money, a mere act of grace on the part of the United States Government? If it were, I am of opinion that this action would clearly be not maintainable, and, at first sight, there is much to be said for the contention that it is a mere act of grace. The money out of which this is paid to the defendant is a sum of money paid by Great Britain to the United States, from one sovereign state to another; and *Rustomjee* v. *The Queen* (34 L. T. Rep. N.S. 278; 36 L. T. Rep. N. S. 190; 1 Q.B. Div. 487; 2 Q.B. Div. 69) is a distinct authority for holding that money being paid by one sovereign state to another in respect of war losses occasioned by the paying state to the subjects of the receiving state, gives no legal right whatever to a particular subject of the receiving state, compensation for whose loss has been paid to that state, capable of being enforced in any court against the Sovereign or the Government of that state. It is therefore no doubt clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character.

But it seems to be equally clear, as the result of great authorities both in England and in America, that, if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them in respect of what they so recover trustees for those who in equity and justice are entitled to it. This appears to me to have been held in principle by Lord Northington, Lord Hardwicke, and Chancellor Kent, when Chief Justice of New York. The cases of *Blaauwpot* v. *Da Costa* (1 Eden, 130), *Gracie* v. *Cockran* (1 Ves. sen. 98), and *Randal* v. *New York Insurance Company* (8 Johnson's N.Y. Rep. 237) appear to me clearly to show that these great lawyers would have held the defendants in this case liable. The language of Lord Hardwicke and Lord Northington appears to me to show that there is a right to the benefit or the result of which the insurers are entitled. The language of Chancellor Kent, it may be said, is extra-judicial, for there was not such right in existence in the case before him. It is so; but the judgment is considered, and the deliberate opinion of Chancellor Kent is an opinion to which great deference is due.

If this money had been received by the defendants before the plaintiffs had been sued, or if the cargo had not been physically destroyed, but had been captured and restored by the United States in specie, could it be maintained that the full amount of the policy would nevertheless have been due from the plaintiffs? I think it could not, yet in principle there is no distinction between the cases.

It has been said that the Act of Congress prevents the plaintiffs from recovering. Probably in the American court that is so; but the Act of Congress cannot affect the rights of litigants in English courts, and if the defendants are possessed of money to which, according to the principles of English law the plaintiffs are entitled, an English court must give it to the plaintiffs, although it may have been the intention of the American statute by which the defendants got the money

that the plaintiffs should not have it. For these reasons I give judgment for the plaintiffs.

The defendants appealed from this judgment.

March 7.—The *Attorney-General* (Sir H. James) and Hon. *A. E. Gathorne Hardy* for the defendants.—The plaintiffs are not entitled to recover here, for the sum awarded to the defendants by the United States Government was not a sum to which they had any claim that could have been enforced at law if the Government had not been willing to allow it. This distinguishes the present case from *The North of England Insurance Association* v. *Armstrong* (3 Mar. L. C. O. S. 330; 21 L. T. Rep. N. S. 822; L. Rep. 5 Q. B. 244), and there is this further distinction, that in that case damages for the loss of the vessel had been recovered by the owners in the underwriter's name, whereas here no claim by, or on behalf of, the underwriters could have been supported in the American court. *Randal* v. *Cockran* (1 Ves. sen. 97) and *Blaauwpot* v. *Da Costa* (1 Eden. 130) do not support the judgment of Lord Coleridge. In those cases the money received by the owners was received as salvage, and there was nothing like the Act of Congress here to prevent its having that character, or to interfere with the claim of the underwriters. It is true that the Act of Congress is in no way binding on the English Courts, but it shows the character of the compensation received by the defendants. The dictum of Kent, C.J., in *Gracie* v. *New York Insurance Company* (8 Johnson's N.Y. Rep. 237), where he speaks of the United States Government as becoming a trustee, is extra-judicial and is not correct, for the Government could not be liable as a trustee would. *Simpson* v. *Thomson* (3 Asp. Mar. L. C. 567; 38 L. T. Rep. N.S.; 3 App. Cas. 279) shows that the plaintiffs, being underwriters, cannot assert a right to this kind of compensation for the loss of the property insured. where such compensation could not have been recovered by the owners.

Butt, Q.C. (*Cohen*, Q.C. and *Hollams* with him) for the plaintiffs.—The present case is governed in principle by *North of England Insurance Association* v. *Armstrong* (*ubi sup.*). In *Simpson* v. *Thomson* (*ubi sup.*) Lord Cairns, C. says: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss;" and in *Stewart* v. *Greenock Marine Insurance Company* (2 H. of L. Cas. at p. 183), Lord Cottenham, C. says: "In all cases in which the subject is not actually annihilated the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather, such property vests in the underwriters." Both these statements of the law are, in point here, and the latter decision shows that, to entitle the underwriters to any advantage incident to the property insured, there need be no existing right in the assured to such benefit at the time of the loss. Here there was no right in the defendants as against the United States Government at first, but when the Act of Congress passed, it gave him a right. Unless it can be said that the awarding of compensation is a pure matter of grace and bounty on the part of the United States Government, and not incident to the insurance, the underwriters are entitled. This is no more an act of bounty and grace than was the action of the British Government in the cases of the Spanish reprisals, *Randal* v. *Cockran* and *Blaauwpot* v. *Da Costa* (*ubi sup.*). The United States Government, by passing the Act of Congress, have appropriated money to the defendants' claim to compensation. Then, as to the contention that the plaintiffs' claim is excluded by the terms of the Act of Congress, surely that Act cannot deprive English underwriters of their rights in English Courts of Justice.

Gathorne Hardy replied.

Bramwell, L.J.—I cannot (though I say so with the greatest respect) think that the judgment of Lord Coleridge is right; and, although the court is not unanimous, it seems to me that it would be useless to take time to consider our judgment, for what we have to decide is a short point, and there is no complication in the case. Lord Coleridge thought that there were only two points which it was necessary to consider, for he said in the course of his judgment: "Two points arise: first, Is the value in the policies which have been paid absolutely conclusive in case of actual loss between the parties to the policies? and secondly, Was the payment of this money to the defendants more than a free gift, a pure act of grace on the part of the United States."

Now I venture to think that there is a third, and a most important point, which is this: Suppose this was a free gift, was it a gift which could be called a portion of the salvage of the thing insured?

I agree with the reasoning and the conclusion of Lord Coleridge on the other points; and, agreeing with his reasoning, I should have thought that if the money had been awarded because the cargo was taken by the *Alabama*, *simpliciter*, it would have been a portion of the salvage, and the present case would have been within the principle of the cases referred to and relied upon in his judgment.

But then arises the third question, which was omitted in Lord Coleridge's judgment, namely, Was this given as salvage? I am clearly of opinion that it was not. In considering this question, we must look at the Act of Congress. It says that no claim shall be allowed for any loss in respect of which compensation or indemnity has been received from insurers, but that if an owner insures by a valued policy for an amount which is under the real value of the property insured, he shall receive nothing for the policy, but for the under-insurance he shall receive an indemnity. I may use Mr. Hardy's argument as to this question. Suppose there were a subscription or a grant of money awarded for the purpose of encouraging people to insert moderate values in valued policies, and that a person received an indemnity for a loss from the sum so subscribed or awarded, it seems clear to me that this would not be salvage. Suppose the cargo got safe into port after payment had been made for a loss, so that the owners received the benefit of the full value of the cargo, in such a case as that could the insurers recover back more than the amount

which they had paid under the policy? Again the defendants might go before this court in America, and ask for more compensation on the ground that they had not been really indemnified if the plaintiffs are entitled to recover in this action. On a state of facts like that in the English cases which have been referred to, *Blaauwpot* v. *Da Costa* and *Randal* v. *Cockran*, and that referred to by Kent, C. J. in *Gracie* v. *The New York Insurance Company*, if proceedings had been taken in the name of the underwriters saying, "We are entitled and we will make the assured a defendant if he will not support our claim," they would have had a cause of action against him; but in the present case could an action be maintained by the underwriters in the United States? Not for a moment. It is said that the Act of Congress cannot take away the rights of parties in the English courts. That is true, but this money was given under the Act, and it seems to me that in the distribution of it the maxim *Cujus est dare ejus est disponere* applies. I am of opinion that this money is not salvage, and that the defendants are entitled to keep it, and are not bound to hand it over to the underwriters, and therefore that the judgment ought to be reversed.

Baggallay, L.J.—I have the misfortune to differ from my learned colleagues in this case, for I think that the view adopted and the reasons given by Lord Coleridge are correct, and I agree with them. If the distribution of this money were a mere act of grace on the part of the United States Government, it is clear that there would be no case made out on the part of the plaintiffs; but I cannot distinguish the present case from the cases of the Spanish reprisals, to which our attention has been called (*Blaauwpot* v. *Da Costa* and *Randal* v. *Cockran*). No doubt the Goverment, both in those cases and in the present, could have done as they thought fit, and conld not have been compelled to distribute the money; but they have done so, and in the present case, just as in the others, the fund is directed to be distributed among the persons who may be found to be entitled to receive a share of it. Therefore in those cases persons in a similar position to that of the present plaintiffs have been held entitled to recover. It is said here that the money paid by the United States Government was not paid in respect of anything covered by the insurance, but in respect of the difference between the amount of the insurance and the real value of the cargo. But this is a valued policy, and bearing in mind the principle laid down in *The North of England Insurance Association* v. *Armstrong* (*ubi sup.*) I think the underwriters are entitled to recover. It is clear that the claims before the United States Commissioners were made in respect of the loss of the *Lamplighter*, and the destruction of the cargo belonging to the defendants, which was the subject matter of the insurance. Therefore in my view this appeal ought to be dismissed.

Brett, L.J.—If we had not had plenty of time to consider the point, I should think it right to reserve judgment, as the court is not unanimous. This money was in the first place recovered by the American Government from England by treaty. The United States Government did not bind itself in any way as to the disposal of the money, and there was no obligation on it to give any of that money to the present defendants. Therefore there was a sum of money in the hands of the Government, and there was no obligation binding the Government as to its disposal. The Government was at liberty to make a gift of it to any person, bnt was not bound to do so.

If it had been paid over as a portion of the salvage, it may be that the mere fact that there was no obligation on the part of the Government would not prevent the money from being payable to the underwriters. That may be the effect of the cases before Lord Hardwicke and Lord Northington—*Randal* v. *Cockran* and *Blaauwpot* v. *Da Costa*—but I doubt if that is the principle of those decisions. I should think the principle must be that the Government had recovered the money for the assured; but if that were so, the money could not be recovered from the Government. If these decisions proceeded on the supposition that the money was a pure gift on the part of the Government, and was handed over to the assured as such, I could not follow the reasoning, and, unless we are bound by the decisions, I should say that we ought not to follow them. If the money was paid over in the present case as part of the salvage of the property insured, these cases might be authorities in favour of the contention on behalf of the plaintiffs.

In my opinion, however, the true principle is that the United States Government did not pay this money as salvage, that it was paid, not for the loss of the goods, but as a gift, because the owners of the goods were not insured to the full value of what they had lost. The Government would have paid the owners of the goods if they had not been insured at all, or if they had entered into a policy, but could not recover from the underwriters. The payment was not in respect of the loss, but because the owners were not fully insured.

The present case is quite different from the English cases to which I have already referred, because here the money could only be recovered in America before one court. If the present defendants had sued in that court, stating that they were suing for the underwriters, or if the underwriters had sued in their own names not one penny could have been recovered. In the English cases, if the assured had declared that he was suing as trustee for the underwriter, or if the underwriter were suing in his own name, the person so suing would recover all the money; but then the Government would pay as matter of salvage. Here the assured could not recover on behalf of the underwriters. I am of opinion that the Act of Congress makes it a free gift, whatever money is paid, because the owners are underinsured, and therefore that this is distinguishable from the English cases, and the judgment ought to be reversed.

Judgment reversed.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Walton*.

Solicitors for defendants, *Markby Stewart*, and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

May 10 *and* 11, 1881.

(Before Sir R. PHILLIMORE.)

THE LEON.

Pleading—Demurrer—General maritime law—Foreign law—Lex loci—Lex fori.

Collisions between ships when one or both are foreign, on the high seas, are questions communis juris, and liabilities created by them are to be decided by the general maritime law of liability as administered in the court where the cause is tried.

By general maritime law the liabilities of the ship and of the owners are identical for damages arising from collision.

A collision took place on the high seas between a British and a Spanish ship; both vessels sank. The English owners commenced a suit against the Spanish shipowners, who had an office in England. The Spanish shipowners appeared, and pleaded that by Spanish law there was no personal liability.

Held, a bad defence, as the liability was governed by general maritime law and not by Spanish law.

THIS was a demurrer to a portion of a statement of defence.

The plaintiffs, the owners of the British steamship *Harelda*, brought an action against Olano, Laringa, and Co., owners of the steamship *Leon*, for damages sustained by them from a collision between the *Harelda* and *Leon*, on the high seas, on the 6th Jan. 1881.

Both the *Harelda* and the *Leon* had sunk with their cargoes in consequence of the damage sustained in the collision.

Messrs. Olano, Laringa, and Co. were merchants carrying on business in Spain and at Liverpool, and the *Leon* was sailed under the flag of Spain.

The writ in the action, which was *in personam*, was issued on the 10th Jan., and on the 20th an appearance was entered for the defendants.

The statement of claim delivered on the 1st March alleged that "the collision was caused by the neglect or default of those on board the *Leon*."

The statement of defence, delivered the 25th March 1881, besides denying the negligence and charging that the "collision was caused by the negligent and improper navigation of the *Harelda*," also contained the following paragraphs:

1. About 2.30 a.m. on the 6th Jan. 1881, the screw steamship *Leon*, of 1650 tons register, of which the defendants, who were and are subjects of the King of Spain and domiciled in Spain, were part owners . . . . was off the coast of Portugal about twelve miles from the shore.

10. The defendants further say that before and at the time of the said collision the *Leon* was a Spanish ship sailing under the Spanish flag, and wholly owned by subjects of the King of Spain, and that if the said collision was occasioned by an improper or negligent navigation of the *Leon* (which the defendants deny) it was wholly occasioned by the negligence of the master or mariners of the *Leon*, and not by such owners, or the defendants, or any of them, and that by the law of Spain in force at the time of the happening of the said collision and now, the masters and mariners of a ship, and not the owners, are liable in damages in respect of a collision occasioned as in the statement of claim alleged, and by such law the defendants are not liable in respect of the damages proceeded for in the action.

The plaintiffs joined issue on the defence so far as the merits of the case were concerned, and also demurred to paragraph 10 in the following terms:

2. The plaintiffs also demur to paragraph 10 of the statement of defence, and say that the same is bad in law, on the ground that the matters therein afford no defence in law to the plaintiffs' claim, in whole or in part, and on other grounds sufficient in law to sustain this demurrer.

The demurrer was argued on the 10th and 11th May.

Benjamin, Q.C. and *Myburgh* in support of the demurrer.—The defence raised by paragraph 10 is bad in law. It is immaterial what the law of Spain is; when a collision takes place on the high seas, the liability of the parties is governed by the general maritime law, though the measure of it is ruled by the law of the place where the case is tried. In *The M. Moxham* (3 Asp. Mar. Law Cas. 95, 107; 1 P. D. 107; 34 L. T. Rep. N. S. 559), the defence of Spanish law was held valid, but because it was damage done to real property while in Spain, not on the high seas. Before the Regulations for Preventing Collisions at Sea had been adopted by other nations, and before conventions had been made concerning them, and whilst therefore they were only a portion of the municipal law of this country, it was held that they did not apply to a collision between a British and foreign ship on the high seas, even when tried in this country:

The Saxonia, Lush. 40; 6 L. T. Rep. N. S. 6; 3 Mar. Law Cas. O. S. 192.

"Generally, when a collision takes place between a British and foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place. If the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to *lex fori*:"

The Zollverein, Swab. 96, at p. 99.

It is a rule of general maritime law that when a collision takes place the ship which has wrought the wrong is liable for its consequences; that is, if the ship were here she could no doubt be sued. In fact the owners are here and have appeared; they are sued simply as merchants at Liverpool. It may be that they are in one capacity Spaniards and subjects of the King of Spain, as alleged in the defence, but they are also merchants carrying on business at Liverpool, and under the protection of the laws of England, and therefore subjects of the Queen of England, and liable to be sued here by ordinary process. "If a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, it would be hard to seize upon his goods; but a residence not attended with these circumstances ought to be

considered a permanent residence: (Boyd's Wheaton, s. 321.) The character of a British merchant is gained by residence, as in this case, for the purposes of trade:

The Indian Chief, 3 Ch. Rob. 12.

Even assuming that the owners of the ship were Spaniards, and only Spaniards, the case would be governed by general maritime law as administered in this country; and if they are, in consequence of the residence, British merchants, then the case is to be decided by English law, if that should differ from general maritime law, but there is no pretence for saying it should be governed by Spanish law.

Webster Q.C. and *E. C. Clarkson*, Q.C. against the demurrer.—Our statement in paragraph 1 of a Spanish domicile is not demurred to, and therefore for the purposes of this argument it must be taken to be admitted. It is perfectly true that by general maritime law the ship is liable for the results of a collision, and that also is the rule of Spanish law, and had it been material it might have been so stated in the 10th paragraph. but as the ship is lost the liability is immaterial. But the question of the liability of a shipowner for the acts of a ship's master is no part of general maritime law. It is a question of principal and agent, to be decided by the law of the flag which establishes and regulates that relation:

The General Steam Navigation Company v. *Guillon*, 11 M. & W. 877;
Story's Conflict of Laws, s. 423 h;
The Mary Moxham, 1 P. Div. 43, 107; 3 Asp. Mar. Law Cas. 95, 191.

By general maritime law there is no arbitrary limitation of liability, and if that law is to prevail a foreign ship could not in any case, nor a British ship in case of collision with a foreign ship, take advantage of the British statutes, which enact the arbitrary limitation of 8*l.* per ton. In case of damages arising to goods on board the law of the flag does certainly apply:

Lloyd v. *Guibert*, L. Rep. 1 Q. B. Div. 155; 13 L. T. Rep. N. S. 602; 2 Mar. Law Cas. O. S. 26, 283.

The law which we set up is the law of many maritime states; it is certainly the law in Holland.

The Dundee, 1 Hagg. 120, at p. 128.

This is a personal action against certain Spanish subjects for the consequences of the act of another Spanish subject, and it is in the power of the Government of Spain to say how far he shall be liable for such acts. Suppose a collision between two Spanish ships on the high seas tried in this country, could the court give a remedy to either which neither possessed before his own tribunals? Our English law of limitating liability would not apply to foreign ships at all, nor to English vessels in collisions with foreign ships, were it not for the express words of the amending statute (Merchant Shipping Act 1862) which the courts are bound to obey:

The Amalia, 8 L. T. Rep. N. S. 805; Br. & Lush. 151.

Myburgh in reply.—In addition to the cases mentioned above, the following were referred to in the course of the argument:

Cope v. *Doherty*, 4 Kay & J. 367; 31 L. T. 207;
The Wild Ranger, Lush. 553; 7 L. T. Rep. N. S. 725; 1 Mar. Law Cas. O. S. 206, 275.
The Volant (*a*), 1 W. Rob. 390; 1 Notes of Cases 503;
The Druid, 1 W. Rob. 391; 1 Notes of Cases, 444;
The Johann Friederich, 1 W. Rob. 35;
The Girolamo (*a*), 3 Hag. 169.

Sir ROBERT PHILLIMORE.—This is a case in which it appears an English vessel was run down by a Spanish vessel on the high seas and was sunk. She brought her action against some of the owners resident in this country, and the defence they set up in the tenth paragraph of their statement of defence is: "that before and at the time of the said collision the *Leon* was a Spanish ship sailing under the Spanish flag, and wholly owned by subjects of the King of Spain and that if the said collision was occasioned by any improper or negligent navigation of the *Leon* it was wholly occasioned by the negligence of the master or mariners of the *Leon* and not by such owners or the defendants or any of them, and that by the law of Spain in force at the time of the happening of the said collision and now, the master and mariner of a ship, and not the owners, are liable in damages in respect of a collision occasioned as in the statement of claim alleged, and by such law the defendants are not liable in respect of the damage proceeded for in the action." This plea is demurred to, and the question is whether the demurrer can be sustained or not.

A great deal has been said upon the question of what law is applicable to this case. Now there is no doubt as to the existence of the general maritime law, and in the few observations I shall make it is not necessary to go very abstrusely into the subject, because two cases of recent date seem to dispose of the question.

In the first place, it has not been denied that if the *res* had been seized in this case the liability to damages could not be denied. In the case of *The Druid* (1 W. Rob., at p. 399), the learned judge, Dr. Lushington says: "The liability of the ship and the responsibility of the owners in such cases are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ*. No responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against.

What then is the responsibility of the owners? In the same volume, in the case of *The Volant* (1 W. Rob., p. 387, and 1 Notes of Cases, p. 503), Dr. Lushington says: "By the ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation the owners of the damaged vessel might resort either to the courts of law or to the Admiralty Court, and if they preferred the latter they had the choice of three modes of proceeding, viz.: against the owners, or against the master personally, or by proceeding *in rem* against the ship itself. The Court of Admiralty has jurisdiction over the whole subject-matter of damages on the high seas and the arrest of a vessel is only one mode of proceeding;" and "supposing the ship doing the damage to have sunk or been lost immediately after the collision," as in this case, "I know of no

(*a*) With regard to the case of the *Volant* it should be observed that, on reference being made to it in the course of the argument, the learned judge observed that he had a note to the case by Dr. Lushington, stating that the report in Notes of Cases was correct where it differed from that in W. Rob. He also observed that *The Girolamo* (3 Hagg. 169) was a very doubtful authority.

reason why an action could not be maintained in this court," although the ship could not be arrested. "The jurisdiction of the court"—the High Court of Admiralty—"does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality."

It can make no difference that the defendants' vessel was at the time of the collision under a foreign flag, because "all causes of collision are causes *communis juris*." (*The Johann Friederich*, 1 W. Rob. 35, at p. 40.) In the case of *The Wild Ranger* (7 L. T. Rep. N. S. 725; Lush. 553; 1 Mar. Law Cas. O. S. 206, 275) Dr. Lushington said: "The court has found that the *Wild Ranger*, an American vessel, by improper navigation came into collision on the high seas with a British ship, and the ordinary decree has passed condemning the owners of the American vessel in the damages." In *The Zollverein* (Swabey, at p. 99) Dr. Lushington says: "Generally when a collision takes place between a British and a foreign vessel on the high seas, what law shall the Court of Admiralty follow? As regards the foreign ship, for her owners cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to the *lex fori*."

I am of opinion, without going further into the erudition and research connected with this question of general maritime law, that these authorities independently of others that may be cited are sufficient to enable the court to pronounce that the demurrer must be sustained and with costs, the paragraph demurred to struck out, and that the plaintiffs are entitled to the costs of the demurrer.

Solicitors for plaintiffs, *Stokes, Saunders*, and *Stokes*.

Solicitors for defendants, *W. W. Wynne* and *Sons*, agent for *H. Forshaw* and *Hawkins*.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Jan. 20, 27, 28, *and March* 7, 1881.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

SPAIGHT *v.* TEDCASTLE.

ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.

Ship—Tug—Damage—Contributory negligence—Pilot.

A tug belonging to the respondent was engaged to tow a ship belonging to the appellants to harbour. The ship was in charge of a pilot compulsorily employed. The tug attempted to tow the ship across a bank, instead of going round it, and the ship struck on the bank and sustained damage. In an action brought by the shipowners against the owner of the tug, it was proved that the pilot signalled to the tug to change her course, but did not cast off the tow rope on finding his signals disregarded, and in the opinion of the nautical assessors he was "negligent, supine, and inactive."

Held (reversing the judgment of the court below), that this did not amount to contributory negligence on the part of the ship, and that her owners were entitled to recover for the damage sustained.

The Julia (*Lush.* 224; 14 *Moo. P. C.* 210) *approved.*

THIS was an appeal from a judgment of the Court of Appeal in Ireland (Ball, C. and Deasy, L.J., Fitzgibbon, L.J. dissenting), which had affirmed a judgment of the Court of Admiralty in favour of the respondent.

The action was brought by the owners of the ship *Ruby* against the owner of the steam-tug *Toiler*, to recover damages for negligence in towing the *Ruby*.

On the 9th Dec. 1878 the *Ruby* arrived off the Kish light in Dublin Bay on a voyage from Quebec, and engaged the *Toiler* to tow her into Kingstown Harbour. The weather was squally, and the *Ruby* was in charge of a licensed pilot, compulsorily employed. The master of the *Ruby*, after engaging the tug, left the deck, the vessel being in charge of the pilot. There is a bank in the bay called Burford Bank, and the tug attempted to tow the ship across it. The pilot thought that it would not be safe to do so, and signalled to the tug to alter her course, which she did; but afterwards, in spite of his signals, she altered again, and the *Ruby* grounded on the bank and sustained injury. The action was brought to recover damages for the injury so sustained.

The judge of the Admiralty Court, who was assisted by nautical assessors, thought that the evidence disclosed contributory negligence on the part of the *Ruby*, and gave judgment for the defendant, which judgment was affirmed by the Court of Appeal as above mentioned.

The owners of the *Ruby* then appealed to the House of Lords.

Butt, Q.C., *Boyd*, Q.C. (of the Irish Bar), and *Ram*, appeared for the appellants.

Cohen, Q.C. and *Martin Burke* (of the Irish Bar), for the respondent.—In addition to the cases mentioned in the judgments *The Diana* (1 W. Rob. 131) and *The Duke of Manchester* (2 W. Rob. 470) was referred to.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 7.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: I have had an opportunity of seeing the detailed examination of the evidence in this case which will be submitted to your Lordships by Lord Blackburn; and your Lordships have before you the full discussion which that evidence received from the learned judges in the court below. My view of the main conclusions to be derived from that evidence being the same as that taken by Fitzgibbon, L.J., and by my noble and learned friend, I do not think it necessary to occupy your Lordships' time by going in detail over the same ground.

There is an important point of law which, for some reason which I do not at present understand, was not argued at your Lordships' bar, but which it would have been necessary to consider if your Lordships had taken the same view of the effect of the evidence which was taken by the majority of the judges in the court below. It

seems to have been assumed that the plaintiffs, the owners of the *Ruby*, would have been answerable for contributory negligence, not only of their own captain and crew, but of the pilot, whose employment was compulsory by law. If in any case which may hereafter occur it should be necessary to determine the question, the statute 17 & 18 Vict. c. 104, s. 388, and the opinions delivered in this house in the recent case of *The Clyde Navigation Company* v. *Barclay* (3 Asp. Mar. Law Cas. 390; 1 App. Cas. 790; 36 L. T. Rep. N. S. 379) will require attention. But, for the present purpose, I think your Lordships may properly deal with this case as if the employment of the pilot had not been compulsory.

Great injustice might, in my opinion, be done if, in applying the doctrine of contributory negligence to a case of this sort the maxim, *Causa proxima, non remota, spectatur*, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs, cannot be established merely by showing that, if those in charge of the ship had in some earlier stage of the navigation taken a course, or exercised a control over the course taken by the tug which did not effectually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence, if it might, in the circumstances which actually happened, have been unattended with danger but for the defendants fault, and if it had no proper connection as a cause with the damage which followed as its effect. The question is not, in my opinion, whether it would have been wiser for the master of the *Ruby* to prevent the tug from taking such a course in the direction of the south buoy as might bring her as near as she actually came to the bank. If, taking that course (which the master of the tug, on his own responsibility, deliberately and voluntarily did), all danger might have been avoided by proper conduct and management on the part of both vessels at the proper time, the master of the *Ruby* was, in my judgment, entitled to assume that the master of the tug knew what he was about and would do what was necessary to avoid getting too close to the bank, unless the contrary manifestly appeared. At the critical time the *Ruby* made all the signs which were possible to the tug, and if they had been followed (as at first they were), I think it is the just conclusion from the evidence that no damage would have occurred. Upon the evidence I cannot see my way to hold that the *Ruby* then omitted anything which she ought to have done, or did anything which she ought not to have done. She did not contribute, by act, sign, or omission, to the determination of the master of the tug to starboard again after he had ported, and so to carry the *Ruby* across the bank, which was the cause of the damage. This was the fault or error of the master of the tug only. I cannot hold that, in the difficult circumstances of that moment, it was contributory negligence on the part of the *Ruby* not to cut herself adrift from the tug; I am by no means sure that the damage would not have been greater if this had been done, or that, in that case, such a course of action might not, more plausibly, have been represented as contributory negligence.

My conclusion is, that the judgment under appeal ought to be reversed, and I so move your Lordships.

Lord BLACKBURN.—My Lords: This was a cause of damage, instituted by the appellants, as owners of the barque *Ruby*, in the High Court of Admiralty of Ireland, against the respondent, as owner of the steam-tug *Toiler*, to recover damages, because the *Ruby* was run aground on a shoal in the bay of Dublin, called "Burford Bank," in consequence, as is alleged, of the negligent performance of that duty which the owner of the *Toiler* had taken upon himself by having, through his master, entered into a contract to tow the *Ruby*. It is not in dispute that a contract of towage was entered into, nor that while the *Ruby* was being towed by the *Toiler* she took the ground, and sustained serious damage; and it is not in dispute that at that time the *Ruby* was in charge of a duly licensed pilot, whom she was obliged to employ, pilotage in the Bay of Dublin being compulsory.

The judgment delivered by Lord Kingsdown in a case in the Privy Council, reported under the name of *The Julia* (Lush. 224), and also under the name of *Bland* v. *Ross* (14 Moo. P. C. 210) clearly and accurately states the law applicable here. In that case the tug sued the ship for damages for a collision. Lord Kingsdown says, "When such a contract is made the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken, If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise; such an accident would be one of the necessary risks of the engagement to which each party was subject, and create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not, by any misconduct or umskilfulness on her part, contributed to the accident."

He states the four questions which arose in that case. Three of them are material for the consideration of this case: "1. Did the accident arise from the misconduct of the ship? 2. Did the tug by any misconduct on her part contribute to the accident? or, what is in truth but another form of the same question, could she by using due diligence have avoided it? 3. If both these questions are decided in favour of the tug, can the ship escape the consequences of her misconduct on the ground that it is to be imputed solely to the pilot, and in no degree to the master or the crew?"

In the case of the *Julia* those three questions were disposed of on the evidence. The first two, merely changing the parties from "tug" to "ship," and *vice versâ*, were disposed of in this case by the judge of the Admiralty Court and his assessors, who found first that the accident arose from the misconduct of the tug. The *onus probandi* on the first issue lay on the plaintiffs below, and as the duty of the tug was to carry out the directions received from the ship, and the pilot who was in charge of it, the tug would not be

guilty of neglect of duty by pursuing an injudicious course, if it was pursued in obedience to the pilot's orders. So far as this issue is concerned the misconduct or want of skill on the part of the pilot is relevant; but I think the counsel for the respondent hardly denied that there was ample evidence to justify the finding of this issue for the plaintiffs.

The second question the judge and his assessors answered in favour of the defendant, that the ship, by misconduct on her part, contributed to the accident. On this issue the burden of proof lay strongly on the defendant. I cannot but think that there was a misapprehension on the part of those who tried the cause below as to what would constitute contributory negligence; on this I will observe when I come to deal with the facts.

The third question, as is stated by Lord Kingsdown, does not exactly arise here; but I think that the evidence is such as to raise this question: supposing the first question to be decided in favour of the ship, and the second question also to be decided in favour of the ship as far as regards the conduct of the captain and crew, and all those for whose negligence the owner of the ship would be responsible to third persons, on the ground stated in *Quarman* v. *Burnett* (6 M. & W. 509), that they were persons whom "he had selected as his servants from the knowledge of, or belief in, their skill and care, and whom he could remove for misconduct, and who were bound to obey his orders," can the tug escape the consequences of its misconduct on the ground that the pilot, whom the shipowner did not select, but was compelled by law to take, and for whose misconduct he would not have been liable to third persons might, if he had exercised proper skill and care, have avoided the consequences of the tug's misconduct, and failed to do so? This is disposed of by the judge of the Admiralty Court in Ireland, in a single line. He says, "The ship, as I take it is affected by the pilot's conduct." This is not a self-evident proposition.

The majority of the Court of Appeal in Ireland thought the judge of the Admiralty Court right, on the authority of *Smith* v. *St. Lawrence Tow Boat Company* (2 Asp. Mar. Law Cas. 41; L. Rep. 5 P.C. 308; 28 L. T. Rep. N. S. 885). which however seems to me a decision that it was not a breach of duty in the tug in that case to pursue a course which the pilot in charge at least consented to, is he did not order it; and *The Energy* (L. Rep. 3 A. & E. 48; 23 L. T. Rep. N. S. 601; 3 Mar. Law Cas. O. S. 503), which does not seem in point. To these I may add the case of *Thorogood* v. *Bryan* (5 C. B. 115; 18 L. J. 336, C. P.), in which the Court of Common Pleas, consisting of very able judges, decided in 1849 that a passenger on a public conveyance was so far identified with his own conveyance that he could not recover for an injury sustained by him from the negligence of a third person, if there was contributory negligence on the part of those conducting the conveyance on which he was a passenger. Maule, J. gives reasons which are certainly not applicable to the case of a pilot whom the shipowner is compelled to take. He says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver; but I think that that cannot with propriety be said. He selects the conveyance; he enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. The passenger is not without remedy. But as regards the present defendant he is not altogether without fault. He chooses his own conveyance, and he must take the consequences of any default of the driver whom he thought fit to trust." This decision was very much questioned by the learned editors of the fourth edition of Smith's Leading Cases. Their remarks on it, and the subsequent cases in which it has been discussed, are collected at page 300 of the seventh edition of that work, in the note to *Ashby* v. *White*. But the decision itself has never been actually overruled. The precise question, whether the principle on which it proceeds, if sound, is applicable to the case of a pilot, has never, that I can find, been discussed, though in *The Energy* it seems to have been acted upon.

Fitzgibbon, L.J. in the present case glances at what is my difficulty, along with a good many others which perhaps had more weight with him, when he says, "I regret that this case is the first to lay down that the captain of a tug who has contracted to bring a ship to harbour with reasonable care may, against orders or without orders, wilfully drag her over a bank which he knows to be dangerous, though he sees the pilot whom he is bound to obey vehemently endeavouring to convey some signal to him, and indicating that the ship is going aground, and that the owner of the ship so treated is to be deprived of all redress because the pilot, whom it is not even in his power to select, had not the foresight, or the presence of mind, or the courage, to cast his ship adrift, and at the approach of night, against a high wind, with a rising tide, let her take the chance of avoiding alone the consequences of the admitted misconduct of the tug which was employed to conduct her safely home. I can only say that I entirely dissent from such a conclusion," The counsel for the appellants did not rest their case on this point of law, and it was not argued at your Lordships' bar. It is one of general importance, and if it were necessary to decide it either way, I should wish to hear a further argument on that point. But before putting the parties to that expense, I think it right to inquire whether, even if the ship is for this purpose affected by the pilot's conduct, a proposition which I neither affirm nor deny, the owner of the tug did in this case satisfy the onus cast on him of showing that there was contributory negligence on the part of the ship. I have come to the conclusion that he did not. [His Lordship went through the evidence in detail, and continued:]

On this evidence two questions arise: first, did the pilot make such signals that it was negligence and want of skill in the master of the tug not to understand and at once obey? That the pilot meant to give him such signals is clear; and I should be strongly disposed to draw the conclusion that he did so, but it is of course possible that he might have lost his head altogether, and have made unintelligible signs; and those who heard the witnesses and saw the pantomime described on the notes as "witness made the signs with his hands," had better means of

forming a judgment on this than I have. But I think this is not material, for all are agreed that the master of the tug did at last obey, and port his helm. Then the next question is, if he had continued to follow that course would the *Ruby* have gone clear of the bank? She had got too near, dangerously near to the bank, and I think it at least very doubtful if a vessel under canvas only could then clear the bank. But with the aid of a tug both to bring the ship's head round more quickly, and to assist in checking the way of the ship towards the bank, which was not to leeward, a vessel assisted by a tug might get clear of the bank after she could no longer do so under canvas alone. I should have liked to have more distinctly the opinion of the naval assessors on this point, which is one of seamanship, but I cannot find that they were asked, and probably, from not knowing the perhaps artificial rules by which the law of contributory negligence is regulated, they did not think it of so much importance as I think it was. Was the course which the tug then for a short time took one which could, if pursued, have taken the vessel clear? The master of the tug himself says that it would, and I find no one who says to the contrary.

If this was so, and I think we must take it to be so, there would have been no accident if the tug had not starboarded her helm. Was that negligence? I think it was very gross negligence. The master excuses it by saying that the *Ruby* not having followed him he thought he must have misunderstood the previous signals. Now I think that the evidence is very strong that the *Ruby* did follow him; and if he thought she did not, it must have been because, on the most lenient construction of his conduct, he did not wait to see whether she was doing so or not. I quite agree with what Lord Kingsdown said in *The Julia* (*ubi sup.*) as to the advantages which those who see the witnesses have in forming an opinion as to anything depending on a conflict of testimony, and on the propriety of not setting aside their decision without strong grounds. And I agree that this observation has still more force where the question is one of seamanship, and the court below has the assistance of nautical assessors. I am perfectly aware of what would be the probable fate of a ship which was trusted to my pilotage, and would therefore never think of acting on my own notions of what ought to be done, if I found that opposed to the opinion expressed by nautical assessors. But I do not think I have differed from them in holding that the starboarding of the helm by the tug was negligence, and was the cause of the accident. I also accept the finding that the pilot was "negligent, supine, and inactive," and that all the more readily because I have myself come to the same conclusion. And I will not quarrel with their finding that the captain of the *Ruby* was to blame in quitting the deck, though I am by no means clear that I should have come to that conclusion myself. But no negligence which was over before the tug negligently starboarded her helm could be contributory negligence in the sense which is required to relieve the tug from the consequences of that negligence. Be it that there was negligence in the ship, and those for whom the ship was responsible, in letting her get so dangerously near the bank before her helm was ported, as complete as the negligence of those who, in *Davies* v. *Mann* (10 M. & W. 546), left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship. To make a defence on this ground it must be shown that the injured party, or those with whom, for this purpose, he is identified, might by proper care subsequently exerted have avoided the consequences of the defendant's want of proper care. I do not think that, in this case, the pilot had presence of mind or skill, so as to know whether there was anything that could be done or not, but I am unable to see what a skilful person in charge could then have done. It is said that he might have thrown off or cut the tow rope and wore ship under canvas, and the assessors say that he could have done so, and ought to have done so, on what they call the first occasion, when he was half a mile or so further from the bank. But they do not say that there was still space enough to do so after the tug starboarded, and I rather think, with Fitzgibbon, L.J., that by implication they, finding he was to blame for not doing so on the first occasion, express an opinion that he was not to blame for not doing so on the second; and the evidence of the second mate is clear, that it was too late, that the space was too short. I do not attach much weight to the evidence of the pilot, but he says the same.

It is then said that the *Ruby* might have tacked, and so got off safe. No case of this sort was made on the evidence, the only question asked being of one witness, whether the ship could have then tacked, and he answered "No." But, says the judge of the Admiralty Court, "There was a second occasion, and that was when the *Ruby* got closer and in more dangerous proximity to the bank. That was the second time the pilot was imperatively called upon to act. The assessors are of opinion that, with the assistance of the tug, the *Ruby* could have tacked and gone in a south-easterly direction, and so been in safety. It strikes me as odd that this question was not put to any of the witnesses but one, and that was to the second mate, and he says that she could not have tacked; if he meant that unassisted she could not have tacked, then to this the assessors agree. But the witness was not asked whether she could, with the tug's assistance, have tacked. The assessors are of opinion that she could; that the pilot should have given orders for that purpose, and that he is culpable for not having done so. These are the two instances; but the assessors' opinion is that from first to last he was negligent." I should like to have asked the assessors whether, if the ship being so near the bank as she was, had tried to tack and failed, she would not have come on the bank broadside, and at least run the risk of a far more serious accident than actually occurred; and if they had answered, as I have little doubt they would, that it was so, I would then have asked them if a person of competent skill—I do not mean this pilot, who they clearly thought had not competent skill—but if a person of competent skill having charge of the *Ruby* at that time, knowing where the bank was, and knowing that the person in command of the tug was one to whom it was, to say the least, difficult to convey orders, and who was not very quick at obeying them, might not, without showing any want of skill, come to the conclusion that it was best to follow the tug and

go over the bank, hoping that the ship would not have much injury from touching in going over the bank, rather than to try what was a somewhat delicate manœuvre, which if it failed, was likely to cause a much worse accident?

No such question was asked, and I cannot tell how the assessors would have answered it. I think that, unless that question was answered in the negative, no case of contributory negligence was made out, even on the assumption that the ship was for this purpose identified with the pilot. The onus certainly lay strongly on the tug to make out this, and I think, on the evidence, it is not made out. I therefore come to the conclusion that, without expressing any opinion either one way or the other on the question of law, the judgment should be reversed.

Lord Watson concurred.

Order appealed from reversed, and cause remitted to the court below. Respondent to pay to the appellants the costs of this appeal.

Solicitors for the appellants, *Pritchard* and *Sons*, for *J. T. Hamerton* and *Sons*, Dublin.

Solicitors for the respondent, *Waltons, Bubb*, and *Walton*, for *James Davis*, Dublin.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqs., Barristers-at-Law.

Friday, March 25, 1881.

(Before James, Brett, and Cotton, L.JJ.)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY.)

The Alhambra.

Charter-party—"To a safe port, or as near thereunto as she can safely get and always lie and discharge afloat"—Carriage of goods—Delivery—Lightening outside port—Port of Lowestoft.

Where, by charter-party, a vessel is to call for orders for a safe port (or as near thereunto as she can safely get), and always lie and discharge afloat, she is entitled to be sent to a port which she can enter loaded, and in which she can always lie and discharge afloat at all times of the tide; and, if she be ordered to a port in which she cannot do so, she is entitled to proceed to the nearest port to the said port in which she can do so, and there discharge.

Decision of Sir R. Phillimore in the court below reversed.

This was an appeal from a decision of Sir R. Phillimore given in the Admiralty Division on the 27th July 1880.

The facts of the case are fully set out in the report of the case in the court below (43 L. T. Rep. N. S. 31; 4 Asp. Mar. L. C. 334).

Butt, Q.C. (with him *Clarkson*, Q.C.).—A "safe port" means that a vessel can always lie afloat. If she grounds it is not a safe port. The question is whether Lowestoft is a safe port. Now, it is proved that, whenever big ships go to Lowestoft, they either lighten in the roads or go into the harbour and ground. Again, safe port means a safe port for the ship with the cargo which she is carrying, and drawing the draft of water she is actually drawing. [Brett, L.J.—If a ship does not steer properly, would the charterers be bound to name a port into which she could enter? It is to be presumed of course that they would not know anything of her bad steering powers.] I only contend here that a safe port means a port where a vessel drawing 16ft. 6in. with her cargo can lie always afloat. The judgment in the court below [reads judgment] was founded wholly on the cases cited there, and especially on the Scotch case of *Hillstrom* v. *Gibson* (8 Sc. Sess. Cas. 463; 3 Mar. Law Cas. O. S. 302, 362). That case does not really affect my position, inasmuch as in that case the master always treated Glasgow as his port of discharge, and never attempted to refuse it. Here he refused from the first to accept Lowestoft. [Brett, L.J.—The court in *Hillstrom* v. *Gibson* finds that the master was bound to lighten and go forward. Does not that involve the proposition that the duty of the master under the charter was to go to Glasgow?] No; the obligation to go to Glasgow did not arise under the charter-party. The decision was not that the master was bound to go to Glasgow, but that after he had accepted Glasgow he was bound to go there if he could by reasonable lightening get there. There is no decision that Glasgow was a safe port within the meaning of the charter-party. [Brett, L.J. — Your argument is then that, although a master may be able to enter a port and discharge always afloat by a little lightening, he is not bound to do it.] Yes; I go to the full extent of that proposition. In this case, however, there is no need to go so far, because we were called upon to unload an unreasonable quantity. In *Capper* v. *Wallace* (L. Rep. 5 Q. B. 163; 42 L. T. Rep. N. S. 130; 4 Asp. Mar. L. C. 223) Lush, J. considered one-third too much. [Cotton, L.J.—In that case the port of Koogerpolder was accepted in the bill of lading.] Yes; that is my contention as to that case with respect to my first point, that the master of the *Alhambra* was entitled to a port where she could discharge always afloat. I am now contending that, if your Lordships are against me on that, the *Alhambra* would have had to discharge an unreasonable quantity. *Hillstrom* v. *Gibson* (*ubi sup.*) is only against me to the extent that a lightening of one-fifth is not unreasonable. Now, when she had discharged 220 tons she drew 12ft.; her full cargo was 639 tons. [Brett, L.J.—Is not *Shield* v. *Wilkins* (5 Ex. 304; 19 L. J. 238, Ex.) in your favour? There Pollock, C.B. says the vessel need not have crossed the bar at all.] It is so. [He was then stopped by the Court.]

Millward, Q.C. and *J. P. Aspinall* for the respondents.—All that *Shield* v. *Wilkins* decides is that, if the *Alhambra* had been bound by charter-party to go to Lowestoft, or so near thereto as she could safely get, and there load a cargo, she would have had two courses open to her: she might have gone in and taken what she could and then have gone out and waited for the rest; or alternatively have waited outside, and insisted on the whole of her cargo being brought to her there. She was ordered at Falmouth to proceed to Lowestoft, and the matter then stood just as if

Lowestoft had been inserted in the charter-party or bill of lading. [BRETT, L.J.—I doubt whether you had a right to order him to Lowestoft at all; and, secondly, I very much doubt whether you did as a fact at Falmouth order him to the roads.] She was only in the roads for a temporary purpose. She had not arrived at her final place of discharge. Her insurance policies would still have been running on. The learned judge below found that it is customary at Lowestoft for vessels of this size to allow themselves to be lightened in the roads. [BRETT, L.J.—If we say that Lowestoft Roads are not part of the port of Lowestoft, custom would not be admissible. JAMES, L.J.—At any rate it would not be a customary mode of discharging in the port. COTTON, L.J.—I understand you to contend that a safe port means a port which is safe for a ship partially unloaded outside according to the custom of the port.] We do not call the lightening an unloading or a portion of the delivery for the purpose of saying that it is the final place of delivery. It is a process to enable her to complete her voyage. JAMES, L.J.—Then you contend that a safe port means a port which a little not unreasonable manipulation at a place not unreasonably distant will enable a vessel to enter without risk, and the appellants say, We will have no port except where we can lie afloat at low tide safely, with all our cargo on board.] That is the contention.

JAMES, L.J.—I am of opinion that the question in this case depends upon what construction is to be put upon the charter-party, and that is a mere construction of the words used. The charterers had the right to order the ship to proceed to a safe port—any safe port—or as near thereto as she can safely go, and there lie with her cargo always afloat, and discharge. On the construction of the whole of the charter-party the plain meaning is, that she is to be sent to a port, to a safe port; that is, a port in which a position of safety was to be got, and moreover a port into which the ship could safely get and always lie and discharge afloat. She has contracted to go to such a port only, and not to that port with a little variation. In making the charter-party the shipowner says: "I will go to that port if I can get there; if I cannot get there I will get as near thereto as I can safely get and lie afloat and discharge, whether at Lowestoft or not, so long as I go to a safe port." Now it is conceded that Lowestoft was not a port in which a ship of the size and burthen of the ship in question could safely go when she was drawing 16ft. 6in. It is admitted that at low water at Lowestoft there is not more than 11ft. and sometimes less: that was not in my opinion a safe port. A safe port is not a port in which a vessel can lie with safety, merely by reason that there is something outside the place in which the ship can lie afloat, and in which she can discharge a part of her cargo, as is contended ought to have been done in this case. It may be all very well that that should be done in some cases, but that is not the contract the parties entered into. The contract was to go to some place of safety for a ship of such burthen, and which complies with the other requisites. I am of opinion, therefore, that the defendants are entitled to the judgment of the court.

BRETT, L.J.—I am of the same opinion. The question is, what was the sort of port to which, when the ship arrived at Falmouth for orders, the charterer or his agent had the right to order the ship to go. The first necessity was to order her to go to a port in the sense in which that word is used in seamanlike language; secondly, that it should be a port in which she might always lie and and discharge afloat, and according to my view, the meaning is, it should be a port in which, from the moment she entered into it, in the condition in which she was entitled to go into it, she should be able to lie afloat until the time of final discharge. The condition in which she was entitled to go in would be the condition of a fully loaded vessel, and she was not bound to unload before, but to go into port. The meaning then must be a port in which she shall, when fully loaded, be able to lie afloat, and to lie afloat from that moment until discharged in a reasonable way. But there is something more than that; it must be safe. Therefore, if ordered to a port where she could lie afloat from the beginning to the end of her discharge, yet if it were not a safe port, she was not bound to go to it at all. The question is whether Lowestoft was a port to which, taking that construction of the charter-party, the consignees were entitled to order her to go. They ordered her to go to "Lowestoft." The meaning of that is, not to go to Lowestoft Roads, but to the harbour. Therefore the question must be whether Lowestoft harbour was a place in which she could enter fully loaded, and lie afloat and unload. In my opinion it was not. It was said she could have done it if she had partially unloaded in Lowestoft Roads at a distance from the harbour, and a custom to do so was vouched. It seems to me that that custom is inadmissible, because it related to a thing to be done before the ship got to Lowestoft. Therefore it seems to me that that was a thing she was not authorised to do. *Shield* v. *Wilkins* (*ubi sup.*) is an authority in point. I will reserve my opinion as to the Scotch case, as the question there decided does not arise here.

COTTON, L.J.—I am also of the same opinion. In my opinion the true construction of the charter-party is, that a safe port means a safe port for a vessel loaded. *Shield* v. *Wilkins* is exactly in point. The port must also have been safe. The only question is, whether Lowestoft was such a place, or whether there was anything as regards the custom to justify the charterer in ordering the ship there; and the further question is, whether Lowestoft means the road. The roads are not part of the port. The charterer has ordered the ship to go to the port. Must not that mean the harbour where the ship can safely unload always lying afloat? That will not entitle the charterer to say that the ship shall go to the roads. As to the custom, it is when the ship has got to the port the unloading will be according to the custom of the port. In this particular case the construction of the contract must be, that the ship in a loaded state shall safely go in and unload and discharge, and that is varied by this, that at this particular port ships do lie outside and take out part of their cargoes. The custom is in no way admissible as a construction of the charter-party. When the port is fixed the custom may regulate certain things to be done, but in my opinion the custom of a port to which a ship shall go cannot apply in this place.

James, L.J.—I only wish to say a word as to the custom. The custom attempted to be established in this case is, that Lowestoft does not mean Lowestoft, but something else.

Judgment of the court below reversed.

Solicitor for the plaintiff, *H. C. Coote*, for *C Diver*, Yarmouth.

Solicitors for the defendant, *Hughes, Hooker, and Co.*

Monday, July 26, 1880.

(Before James, Brett, and Cotton, L.JJ.)

Wednesday, March 23, 1881.

(Before Jessel, M.R., James and Cotton, L.JJ.)

Wednesday, May 4, 1881.

(Before Jessel, M.R., Baggallay and Lush, L.JJ.)

The City of Mecca.

PROBATE, DIVORCE, AND ADMIRALTY APPEALS (ADMIRALTY).

Jurisdiction—Practice—Bail—Foreign judgment—Maritime lien—Action in rem—Action in personam.

The Admiralty Division of the High Court of Justice cannot entertain an action in rem on a foreign judgment in personam for damages arising out of a collision.

Semble, a foreign judgment in rem for damages by collision can be sued upon in England in rem.

Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail.

These were appeals from judgments of Sir R. Phillimore on two motions. The argument and judgment on the first is reported *The City of Mecca* (4 Asp. Mar. Law Cas. 187; 5 P. Div. 28; 41 L. T. Rep. N. S. 444). That judgment was appealed from, and in the first instance, came before the Court of Appeal, consisting of James, Brett, and Cotton, L.JJ., on the 26th July 1880, when, it being represented by defendant's counsel that further important evidence had been filed since the hearing below, the following order was made:

The Court of Appeal having heard counsel for defendants (appellants), counsel for the plaintiffs (respondents) not being present, ordered that the action should be remitted to the judge of the court below, with directions to rehear the defendants' motion to set aside the summons, on the further evidence filed since the 25th Nov. 1879, the date of the order appealed from, and with power to deal with the costs of this application.

The motion was accordingly reheard by Sir R. Phillimore, on the 28th and 30th July, when, after fresh evidence as to the nature of the judgment of the Portuguese court, and of the law of Portugal, and hearing

Benjamin, Q.C. and *E. C. Clarkson* for the defendants, and

Webster, Q.C. for the plaintiffs, the following order was made:

The judge having heard counsel further hereon directed the defendants' motion to set aside the proceedings in the action to stand over. He further directed (the defendants' counsel objecting thereto) that the indorsement of claim upon the writ of summons should be amended by altering the same into an indorsement of claim for damage by collision, reserving all questions as to costs, but gave leave to the defendants to appeal from this order.

The indorsement on the writ was then amended as follows:

"The plaintiff's claim is for damage by collision;" and subsequently a further amendment was made, so that the indorsement ran as follows:

"The plaintiffs claim 25,000*l.* against the steamship *City of Mecca* and her owners, for damages occasioned by a collision which took place off Capo Espichel, on the coast of Portugal, in the month of Jan. 1875."

On the 23rd Nov. defendants moved the court to "rectify this indorsement" by making it "comply with the direction to amend the same given," by order of the 30th July 1880.

Benjamin, Q.C., *Butt*, Q.C., and *Clarkson* appeared in support of the motion, and argued that the addition of the words "and her owners" in the indorsement on the writ of summons in an action *in rem* was intended to cover the circumstance of the judgment of the court in Portugal being *in personam*, and was therefore an attempt to enforce a personal judgment of a foreign tribunal by proceedings *in rem*.

Webster, Q.C., *G. Bruce*, and Dr. *W. G. F. Phillimore*, for plaintiffs, argued that the presence of the words objected to made no practical difference in the cause of action or method of proceeding.

The Court made the following order:

The judge having heard counsel on both sides directed plaintiffs to amend the indorsement in the writ of summons in this action by striking out the words "and her owners," but made no order as to costs.

Previously to this motion the plaintiffs had, on the 15th Nov., filed a statement of claim in the action, which statement the defendants moved to strike out by another motion on the same day.

Butt, Q.C.—The statement of claim is irregularly filed. We have never absolutely appeared in the action. The original motion to strike out the writ of summons is still pending by the order of the 30th July, which we say, and have just proved in the former motion, has not been complied with. We could not file a petition on protest, though our appearance hitherto has been on protest, until the matter of the writ was settled. That is now settled by the order just made, and we shall at once appear absolutely to the action, which will now go on like any other collision action.

Webster, Q.C.—We are perfectly in order. We amended our writ in accordance with the order of the court; the difference made to-day is quite immaterial, and the defendants failing to appear to that writ, and also failing to file a petition on protest, we are justified in proceeding under the default rules.

Sir R. Phillimore.—The statement of claim was irregularly put upon the file. The plaintiffs ought not to have filed their statement of claim whilst the motion to amend the indorsement on the writ was still pending, the complaint being that the defendants had not obeyed the order of the court of the 30th July 1880. An absolute appearance having now been entered, the next step is obviously for the plaintiffs to deliver anew the statement of claim; and the following order was made:

The judge having heard counsel on both sides, directed the statement of claim filed by the plaintiffs in the action to be taken off the file, but made no order as to the costs of the motion.

Webster, Q.C. then moved for an order to consolidate two actions: one, that in which the orders had already been made, by the owners of the *Insulano* against the *City of Mecca*; and the other by the underwriters of the *Insulano* against the same ship. If the two actions are kept distinct, the evidence needed on the main question of foreign law, which is very expensive, will have to be taken twice over on precisely the same point.

Butt, Q.C.—We will agree to an order that the evidence in one suit shall be taken as evidence in the other.

A further motion to strike out the statement of claim in the second action was postponed.

On Tuesday, the 7th Dec. 1880, the court was moved to stay all proceedings in both actions until a preliminary act had been filed (Order XIX., r. 30). On hearing the motion in the first action (*Cotesworth and others* v. *Owners of the City of Mecca*) the Court made the following order:

The judge having heard counsel on both sides, directed plaintiffs to file the preliminary act within fourteen days, with leave to the defendants to plead and demur, or otherwise object to the statement of claim within eight days after the said preliminary act shall have been filed, and he condemned the plaintiffs in the costs of this action.

On the 25th Jan. 1881 the court was moved in both actions:

To strike out or reject the plaintiffs' statement of claim delivered in this action on the 29th Nov. 1880, upon the ground amongst others that the said statement of claim is a departure from the cause of action set out in the writ, and at variance with the understanding arrived at between the parties to the action, and carried out by order of the court, as to the form and nature of the action, and to allow to the other defendants a fortnight's time to plead and demur if necessary, and to condemn the plaintiffs in the costs consequent upon the delivery of the said statement of claim, and of and incident to this application.

The statement of claim stated that the collision had occurred, but gave no details of the circumstances, but pleaded the foreign judgment against the *City of Mecca*.

Butt, Q.C., *Benjamin*, Q.C., and *Clarkson* for the defendants.—We object altogether to the statement of claim in its present form; the plaintiffs are still attempting to enforce a personal judgment by a proceeding *in rem*. They must either, if they choose to proceed at all on this personal judgment, do so in the ordinary way by a personal action and release the ship, or if they choose to arrest the ship, they must proceed, as in any other ordinary collision cause *in rem*, setting out the facts concerning the collision on which they rely, and giving us an opportunity to traverse these facts; here they only plead that a collision took place, which no one can deny, and that by a competent court we were found to blame for the collision, and pray judgment against us.

Webster, Q.C., *G. Bruce*, and Dr. *W. G. F. Phillimore*.—Nothing has taken place either by agreement or understanding, or by order of the court, to preclude me from my right of pleading in the present form. Whether the judgment of the Portugese court was *in rem* or *in personam*, matters not here; it is a judgment for damage by collision, and damage by collision confers a maritime lien; a maritime lien thus exists upon the ship, which I make operative by arresting the ship, and then I plead the judgment in the ordinary form.

In the result the following order was made:

The judge having heard counsel on both sides, rejected defendants' motion to strike out or reject the statement of claim, but gave them leave to plead and demur to the said statement of claim within twenty-one days, and further he refused to remit the parties to the position in which they stood prior to the amendment of the writ of summons, and directed the costs of this motion to be costs in the action.

This was one of the orders appealed from.

In addition to the proceedings set out above, the Court of Admiralty was moved on the 3rd Aug. 1880 to discharge the bail given in the original action.

E. C. Clarkson.—The bail in this case rendered themselves liable for what damages might be recovered in a suit in which it was sought to enforce a personal judgment abroad by a suit *in rem* here; the appearance was under protest to the jurisdiction, and the risk the bail ran in that action was very slight, but the whole basis of the action is now changed; there is no doubt that in its present form the court has jurisdiction to entertain this suit, and that is not the liability we incurred when we gave bail. The original suit was by underwriters, who have no *locus standi* in this court, to sue *in rem* on a foreign judgment *in personam*; now it is an ordinary suit for damage by collision.

Webster, Q.C.—The bail are not parties to the suit, and therefore cannot be heard to object to any change introduced in the proceedings. "The sureties are not parties in the original suit, and they are not entitled to interfere in any stage of the proceedings:"

The Harriett, 1 W. Rob. p. 253; 1 Notes of Cases, p. 337.

[*E. C. Clarkson*.—I appear for the defendants in the cause as well as for the bail.] If the defendants adhere to the protest to the jurisdiction they should have filed a petition on protest, but the time to do so has expired, and therefore the appearance is absolute, and their bail bound. But moreover the bail represents the *res* (*The Wild Ranger*, Br. & Lush. 87; *The Nied Elwin*, 1 Dod. at p. 53), and nothing that has taken place in the cause would have released the *res* had it remained under arrest. It is the warrant of arrest that the giving of bail is substituted for, not for the writ of summons, and therefore no amendment of the writ affects the position of the bail. It is not necessary that the cause of action in which bail is given should be identical with that which ultimately is tried:

The Skipwith, 2 Mar. Law Cas. O. S. 20; 10 L. T. Rep. N. S. 43,
The Princess Royal, 3 Mar. Law Cas. O. S. 328; L. Rep. 3 A & E. 27; 22 L. T. Rep. N. S. 39.

In the latter case the præcipe to institute, which under the old practice occupied the same place in a cause *in rem* that the writ of summons does now, was amended so as to alter the form of action, but it was never attempted to be set up that the bail should be discharged. But the case is even stronger since the Judicature Acts, as now any indorsement on the writ may be amended:

Order III., r 2;
Order XXVII., r. 2;
Wilson Jud. Act, 2nd edit. p. 108.

Besides, the form of the bail bond is absolute, and in this case the defendant has as yet only appeared on protest, therefore he cannot at all events allege that the cause of action has changed unless he puts himself in order by an absolute appearance.

E. C. Clarkson in reply.

Sir R. Phillimore.—I am satisfied, both on the authorities cited as to the practice of this court before the Judicature Act, and also by references made to the Judicature Act itself, that I ought not, at the present stage of affairs, to discharge the bail, and I therefore dismiss the motion, but, as the question is *primæ impressionis*, I shall make no order as to costs.

On the 23rd March the appeal from the order of the 25th Jan. 1881 (*ante*) came on for hearing before Jessel, M.R., James, and Cotton, L.JJ., when it appearing that there was a misunderstanding amongst the parties as to what had taken place on the hearing of the various motions in the court below,

Jessel, M.R. said:—Great costs have already been thrown away on the various proceedings in this case. To avoid still greater expense, we are of opinion that it will be best to clear away all that has taken place since the appeal on the original motion came before the court in July last; that is to say, we will hear the original motion on the new evidence. The former order of this court of the 26th July 1880 (*ante*) will be discharged by consent, and all the questions of cost will be dealt with by the Court of Appeal, both those of the original motion and those incurred since that motion was on the former occasion before this court.

On the 4th May the original motion thus reinstated "to set aside all proceedings" (4 Asp. Mar. Law Cas. 187; 41 L. T. Rep. N.S. 445; 5 P. Div. 29) came before the court, consisting of Jessel, M.R., Baggallay and Lush, L.JJ.

The evidence before the Court of Appeal consisted of the translation of the various judgments in Portugal, translations of several articles of the Commercial Code of Portugal referred to in these judgments, and affidavits of Portuguese advocates as to the nature and effect of the proceedings in the action for damages in Portugal.

The various judgments of the courts in Portugal so far as they are material to the question at this time before the court are as follows:

Civil Proceedings in the Supreme Court of Lisbon.

1. Petition by Bensaude and Co., agents for the Insular Navigation Company (Empreza Insulano de Navigaçao) owners of the Portugese steamer *Insulano* . . . as agents for the company assured . . . stating that the vessel was insured in 7000*l.* by Lloyd's of London, that she was wholly lost by collision with the *City of Mecca*, that the *City of Mecca* was solely to blame for the collision; that Lloyd's "purpose bringing their action for compensation against whomsoever may be liable for the fault or neglect, which they will institute in the competent tribunal;" that it is the duty of the owners and their agents to act for Lloyd's and praying that an "embargo may be effected for the aforesaid sum on the hull, rigging, and tackle of the English steamer *City of Mecca*, and notice of the embargo given to the port and custom authorities."

2. Sentence on the said petition dated 24th Feb. 1875, granting the embargo, permitting it to be substituted by a sufficient bond and giving thirty days for the institution of the action.

3. Petition on appeal from the sentence of embargo by David Anderson, the captain of the *City of Mecca*, and the consignees of the steamer in Lisbon.

4. Sentence on the appeal, dated 6th March 1875, allowing the appeal and discharging the embargo, "because it is one of the essential requisites to enable the court to decree, that the certainty of the debt should be proved. . . . which certainly it could not possess without having verified by competent experts that the ship ran into was unable to avoid the collision of the vessel running into her, . . . and moreover because, assuming the hypothesis that the vessel that ran foul of the other should be declared liable to make good the damages caused by the collision, such debt cannot be deemed as privileged with a view to laying on the embargo."

5. Petition on appeal from the decision of the Supreme Court discharging the embargo to the Supreme Trial by Bensaude and Co.

6. Sentence of Supreme Tribunal affirming decision of Supreme Court dated 25th June 1875.

7. Sentence of the Tribunal of Commerce at Lisbon, dated 17th Dec. 1876, stating that W. Cotesworth, T. A. White and others, underwriters of the London Lloyd's, and Bensaude and Co., in the capacity of representatives of the Empreza Insulano de Navigaçao, owners of the steamer *Insulano*, the first on their own behalf, and the second in the capacity of underwriters who have not forwarded a power of attorney, have come before the tribunal against David Anderson, captain of the English steamer *City of Mecca*, George Smith and Sons, of Glasgow, and William Graham, jun. and Co., of Lisbon, the former the owners and the latter the consignees of the said vessel, alleging that Lloyd's underwriters of London insured the Portuguese steamer *Insulano* for the sum of 7000*l.*, that the steamer was totally lost in consequence of a collision, and that the plaintiffs had paid the 7000*l.*, that the collision was entirely and exclusively due to the captain of the *City of Mecca;* that the defendants William Graham and Co. disclaimed liability altogether for the matters claimed; that the defendants object to the jurisdiction on the ground that the cause of action arose on the high seas outside Portuguese territory, and that the defendants are all foreigners; and also that on the merits of the case the defendants were not liable, the collision having been caused by the *Insulano*, and adjudging "the defendants in this action, William Graham, jun. and Co., to be incompetent," and therefore dismissing them from the suit; finding the plaintiffs and the rest of the defendants competent parties, and adjudging "the said action to be well founded and proved, the counter-charges to be unfounded and not proved," and in conformity thereunto condemning "the defendants David Anderson and George Smith and Sons jointly and severally to pay to the plaintiffs the amount claimed with interest. . . . ."

8. The judgment of the Court of Appeal (Relaçao), dated 2nd March 1878, on an appeal by the defendants against the judgment of the Tribunal of Commerce, dismissing the appeal, and affirming the decree of the Tribunal of Commerce.

9. The judgment of the Supreme Tribunal dated 21st June 1879, on an appeal from the judgment of the Court of Relaçao, further affirming that judgment and the judgment of the Tribunal of Commerce.

Benjamin Q.C., *Butt*, Q.C., and *Clarkson*, Q.C., in support of the motion. There are two questions: first, is this foreign judgment not a judgment *in personam*; secondly, even if it is not a judgment *in personam*, can it be enforced here by proceedings *in rem*? The words of this judgment do not create a charge on the *res*, only a personal liability on the captain and owners. [Jessel, M.R.—You say that, assuming the courts in this country may enforce the judgment, yet that the Court of Admiralty may not make use of all its special remedies for the purpose.] There was an attempt to make this in some sort a proceeding *in rem* in Portugal, but it was not permitted; it appears that the law of Portugal does not permit or recognise proceedings *in rem*. At the time these judgments were given the *res* was not in Portugal at all, nor any bail representing the *res*. The plaintiff may either have the advantage of proceedings *in rem* here by proceeding as in an ordinary collision suit, or he may proceed on his foreign judgment by an ordinary personal action, but he cannot combine the two in the way here attempted.

Webster, Q.C., *G. Bruce*, and Dr. *W. G. F. Phillimore*, for the plaintiffs, owners of the *Insulano* and others, in opposition to the motion.—Damage by collision constitutes, by the general maritime law common to all civilised nations, a maritime lien; the proceeding before the Tribunal of Commerce was "for the purpose of enforcing a maritime lien," and therefore a "proceeding *in rem*:"

Castrique v. *Imrie*, 3 Mar. Law Cas. O. S. 454; L. Rep. 4 H. of L. 447; 23 L. T. Rep. N.S. 43.

In this country a maritime lien can be perfected at once by arresting the ship, subject of course to an action for damages if the arrest is ultimately proved to have been wrongful; but in Portugal, though the maritime lien exists, it cannot be perfected by the arrest and sale of ships until after judgment has been obtained. [Jessel, M.R.—A judgment to settle the fact that the vessel is liable, not the amount of that liability.] Certainly; therefore, our attempt to arrest the vessel before getting that judgment was premature, but now we are in possession of the judgment and are in a position, if the ship was in Portugal, to arrest and sell without further action; it is therefore beyond doubt a judgment *in rem* in Portugal, and therefore can be sued upon by proceedings *in rem* here. It is not correct to say that it is the nature of the process which confers a maritime lien; it matters not whether the process is *in rem* or *in personam*, it is the fact of the collision which gives a maritime lien. By the affidavits in this case it appears that this judgment could be enforced by the sale of the ship, if in a Portuguese port, even if she had changed hands and come into the possession of an innocent purchaser, and that is the test of a maritime lien:

The Europa, 1 Mar. Law Cas. O. S. 337, 420; Br. & Lush. 89; 8 L. T. Rep. N. S. 368.

Jessel, M.R.—This is in form an appeal from a decision of Sir Robert Phillimore. It is not so in fact, because the facts that are before us are totally different from the facts which were before him. He decided that there had been a judgment *in rem* by the Portuguese court having jurisdiction in Admiralty; that an action, being brought on that judgment in the High Court, might be brought as an action *in rem*—that is, as an action against the ship—and might be enforced in the way in which process in this action was enforced by an arrest of the vessel. The owners appeared under protest, and asked to set aside all those proceedings, and he decided against them on that ground. It is hardly necessary to read his judgment, but I think it is only fair, arriving, as I do, at a different conclusion on the present facts, to read this to show that that is what he really said. He said (4 Asp. Mar. Law Cas. 187; 41 L. T. Rep. N. S. 448; 5 P. Div. 33): "The court is now called upon to be *aidant* to the enforcement of a judgment *in rem* given by the Portuguese court." And then he said: "Although there is no direct precedent on the point, it is clearly for the interests of justice that this court should . . . having its hand upon the *res*, not take it off until the sentence be executed." That is the foundation of his judgment. It appears that the real facts of the case were not before him at all. There was an affidavit on a most important point—that the proceedings in Portugal were *in rem*—by a clerk to the solicitors. I am far from saying that it was purposely erroneous, but it did lead to an erroneous conclusion in the mind of the learned judge, and it probably would have led any other person to an erroneous conclusion. It now appears that, by the law of Portugal, there is no such thing as an action *in rem*. It does not exist at all. What the reason may be is immaterial to inquire, and the reason given is certainly a very odd one, but still the fact is quite plain; this is what is said by a gentleman of great eminence in Portugal, a Portuguese advocate, and president of the Association of Advocates in Lisbon, and he has practised as an advocate since 1840, and he says that modern Portuguese law does not accept in terms the distinction of actions *in rem* and *in personam*, because Portuguese law deals little in doctrine. Whether that reason is satisfactory to his mind, or not, I do not know. I am afraid it is not satisfactory to mine. The fact, however, being so, the course of procedure seems to be this. They bring a personal action against the owners and the captain, who are both liable for the collision; and when they have got judgment in that action, if the owners and captain do not pay, and if the vessel, after the judgment, comes within the jurisdiction of the Portuguese court, they enforce their personal judgment as against the vessel, under the doctrine of the law of nations, which is stated by the two advocates, whose affidavits are before the court, to be part of the law of Portugal, that damage arising from collision gives a maritime lien on the vessel which is in fault, and that the lien dates from the time of collision, and of course is not created by the judgment, which merely ascertains the amount of the damages, and also decides, if it be disputed, whether there is any lien at all, that is, whether there is any fault or liability on the part of the vessel. That being so, the judgment in this case was given actually against the captain and owners by name, and there is no other judgment, and the present action is brought on that judgment, and on that judgment only. There was in reality in Portugal an attempt to seize the vessel by arrest, which attempt failed, because, as I have already said, the Portuguese law does not allow the arrest of a vessel before

the damage is ascertained, and therefore the embargo, as it is called, was discharged, and there was no arrest of the vessel, nor does it appear that it has since come within the jurisdiction of the court of Portugal, nor is there any decree asserting a maritime lien or order directing a charge on the vessel, or directing the sale of the vessel. It appears to me clear that this judgment is a personal judgment in a personal action. Then it may be said, what is there to argue? The argument presented to us by the respondents is this: First of all, it is alleged that the action in Portugal was an action for enforcing a maritime lien; secondly, that whatever the terms of the judgment might be, it was a judgment for enforcing a maritime lien, and therefore a judgment *in rem*, and that that being so it was a judgment binding the vessel in the courts of every civilised country under the international law. But I find the simple answer is, that it is not an action or proceeding to enforce a maritime lien. Nothing of the kind appears on the proceedings. There is no suggestion from beginning to end that the ship is liable, there is no declaration that the ship is liable, and it does not appear on the proceedings that the ship was even within the jurisdiction at the time the action was commenced against the owners. An action for enforcing a maritime lien may, no doubt, be commenced without an actual arrest of the ship, but there is no suggestion that they intended anything of the kind, and in fact the law does not allow it. An action against a ship, as it is called, is not allowed by the law of Portugal. You may in England and in most countries proceed against the ship. The writ may be issued against the owner of such a ship, and the owner may never appear, and you get your judgment against the ship without a single person being named from beginning to end. That is an action *in rem*, and it is perfectly well understood that the judgment is against the ship. In the present case the judgment does not affect the ship at all unless the ship should afterwards come within the jurisdiction of the Portuguese court, and then it can be made the foundation of a proceeding by which you can arrest the ship and get it condemned. Therefore it seems to me to be plain that this is a personal action, as distinguished from an action *in rem*, and any attempt to make it out something else because the law of Portugal does not allow actions *in rem* is to change the real nature of the action to meet the exigencies of those who want to make the judgment of the court of Portugal go further than it in fact does. It appears to me, therefore, that there is no longer the same state of circumstances as that on which the judge in the court below decided, for the judgment is not a judgment *in rem* either in form or circumstances, neither is the action an action *in rem*. Reference has been made to the case of *The Bold Buccleugh* (7 Moore P. C. Cas. 267), from which I will read a few words of the judgment delivered by Sir John Jervis. At page 284 he says: "Having its origin in this rule of the civil law a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process, and Story, J. explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only competent court to enforce it. A maritime lien is the foundation of the proceeding *in rem*—a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course there a maritime lien exists which gave a privilege or claim upon a thing to be carried into effect by legal process." Then he refers to what occurred in that case, and adds that an action was brought in Scotland against the owners by name, very much like the action in the foreign court in this case; but there is something in addition, because in Scotland when the ship comes within the jurisdiction they arrest the vessel to secure the debt and then—and this applies exactly to this case—"the arrest of the steamer was only collateral to secure the debt." They did not get so far in Portugal. They tried but failed; then he says, "We have already explained that in our judgment a proceeding *in rem* differs from one *in personam*, and it follows that the two suits being in their nature different the pendency of one cannot be pleaded in suspension of the other." That is, the formal proceedings in Scotland were against the person, although the vessel was arrested as security for the debt. It is really the form of the proceedings which must be looked at to ascertain whether it is a proceeding *in rem* or *in personam*. The case before us is much stronger than *The Bold Buccleugh*, as here the attempt to arrest the vessel failed altogether. For this reason it seems to me we should go further than we should be warranted by any principle in going if we said that the judgment was not a personal judgment and that the court was entitled to order the arrest of the vessel as if it were an action *in rem* and a judgment *in rem*. Therefore I consider this appeal ought to be allowed.

Baggallay, L.J.—I am of the same opinion. In the early part of Jan. 1875 a collision took place off the Portuguese coast between the British ship *City of Mecca* and a Portuguese ship called the *Insulano*. On the 1st Sept. 1875 the action was commenced in Portugal with reference to proceedings to enforce the judgment in which this present appeal is brought. It would appear that in the year 1878 or 1879 an action was brought in the Admiralty Court in England, when the writ in that action was issued it had this endorsement upon it: "The plaintiffs' claim is upon a judgment of the Tribunal of Commerce of Lisbon, and the plaintiffs claim 25,000*l*." That judgment of the Tribunal of Commerce at Lisbon was a judgment pronounced on the 17th Dec. 1876, and which condemned the defendants, the owners of the *City of Mecca*, jointly and severally to pay to the plaintiffs "the amount claimed with interest from the date of disbursement." It was an action brought by the owners of the *Insulano*, and also by the underwriters who paid certain claims under policies upon the ship; therefore it seems to me impossible to say, looking at the form of the judgment itself, that it was any more than a personal action, a judgment against the defendants personally for the payment of a specific sum of money. But before this writ was issued an application was made to the judge of the Probate Division for liberty to issue the writ, and to proceed to arrest the ship, and an affidavit was then made

which I am willing to accept was made in ignorance of the true state of the case, alleging that the action commenced in the Portuguese courts had been a proceding *in rem* as far as regards the ship. The defendants never seemed to be aware that this was not the case, until after the matter had been disposed of by the judge of the Probate Division, when an application was made to him to set aside the writ. He proceeded, as I read his judgment, entirely on the footing that the proceedings in Portugal had been proceedings *in rem*. For reasons that have been assigned by the Master of the Rolls, and which it is unnecessary for me to repeat, it appears to me that there is no question but that the proceedings before the Tribunal of Commerce in Portugal were entirely personal proceedings—proceedings *in personam*. No doubt proceedings of a different character were commenced in the Civil Tribunal of Portugal, and those proceedings preceded the judgment of the Tribunal of Commerce. In the first instance in the Civil Tribunal an embargo was obtained by the parties who were plaintiffs both in those proceedings and also in the action before the Tribunal of Commerce, and an order was obtained to arrest the ship, and the ship was only released by giving security, but those proceedings were made the subject of an appeal, and ultimately by the final Court of Appeal the decision of the court of first instance was reversed on the two grounds to which reference has already been made, the one that it was not within the ordinary jurisdiction of the court to grant an embargo unless it were established that the ship was to blame, so far differing from proceedings in the English Court of Admiralty, in which, whilst the matter is in doubt, the ship may be arrested or security given if the ship is allowed to go, but in Portugal it is not the law, while there is a doubt, to do so; and the law of Portugal is so stated in the judgment of the Supreme Court. That was one ground for discharging the embargo. The second I must confess appears to be one more difficult to understand. Whatever might be the effect of that particular reason, which can be only well understood by an examination of the particular article of the code to which reference has been made, one thing is clear, that proceedings may be taken in the Civil Tribunal in Lisbon, by which the arrest of a ship can be obtained, and such a proceeding would be a proceeding *in rem* according to my view. The attempt to take such proceedings in this case was made but failed, and it was decided that they could not be taken except after proof that the *City of Mecca* was alone to blame—after which proof it was not done, probably for the best reason, that the ship was no longer within the jurisdiction, and it would therefore be useless to commence such proceedings. I am at a loss to understand on what ground, now that we have got these facts which were not before Sir Robert Phillimore, it could be established otherwise than that the proceeding before the Tribunal of Commerce was *in personam* and not *in rem*. One argument I do not desire to pass over, which was addressed to us by Mr. Gainsford Bruce; it was this, that in an action on a foreign judgment, the English Court of Admiralty will proceed *in rem* wherever the foreign tribunal has established a maritime lien. I do not think it can be denied that the proceedings in this case established a maritime lien, but that is a different thing from saying that they were proceedings *in rem*. Mr. Bruce was unable to produce any authority, nor do I think any can be found, for the proposition he advanced. It appears to me that this action on a foreign judgment was initiated *in rem* under a mistake, and that the appeal should be allowed.

Lush, L.J.—The question which we have to decide, apart from all technicality, is whether the arrest of the vessel by process out of the Court of Admiralty was a wrongful arrest; that depends, I think, on whether the proceedings in the Court of Portugal were proceedings *in rem*. It is part of the law of nations that courts of admiralty in different countries have the power to condemn vessels and order them to be sold for the satisfaction of a maritime lien. Maritime liens are recognised by all civilised nations and damage by collision is classed among them, and had this been a judgment *in rem*, that is to say a judgment condemning the ship and ordering the ship to be sold in order to satisfy this maritime lien, that judgment would have been recognised in this country and every other civilised country, and it is most important that proceedings under which the sale of another person's vessel takes place should show on the face of them the authority by which that property is to be diverted from the owner, because the title by purchase under proper authority is recognised by all nations, but the title depends on the circumstances under which the sale takes place, and it is therefore important that the judgment should show on the face of it that the proceedings are against the vessel, and not merely against the owners as such, or the captain; that the proceedings have in contemplation the ultimate sale of the ship, and that the judgment orders the ship to be sold, and if this does not appear on the face of the proceedings, then the title of the purchaser has nothing to support it. It is most important, not a mere matter of form but a matter of substance, that the decree under which the sale is attempted to be justified should be shown on the face of the proceeding. Now upon the face of this judgment there is not a word about the ship from beginning to end. It is well known that the owner of a vessel that has suffered by collision with another has two remedies: he may bring an ordinary action against the captain or owner of the other vessel and recover damages; or he may sue *in rem* in the Court of Admiralty and make the ship pay one or the other. It has been given in evidence before us that the Court of Admiralty has been abolished in Portugal and its jurisdiction to try cases of collision transferred to a Court of Commerce, and that there is no power now in that country to institute what are called actions *in rem*. That is what I collect from these proceedings. Whether there is or is not such a power seems, however, to be immaterial. There certainly is a proceeding by which a vessel can be laid under an embargo, that is arrested, if an action is brought against the captain, in order to secure payment of damages, but whether that can be carried out by proceedings *in rem* I do not know nor does it strike me to be material. But what is material in considering an action of this nature claiming damages alone is, that there is nothing about the ship from the beginning to the end. According to the practice in continental courts the article of the code upon which the court founds its judgment is set out in the judgment itself, and

the article which is the most prominent one and on which the judgment of the Tribunal of Commerce is based, says (Art. 1567 of the Commercial Code): "In the event of a vessel being run into by another through the fault of the captain or of the men composing his crew, the entire damage occasioned to the collided vessel and her cargo must be borne by the captain of the ship which caused it;" and further on the judgment says, "consequently the disposition of article 1567 of the Commercial Code which ordains that in the event of a collision through the fault of the captain or crew the entire damage must be borne by the captain of the ship causing such damage is entirely applicable to the defendant David Anderson, the captain of the *City of Mecca*, and that the defendants, the owners of the *City of Mecca*, are bound collectively according to what is laid down in article 1339 of the said code." The action in Portugal was brought against the captain and owners and also against the consignees, and the Tribunal give some special judgment in reference to the consignees, which I need not read, and they then quote the two articles already referred to in giving judgment against the captain and against the owners of the vessel. Then the judgment proceeds to say: "I adjudge the said action to be well founded and proved, the counter-charges unfounded and not proved, and in conformity therewith I condemn the defendants, David Anderson and George Smith and Sons, jointly and severally to pay to the plaintiffs the amount claimed with interest from the date of disbursement, and I do also condemn them to pay the legal penalty both in respect of the petition in the libel and of the petition in the counter-charges." There is not a word about condemning the ship, nor do I see how they could condemn the ship. The ship had been improperly arrested in the first instance because it was found by the Supreme Court that the plaintiff in the action had not performed the conditions by which alone an embargo could be laid on the vessel; that is to say, it was not proved to the satisfaction of the court at that stage of the proceedings that the fault of the collision was entirely due to the *City of Mecca*, and thereupon the court discharged the vessel from the arrest, and the vessel went away. I do not see how it was possible for them to carry out and execute a maritime lien when they had not possession of the thing. The vessel was away, in England, I believe. It was an English vessel, and it naturally left the Portuguese coast, and if a purchaser were bound to prove his title, under the decree of that court, in this case he could not quote a single word of this judgment or of any judgment in the world, that would justify a sale of that ship. It is a judgment purporting to be a judgment against the persons of the captain and owners, and if they ever find them within their jurisdiction they may execute, according to the process they have at their command, the judgment against them individually. But as to executing the judgment against the ship, I doubt, if the ship were found there now, that they could do it. But even if they found the ship there, and they could without further process seize the ship and sell it in satisfaction, that would not make this to be a judgment *in rem* which any court in this country could be called on to execute. For these reasons, therefore, I am of opinion that the action is entirely unjustified in this form, and as not merely has the writ been issued, but also the vessel has been arrested, and therefore the owners of the vessel were deprived of their rights of having full command of that vessel by these proceedings, I think we are well warranted in coming to the unanimous conclusion that the proceedings were wrong, and in not waiting for the further development of the matter by further litigation, but in at once saying that the proceedings ought to be set aside.

Baggallay, L.J. added:—I think I ought to express my entire adoption of the definition of proceedings *in rem* and *in personam* as quoted by the Master of the Rolls from the case of *The Bold Buccleugh* (*ubi sup.*) But I think there is one additional passage as to maritime liens that should be read, viz.: "This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem* relates back to the period when it first attached."

Benjamin, Q.C.—The order of the court will be to set aside the writ and all subsequent proceedings, including the bail bond.

Webster, Q.C.—It will be sufficient if all proceedings subsequent to writ are set aside and the writ amended.

Jessel, M. R.—Does any question arise on the Statute of Limitations?

Webster, Q.C.—The collision occurred on the 1st Jan. 1875, and therefore the question on the statute arises with regard to that, but the judgment not being perfected for a considerable time subsequent to that date no question arises with regard to it.

Jessel, M.R.—The order will be to set aside the writ and all subsequent proceedings; the defendants are entitled to all the costs.

The second motion was then proceeded with, which was an appeal from a similar order of Sir R. Phillimore in an action by other parties against the *City of Mecca*; but on its appearing that the motion in the Court of Admiralty from which this was an appeal had been made subsequently to the original motion to set aside the writ and was therefore affected by the order of the Court of Appeal of 23rd March 1881 (*ubi sup.*), and as the writ in that case was in the usual form of a collision action, it was ordered that in that case the writ should stand, all proceedings subsequent to the writ be set aside, and the costs be costs in the cause.

Solicitors for appellants, owners of *City of Mecca*, *Pritchard* and *Sons*.

Solicitors for respondents, owners of *Insulano*, and others, *Gellatly*, *Son*, and *Warton*.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, Esq., Barrister-at-Law.

March 17, *April* 4 *and* 13, 1881.

(Before Lord Coleridge, C.J., and Baggallay and Bramwell, L.JJ.)

The Inman Steamship Company Limited *v.* Bischoff and others.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Freight—Construction of charter-party—Loss by perils of the sea.

Where a ship is chartered by the Admiralty Commissioners for three months certain, and thenceforward until notice given, the charter-party containing a clause entitling the charterers on the ship becoming incapable to perform efficiently the service contracted for, to put her out of pay, and before the expiration of three months the ship strikes on a rock, and is thereupon put out of pay and discharged from the service and the ship is insured for three months on "freight outstanding," the underwriters knowing of the existence of the charter-party, but not knowing its terms, the loss of freight is not a loss by perils of the sea, and the shipowners are not entitled to recover it under the policy.

Action on a policy of insurance on freight.

On 20th Feb. 1879 a charter-party was entered into between the Commissioners of the Admiralty of the one part and C. T. Ellis (acting on behalf of the plaintiffs, who were the owners of the steamship *City of Paris*) of the other part.

The following are the material provisions of the charter-party.

It was witnessed that the commissioners had hired and taken to freight the *City of Paris*.

For service and employment as a transport on monthly hire for the space of three calendar months certain, and thenceforward until the commissioners for executing the office of Lord High Admiral aforesaid, for the time being, shall cause notice to be given to the said second-named party, his executors or administrators, or to the master or other person having charge of the said ship, that she is discharged from Her Majesty's service, such notice to be given when the ship is in port in the United Kingdom. And the said second-named party doth covenant and agree with the said commissioners in manner following; that is to say, that the said ship shall at all times during the continuance of this charter be strong, firm, tight, staunch, and substantial, both above water and beneath, and in every respect seaworthy and properly manned, fitted, stored, furnished, equipped and found at the proper cost and charge of the said owners. . . . . In consideration of which covenants and conditions, it is agreed by the said commissioners for and on behalf of Her Majesty in manner following; that is to say, that the said second-named party shall be allowed for the hire and freight of the said ship at the rate of 25s. per ton per calendar month . . . during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged—that the said second-named party shall, on signing and sealing hereof, be entitled to receive a bill made out and registered according to the usage of the navy for one calendar month's freight upon account and in part payment according to the rate and tonnage aforesaid, provided it be certified by the inspecting officer that the said ship is ready to proceed on Her Majesty's service. And after the said ship shall have been in the service two calendar months from the commencement of the said service, and the said second-named party shall have produced to the said commissioners a certificate in the required form, the said second-named party shall be entitled to receive a further bill for a moiety of one month's freight upon account in manner aforesaid; and after the said ship shall have been in the said service three calendar months, and the said second-named party shall have produced to the said commissioners such certificate as aforesaid, the said second-named party shall be entitled to be paid a further bill for another moiety of one month's freight upon account, and each month after during the ship's continuance in the said service. If such certificate as aforesaid shall have been produced, the said second-named party shall be entitled to receive a further bill for one month's freight on account, and shall be paid the balance of freight on the passing in the office of the requisite accounts and documents after the discharge of the said ship, all which aforesaid payments shall be made in England by bills payable in three days from and after the respective dates thereof by Her Majesty's Paymaster-General. Provided always, and it is hereby agreed and declared, that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders, by neglect of duty, or that the said ship became incapable from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months. . . . . and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable. . . . . Enters into pay the 18th day of February 1879.

On the 22nd Feb. 1879 the plaintiffs effected a policy on "freight outstanding," the insurance to last "at and from and for and during the space of three calendar months, commencing the risk on the 20th Feb. 1879 and ending on the 19th May 1879, both days inclusive."

The defendants underwrote this policy, knowing that the *City of Paris* had been chartered by the Government, but not being acquainted with the terms of the charter-party.

The *City of Paris* was employed under the charter-party in the transport of troops to South Africa.

On the 21st March 1879 she struck upon a rock at or near the Cape of Good Hope, and sustained serious injury, in consequence of which she was put out of pay.

On the 17th April 1879 the senior naval officer at the Cape of Good Hope discharged the *City of Paris* from Her Majesty's service. When so discharged she was at the Cape of Good Hope. She was repaired, and received a certificate of efficiency on the 14th May.

The plaintiffs brought this action against the defendants on the policy of insurance, alleging a loss, caused by perils insured against by the policy, of freight covered by the policy, which the plaintiffs would have earned between the 21st March and 19th May 1879 if the *City of Paris* had not been put out of pay and discharged as above mentioned.

At the trial the jury were discharged by consent.

Brett, L.J. gave judgment for the plaintiffs.

The defendants appealed.

March 17 *and April* 4.—The appeal was argued by *C. Russell*, Q.C., and *Cohen*, Q.C. (*J. G. Barnes* with them) for the defendants, and by *Gully*, Q.C. and *French* for the plaintiffs.

The arguments used are sufficiently stated in the judgment of the court. The following authorities were referred to:

Rankin v. *Potter*, 2 Asp. Mar. Law Cas. 65; 29 L.T. Rep. N.S. 142; L. Rep. 6 H. of L. 83;
Ripley v. *Scaife*, 5 B. & C. 167;
Havelock v. *Feddes*, 10 East, 555;

Halhead v. *Young*, 6 E. & B. 312;
Taylor v. *Dunbar*, L. Rep. 4 C. P. 206;
Allison v. *Bristol Marine Insurance Company*, 2 Asp. Mar. Law Cas. 54, 312; 34 L. T. Rep. N. S. 809; 1 App. Cas. 209;
Jackson v. *Union Marine Insurance Company*, 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. N. S. 789; L. Rep. 10 C. P. 125;
Harrower v. *Hutchinson*, 3 Mar. Law Cas. O.S. 434; 20 L. T. Rep. N. S. 556; 22 L. T. Rep. N. S. 684; L. Rep. 4 Q.B. 523; L. Rep. 5 Q.B. 584;
Bates v. *Hewitt*, 2 Mar. Law Cas. O. S. 432; L. Rep. 2 Q.B. 595.

Cohen, Q.C. replied.

Cur. adv. vult.

April 13.—Bramwell, L.J. read the judgment of the court. The first question argued in this case turned on the clause in the charter-party that "if at any time it shall be made to appear to the commissioners that the ship became incapable from any defect or cause whatsoever to perform efficiently the service contracted for, then it shall be lawful for the commissioners to retain in arrear the pay of the ship for two months and to put the ship out of pay." The ship having become disabled by perils of the sea, and requiring repairs, the doing of which would last a considerable time, the commissioners, acting under this clause, did put the ship out of pay, and so the plaintiffs said the freight was lost, and lost by perils of the sea. The defendants answered that either the commissioners had no power to do what they did, and if not the freight was not lost; or that they had, and if so the freight was not lost through the perils of the sea, but through the peculiar powers given to the charterers. This argument supposes that the charter-party may be read as though set out in the policy. No doubt it not only may, but must be looked at, and for the purposes of this question at least may be read as though set out in the policy. But what then? The question still arises, Was the loss of the freight a loss by perils of the sea? We are of opinion that it was not. We are of opinion that but for the particular clauses in the charter-party freight would have continued to be earned, notwithstanding perils of the sea. It must be carefully borne in mind that the hiring was not for three months merely, but was for an indefinite time, viz., till notice should be given by the commissioners when the ship should be in a port in the United Kingdom, with a provision that the minimum term of hiring should be three months. Now it is clear, on reason and authority, that but for the clause enabling, if it does enable, the commissioners to put the ship out of pay, she would have continued on it till she returned to the United Kingdom and was discharged, including the time necessary for repairs. That this is so is strengthened by the consideration of the provision in the charter-party "that the ship shall at all times during the continuance of the charter-party be strong, firm, tight, staunch, and in every respect seaworthy." For that involves repairs necessary being done to the ship during the time included in the charter-party. But for the clause in question, therefore, the time in the charter-party would have run during the time of those repairs, and until the ship was discharged in a port in the United Kingdom. The perils of the sea therefore have not caused the loss of freight. They are the *causa sine quâ non*, but not the *causa causans*, not the proximate cause of the loss. Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, and not been injured, but put out of pay. That would have been a loss in one sense by perils of the sea, no less than this, but clearly not covered by the policy. Mr. French, however, took another point. He said, and apparently correctly, that the charter freight accrued *de die in diem*, but only while the ship "duly and efficiently performed the service," that perils of the sea had prevented such due and efficient performance, and so the freight was lost by such perils. We are of a different opinion. There is no exception of perils of the seas in the charter-party to excuse the shipowner, but the clauses which say when he shall be liable, by implication exclude a liability caused by perils of the sea. Those words "duly and efficiently perform," &c., do not constitute a condition precedent; that is manifest from this, that if they did, then, though the service was rendered, but not duly and efficiently, the plaintiffs would not be entitled to any payment. For example, if through mismanagement or even misfortune, five weeks were consumed in doing what could be done in four, no payment would be due. This cannot be. The remedy in such case is by cross action or putting the ship out of pay, the power to do which makes the construction contended for the less needful and probable. Further, the payment is to be monthly, and the second payment is to be after the ship has been two months in the service from the commencement of the service, and is to be a moiety of one month's freight. This is inconsistent with the contention of Mr. French. It may be asked what is the meaning of the words. The best answer I can give is to say about the same as the meaning in a lease of the words that "the lessee well and truly paying rent and performing covenants may quietly enjoy," &c. We think then that the plaintiffs fail on this ground also, and that the judgment must be reversed. This renders it unnecessary to consider other questions; but we may add, we are quite of opinion that this policy includes such a freight as that in the charter, viz., a time freight.

Judgment reversed.

Solicitors for plaintiffs, *Gregory, Rowcliffe*, and *Co.*, for *Hill* and *Dickinson*, Liverpool.

Solicitors for defendants, *Waltons, Bubb*, and *Walton*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported by J. R. Brooke, Esq., Barrister-at-Law.

May 21, 23, 24, *and* 25, 1881.

(Before Kay, J.)

Banner *v.* Berridge.

Statute of limitations—Mortgage of ship—Sale by first mortgagee—Claim by second mortgagee for an account—Express or constructive trust—Acknowledgement—Interest payable in advance.

In January 1873 *L. mortgaged a ship in the statutory form to B. By a contemporaneous agreement it was provided that interest should be payable in advance on the* 1*st Jan. and the* 1*st July, and that six months' interest should be paid in lieu of notice if the mortgage was paid off.*

In February L. executed a second mortgage of the ship to K. and Co. In September both L. and K. and Co. went into liquidation. On the 10th Dec. 1873 B. contracted to sell the ship under the power of sale given him by the Merchant Shipping Act (17 & 18 Vict. c. 104), s. 71. On the 8th March 1880 the trustee in K. and Co.'s liquidation commenced an action against B. for an account of the sale moneys. B. pleaded the Statute of Limitations.

Held, that on a sale by a mortgagee there is no express trust of the purchase monies received by him in favour of the mortgagor. That there is a constructive trust of the surplus only, and that the court will not after the expiration of the statutory period allow evidence to be gone into to show that there was a surplus for the purpose of raising such trust.

Letters written by B. and his agent were relied upon as containing an acknowledgement sufficient to take the case out of the statute.

Held, that the letters contained an admission by B. that there was an account pending and requiring settlement between the parties, and from this the court would, if necessary, infer a promise to pay the balance which should be found due, but that the letters further contained a promise to pay such balance, and took the case out of the statute.

The first mortgagee claimed the six months interest which under the agreement became payable in advance on the 1st Jan. 1874, two days before he received the purchase money, as interest due or payable in lieu of notice.

Held, that this claim was inequitable and could not be allowed.

ON the 7th Jan. 1873 John Lacy, being the registered owner of all the shares in the steamship *Georgian*, executed a mortgage thereof in the statutory form provided by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 71, to secure 18,000*l.*, and the balance of an account current.

On the same day an agreement was executed by Berridge and Lacy, which provided, among other things, as follows:

That the said John Lacy shall pay to the said Richard Berridge interest on the sum from time to time due on this security half-yearly, in advance, on the first days of January and July, at the following rates brought down to the first day July next, at the rate of 12½ per cent. per annum, and after that date at the rate of 10 per cent. per annum.

And that the said John Lacy shall be at liberty at any time, in the event of the loss of the ship or otherwise, to repay to the said Richard Berridge the principle amount then due on the security of the said s.s. *Georgian* on payment of six months' interest in advance, in addition to the principal and interest due at the date of payment. And the said John Lacy shall also be at liberty to repay to the said Richard Berridge the said principal sum of 18,000*l.*, and amount due to him on account current at any time after the expiration of six months from the date hereof, upon giving six months' notice of their intention so to do, or upon his paying to the said R. Berridge six months' interest in lieu of such notice.

On the 5th Feb. 1873 the said John Lacy executed a second mortgage of the said ship to Messrs. J. and H. Keyworth and Co., to secure the payment of the balance of an account current. This mortgage was duly registered on the 10th Feb. 1873, and notice thereof given to Berridge on the 1st Sept. 1873.

On the 2nd Sept. 1873 both Lacy and Keyworth and Co. presented petitions for liquidation. W. H. Banner was appointed trustee in Keyworth and Co.'s liquidation.

In Nov. 1873 Berridge took possession of the ship. On the 10th Dec. 1873 he contracted to sell the ship, and received the deposit. On the 3rd Jan. 1874 he or his agent received the balance of the purchase money, which was more than sufficient to pay what was due upon his mortgage.

A number of letters were written by W. H. Banner to Berridge asking for an account. On the 28th Aug. 1874 Berridge wrote to Banner:

In accordance with the promise given you, I herewith inclose statement of *Circassian* and *Georgian* accounts, in reference to which I will furnish any explanation required, and all necessary vouchers are at your order for examination. There is a sum of 839*l.* 1*s.* 1*d.* standing to the credit of Mr. Preston and Mr. Banner awaiting final settlement. I have been to Messrs. Hollam and Co.'s offices to-day for their bill, but could not obtain same.

On the same day Berridge wrote again:

Since writing to you to-day I find that there is a further sum in the hands of Mr. Preston of 95*l.* 4*s.* 10*d.*, the balance of the captain's account.

The account sent with the first of these letters contained items charged against Banner of 69*l.* 8*s.* 2*d.*, for interest due to Berridge, in lieu of notice on a former mortgage, by Lacy, of a ship called the *Retriever*, which had been lost at sea, and of 828*l.* 12*s.* for six month's interest on the money due on the *Georgian* mortgage on the 1st Jan. 1874, in lieu of notice. The account thus made out showed a balance due from Berridge of 329*l.* 8*s.* 10*d.*, but there was added at the foot of the account a sum of 500*l.* to meet a claim of Messrs. Griffiths, Tate, and Co., on account of the *Georgian*, and an item of which the amount was left open for Hollams and Co.'s law charges. The sum of 839*l.* 1*s.* 1*d.*, referred to in the letters, represented earnings for freight and had been paid into a joint account pending the settlement of other claims against it.

On the 30th Oct. 1874 Cooper, as agent for Berridge, wrote to W. H. Banner:

I am requested by Mr. Berridge to state that he has been expecting to hear from you in reference to his letter of the 28th Aug., and account accompanying same, and that he would be obliged by your informing him if you are prepared to receive the balance.

After this letter the matter appeared to have been allowed to drop. H. W. Banner died in March 1878, and the plaintiff J. S. H. Banner was appointed trustee in Messrs Keyworth and Co.'s liquidation in his place, but it was not till Nov. 1879 that his solicitors again wrote to Berridge for an account. In consequence of this letter an interview took place between Banner's solicitors and Berridge, at which it was alleged that Berridge promised an account. On the 23rd Dec. 1879 Banner's solicitors again wrote for the account, and also asked for an authority to Preston to concur in the payment out to the plaintiff of the 839*l.* 1*s.* 1*d.* above referred to. On the 30th Dec. 1877 Berridge wrote in answer:

Since my removal here my papers have been in a very confused state, I will endeavour to find those relating to the *Georgian*, and as soon as I have done so will write you thereon. The whole matter should be disposed of at the same time.

On the 3rd Jan. 1880 Berridge again wrote to the plaintiff's solicitors:

In compliance with your request I inclose a copy of Mr. Preston's account, by which you will see how the sum of 17,739*l.* 0*s.* 4*d.* was arrived at. The vouchers for

payment will be at your service for examination at any time. There will be some debit on *Circassian* account to charge to the *Georgian* account.

Some further correspondence passed, which was not relied on as containing any acknowledgement of a debt. On the 8th March 1880 J. S. H. Banner commenced this action for an account of the sale and other moneys received by Berridge, and of his mortgage debt, and for payment of the balance due from him to the plaintiff as trustee of Messrs. Keyworth and Co., the second mortgagees.

The defendant Berridge pleaded the Statute of Limitations as a bar to the action. The Merchant Shipping Act (17 & 18 Vict. c. 104), s. 71, enacts that

> Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money,

but contains no directions as to the disposal of the purchase money, and the statutory form, in which the mortgage to Berridge in this case was executed, contains no power of sale or declaration of trust of the proceeds.

Rigby, Q.C. and *Warmington* for the plaintiffs. —As to the defence of the statute, a mortgagee selling under a statutory power becomes a fiduciary agent for the mortgager or second mortgagee:

Tanner v. *Heard*, 29 L. T. Rep. 257; 23 Beav. 555.

The relation between them creates an express trust, and the statute has no application at all. [KAY, J.—The court has been very reluctant to regard a morgagee as a trustee:

Kirkwood v. *Thompson*. 12 L. T. Rep. N. S. 446, 811, 2 H. and M. 392; 2 De J. & S. 613.]

There and in *Re Alison* (40 L. T. Rep. N. S. 93, 234; L. Rep. 11 Ch. Div. 1) and other similar cases it was attempted to make the mortagee a trustee of the land mortgaged. *Locking* v. *Parker* (27 L. T. Rep. N. S. 635; L. Rep. 8 Ch. 30) is a direct authority that the mortgagee is trustee of the proceeds of a sale under his power. The statute is no bar where a man holds chattels as trustee for another, and it is not necessary that the trust should be expressed in writing if the circumstances make it clear that there was a trust:

Wilson v. *Tooker*, 5 Bro. Par. Ca. 193;
Burdick v. *Garrick*, 22 L. T. Rep. N. S. 502; L. Rep. 5 Ch. 233;
Kemp v. *Westbrook*, 1 Ves. sen. 278.

But if the statute does apply, there is more than sufficient acknowledgement in the letters to take the case out of the statute. Berridge's letters acknowledge that there is an account which requires settlement, and from that the court will imply a promise to pay:

Prance v. *Sympson*, Kay, 678;
Re River Steamer Company; Mitchell's Claim, 25 L. T. Rep. N. S. 319; L. Rep. 6 Ch. App. 822.

Even if a promise to pay is required, Cooper's letter as Berridge's agent, which is now sufficient (Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 13), amounts to a direct promise to pay the balance. They also referred to

Colledge v. *Horn*, 3 Bing. 119;
Edmonds v. *Goater*, 15 Beav. 415;
Quincey v. *Sharpe*. 34 L. T. Rep. N. S. 395; L. Rep. W. N. 1876, p. 34.

No case is made for tacking anything due on the mortgage of the *Retriever* to that of the *Georgian*. The defendant is clearly not entitled to the six months' interest he claims in lieu of notice. Such interest could only be payable when the mortgage was put an end to by the act of the mortgagor. Here the defendant has taken possession and himself realised his security.

Northmore Lawrence (*Higgins*, Q.C. with him) for the defendant.—The clear distinction between an express and a constructive trust has been observed all through the cases as applying to personalty as well as realty. In *Beckford* v. *Wade* (17 Ves. jun. 97), where the doctrine was clearly laid down as to real estate, the Master of the Rolls referred with approval to *Andrews* v. *Wrigley* (1 Bro. C. C. 124), where the doctrine was applied to leaseholds. In *Petre* v. *Petre* (21 L. T. Rep. 136; 1 Drew. 371) Kindersley, V. C. defines an express trust within the meaning of the statute as one declared by some written instrument. In *Re Hindmarsh* (1 L. T. Rep. N. S. 475; 1 Dr. & Sm. 129), *Knox* v. *Gye* (L. Rep. 5 Eng. & Ir. App. 656), and *Watson* v. *Woodman* (L. Rep. 20 Eq. 721), the statute was held to apply though they were the clearest possible cases of constructive trust. In *Burdick* v. *Garrick* (*ubi sup.*) there was a power of attorney so worded as to clearly create an express trust. As to the supposed acknowledgement, in all the cases quoted no account was or had been sent. Here we sent in an account showing a balance in our favour. Even if the defendants have a right to strike off the items entered as open, and so show a balance against us, the account can only be an admission that the balance is due and no more. The offer to produce vouchers in our subsequent letter is merely an offer to show how the result was arrived at. There is nowhere any admission of a liability to account. The only authority in favour of my friends contention is the dictum of Mellish, L.J. in *Burdick* v. *Garrick* (*ubi sup.*). In *Prance* v. *Sympson* (*ubi sup.*) the Vice-Chancellor found in the letter relied on an express promise to pay; that is really an authority on my side. And all the authorities show that a mere admission that an account is outstanding is not enough:

Francis v. *Hawksley*, 33 L. T. Rep. 182; 1 El. & El. 1052;
Routledge v. *Ramsay*, 2 Ad. & El. 221;
Hart v. *Prendergast*, 6 L. T. Rep. 173; 14 M. & W. 741;
Spong v. *Wright*, 9 M. & W. 741;
Williams v. *Griffiths*. 3 Ex. 335.

Interest in advance is expressly stipulated for by the terms of the contract. It was due before we received the purchase money of the ship, and we were entitled to retain it.

Rigby, Q.C. in reply.

Cur. adv. vult.

May 25.—KAY, J.—Two questions arise in this case which are of some interest, and upon which I propose to give my opinion. The action is by the trustee in bankruptcy of the second mortgagee of the ship *Georgian*, against the first mortgagee and the trustee in bankruptcy of the mortgagor who has disclaimed, the ship, which has been sold, not having produced enough to pay the first and second mortgagees in full. The principal question is whether the action is barred by the Statute of Limitations, or by laches, following, as the Courts of Equity do, the analogy of that statute. The

dates are these: [His Lordship stated the dates of the mortgages, sale of the ship, and commencement of action, and proceeded:] Now to this action the Statute of Limitations was pleaded, and the first reply to that plea is, that Berridge was bound by an express trust in respect of these moneys which he had received, and that therefore the statute does not apply. As to express trust, there is none in this case in writing. In the ordinary case of a power of sale in a mortgage the power of sale expresses that the mortgagee, when he receives the purchase money, shall hold it upon trust to defray expenses, then to pay himself what is due upon his mortgage, and lastly, to pay the surplus to the mortgagor. Nothing of that kind was expressed in this case. The power of sale is the statutory power under the Merchant Shipping Act 1854, and the only section which has any reference to the matter is the 71st, which is in these words: [His lordship read the section as set out above.] It is plain that there is a mere expression that the registered mortgagee shall have power to sell and give receipts, and there is certainly no express trust there of the purchase moneys. Then I was referred to certain cases, of which I will mention one or two, as being decisions, or something which might help a decision, that a mortgagee selling under that power becomes affected with an express trust of the purchase money. One of them is *Tanner* v. *Heard* (29 L. T. Rep. 257; 23 Beav. 555). [His Lordship read the head-note of that case and proceeded:] But I observe in the judgment that the Master of the Rolls very carefully indeed puts this case not at all upon the ground of a mortgage, but on a further and distinct ground. He says: "The plaintiff says the mortgage was paid off, that the defendant was a trustee for him of the surplus, that the ship was sold on behalf of both parties, that a balance has been found against the defendant in taking the accounts; and that consequently the costs (it was only a question of costs) ought to abide the result. I am of opinion that this not a case in which the principles which obtain in a suit between mortgagees are applicable. I think it distinguishable. It is a case of this description. The defendant was first mortgagee of a ship, the plaintiff was the second; the defendant with the sanction and authority of the plaintiff sold it at Amsterdam, and received the proceeds of the sale. Being entitled in the first place to the amount due on his mortgage and the expenses of the sale of the ship, and there being a surplus, he was bound to account to the plaintiff in the character of trustee." If I understand those words, the master of the Rolls most carefully distinguishes the case from the ordinary case of a mortgagee, and holds that there was a trust because the ship was sold by arrangement between two persons who were both of them interested in the subject-matter of the sale; the ship being sold by one, and the proceeds of sale coming into the hands of that one, he became a trustee of the results of those proceeds. Therefore I cannot take that as an authority for saying that a mortgagee selling a ship under the statutory power of sale becomes an express trustee of the surplus. The other case referred to upon this subject was *Kemp* v. *Westbrook* (1 Ves. sen. 168). But that I find again is a totally different case, because it was not properly the case of a mortgage at all, but of a pledge of goods, and there seems to have been no power of sale. Therefore I do not derive from that any authority which helps me at all in this case. Then I have to look at what upon general principles constitutes an express trust. Upon that point I am referred to *Petre* v. *Petre* (21 L. T. Rep. 136; 1 Drew. 371); there Kindersley, V.C., commenting upon the 25th section of the 3 & 4 Will. 4, c. 27, the section referring to express trusts (which I may mention because it would seem now to be extended expressly to personal estate by sect. 25, sub-sect. 2, of the Judicature Act), says: "The 25th section is also confined to express trusts, that is, trusts expressly declared by a deed or will, or some other written instrument." If that were a complete and exhaustive definition of an express trust, it is beyond all question this case would not come within it. He goes on to say: "It does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument, and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute. But if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the court on the principles of equity would hold him a trustee, then the 25th section of the statute does not apply, and if the possession of such a constructive trustee has continued for more than twenty years" (of course he is speaking of land) "he may set up the statute against the party who, but for lapse of time, would be the right owner. That is the construction I put upon the 25th section of the statute." I have said I do not think that is an exhaustive definition of an express trust. It would confine express trusts in that section of the Act to trusts which are expressed in writing, but the case to which I am going next to refer shows that the meaning of the expression can hardly be limited to that extent. However, it is very valuable (as everything which fell from Kindersley, V.C. was) as an attempt to draw the line between express and constructive trusts. The other case to which I refer is that of *Burdick* v. *Garrick* (22 L. T. Rep. N. S. 502; L. Rep. 5 Ch. 233). There Lord Hatherley says: "It would, indeed, be a strange thing if this court should be obliged to hold that if a person, for instance, were to deposit plate or jewels with his bankers, intending to be absent from home for a great number of years, and those chattels were converted by his bankers to their own use in fraud of the owner, and he were to come back at the end of seven or eight years, he is utterly remediless, either in the shape of an action at law or of a suit in this court, because the dealing with his property has been in the nature of an agency. I apprehend the true rule applicable to these cases is to be found in the case of *Foley* v. *Hill* (2 H. of L. Cas. 28), where it is clearly stated by Lord Cottenham, who distinguishes between the confidence reposed in a factor or agent and the confidence reposed in a person who is merely in the position of a banker. A mere banker who takes charge of his customer's money is not in any fiduciary relation to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his

own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him the very coins or exchequer bills which he deposited with him. But in the present case we have an agent who is entrusted with these funds not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner in purchase of land or stock, and which moneys the factor or agent is bound to keep totally distinct and separate from his own money, and in no way whatever to deal with or make use of them. How a person who is entrusted with funds under such circumstances differs from one in any ordinary fiduciary position I am unable to see. That being so, the Statute of Limitations appears to me to have no application to the case." That obviously enlarges the definition which Kindersley, V.C. gave, and points out that a man may be bound by an express trust where moneys, which in no sense belong to him and in which he has no kind of interest, or goods, plate, or jewels, are placed in his hands by the real owner as depositee of them, and that without any writing or even expression in words that it was to be in trust. That would come, according to Lord Hatherley's dictum here, within the definition of express trust, and that seems extremely reasonable, and therefore one must consider that the express trust is somewhat larger than what Kindersley, V.C. defines it to be, in the case which I have been referred to. Now in this case of *Burdick* v. *Garrick* there could be no kind of doubt about there being an express trust, because the alleged trustee there was a person to whom a power of attorney had been given to collect moneys belonging to the donor of such power, and with them, amongst other things, to purchase land, and procure it to be conveyed to the donor of the power of attorney, and to invest the residue of such moneys in certain securities, either in the name of such donor, or in the name or names of other persons in trust for him. Therefore, in that particular case there was as plain an expression of trust as could well be; but still the remarks I have read from Lord Hatherley's judgment go much further, and show that there may be an express trust without any actual expression in words where property and money, wholly and solely belonging to the person who deposits, is deposited with another person for the benefit of the depositor. Then, that being the nature of an express trust, the question I have to consider is, whether these facts which I have mentioned bring this case within that doctrine. In the first place, we cannot help remarking that this not an entirely analogous case, because the moneys which would come to the hands of the mortgagee, upon the exercise of the power of sale, were not moneys in which he had no interest. They were moneys in which he had a very large interest, moneys which, if the security should happen to be deficient, would wholly belong to him. This consideration led me to suggest, during the argument, a reference to a case which shows how very reluctant the court is to hold a mortgagee to be a trustee to all intents and purposes. The case referred to was *Kirkwood* v. *Thompson*, before Lord Hatherley, who there adopted and approved the language of Wigram, V.C., in *Dobson* v. *Land* (8 Hare, 216), in which case the Vice-Chancellor refused to hold that a mortgagee in possession, who had insured the property in the absence of covenant, was a trustee of the policies for the mortgagor. Now in this case of *Kirkwood* v. *Thompson* Lord Hatherley had to consider a state of things where a mortgage was entirely in the form of a trust for sale, and a second mortgagee had bought the mortgaged property under that trust for sale, and Lord Hatherley says: "The defendants, no doubt, were trustees for sale, but until they do sell they cannot on that account be put in a worse position. I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale, and that distinctly makes no difference in his position, which is that of mortgagee." Now, that certainly was a very strong decision, because there was, so far as words can go, the most explicit and express trust that can possibly be imagined; but, nevertheless, though the trust was so very explicit and express upon the face of the deed, Lord Hatherley held that the true relation of the parties was that of mortgagor and mortgagee, and he would disregard the very words and hold that a mortgagee was not to all intents and purposes a trustee notwithstanding such express words. That case came before the present Court of Appeal in *Locking* v. *Parker* (27 L. T. Rep. N. S. 635; L. Rep. 8 Ch. 30), where the facts as stated in the marginal note were these: [His Lordship read the head-note of that case and continued:] There had been there possession taken more than twenty-one years before the filing of the bill, and nothing in the way of acknowledgment within the meaning of the Act, but there had been certain sales under that trust for sale, and the mortgagee had received the money. "It is said," says James L.J., "however, that there is an express trust in the deed with reference to the sale moneys. The Solicitor-General in his argument admitted that there might be an express trust with reference to the sale moneys in exactly the same way as when a mortgagee sells under the powers of a common mortgage. In that case, when the estate has been sold, there is an express trust of the surplus money for the mortgagor, and if there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But this is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate which, under the circumstances, cannot, according to the view we have taken, be sustained." In the earlier part of his judgment he quotes the words I have read from *Kirkwood* v. *Thompson*, and continues: "If I may be permitted to say so, I entirely concur not only in those words, but in the spirit of those words, that it is not for a court of equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction. Whatever form the matter took, I am of opinion that this was solely a mortgage transaction between the mortgagor and Lysimachus Parker," who was the person entitled to the mortgage money. I have, therefore, a series of decisions—there are other cases to the same effect, but none, so far as I am

aware, in the least degree contradictory—showing that, even where the words of the mortgage express a trust in the most clear and explicit manner, the court is very loth to hold the mortgage to be a trust to all intents and purposes. As I read this last case, where, under an ordinary power of sale, there is an express trust of the moneys to be received by the mortgagee, that is not a trust which the mortgagor can enforce at all, except as to the surplus. Where a trust is so expressed, he may say, The mortgagee is a trustee for me of the surplus. But I am dealing with a case where there was no such trust expressed at all, and I have to say whether there is a relation between mortgagor and mortgagee, which is to such an extent fiduciary that, in the absence of any such words, I am to hold there was an express trust binding the mortgagee, in case he sells, in favour of the mortgagor or second mortgagee, which is the same thing. Of course I must look at the consequences. If at any time—at least within twenty years, at any time, that is, until, according to the ordinary rules of equity, a presumption of payment would arise—the mortgagor or second mortgagee might commence an action against the first mortgagee, alleging that he had sold and that there was a surplus, and require him to account, and that, although there had been no acknowledgment of the existence of any surplus, or of the mortgagor's right to sue in any shape or way within those twenty years after the sale, that is a very serious position in which to put the mortgagee, and, in the absence of distinct authority, I should be very reluctant to hold that to be the case. But I hold the true result of these decisions to be this, that, in this particular case, where there is no trust expressed, either in writing or verbally, of the proceeds of the sale, no trust can possibly arise until it is shown there is a surplus. Then I am disposed to hold that there is sufficient fiduciary relation between the mortgagor and mortgagee to make the mortgagee constructively a trustee of the surplus. But that seems to me to be a case not of express trust at all, but of constructive trust; that is to say, a trust which only arises upon proof of the fact that there was a surplus in the hands of the mortgagee after paying himself. And if that be so, the ordinary rules of a court of equity would apply, that nobody would be allowed to enter into evidence to raise the question of constructive trust after the statutory period had expired. In this case, that is to say, after six years had expired, without acknowledgment of the mortgagor's title or of there being any surplus, from the time when the money had been received by the mortgagee, a court of equity would not allow parties to enter into evidence for the purpose of showing that there was a surplus in order to raise the case of constructive trust; so that the case of constructive trust does not help the present plaintiff. Accordingly, I hold that the reply on the ground of express trust fails, that the true relation of the parties would be that, if there were a surplus, the mortgagee might constructively be held to be a trustee of that surplus, but that it would be impossible, after the lapse of six years from the receipt of that money without acknowledgment, to allow the plaintiff to enter into evidence for the purpose of making out that constructive trust; and accordingly the statute is a bar, or rather the court of equity, acting upon the analogy of the statute, would prevent this case of constructive trust being raised. The other reply was this, that there had been sufficient acknowledgment since the receipt of the money to enable the plaintiff to avoid the bar of the statute. As to the law upon that subject several cases were referred to, one of which is *Prance* v. *Sympson* (Kay, 678). In that case the plaintiff, being solicitor and promoter of a railway company, appointed the firm of A'Beckett and Sympson, in which he and the defendant were both partners, solicitors to the company, upon the terms of dividing the profits. Afterwards he wrote to the defendant for an account. The question was whether the defendant's answer amounted to an acknowledgment, and Lord Hatherley says: "The answer to that letter is, 'I have had a long talk with my partner about this matter; he says and insists that there is a large balance owing to him, but I have put the matter right with him, and you and I must go into it and settle the account.' It may be said that there is some ambiguity in this, but the following words entirely remove it, and I should have thought, even without them, that settling the account meant paying any balance that might be due; the letter however continues, 'It is necessary we should sit down to this matter, and put it on the square.' What can that mean but an engagement that any balance that might be due should be paid? . . I am of opinion that these letters contain a sufficient acknowledgment of the existence of an unsettled account, and a sufficient promise to settle it in the sense of payment to take this case out of the statute." Now that case I take to be a decision, that in the letter there was not merely the admission of an unsettled account—a pending account which ought to be settled—but also an engagement to pay what might be found due on settling that account. However, a different view seems to have been taken of it by one of the most learned judges we ever had, every word of whose judgment is always deserving of the greatest possible attention. In the case of the *River Steam Company, Mitchell's claim* (25 L. T. Rep. N.S. 319; L. Rep. 6 Ch. 822), Mellish, L.J. refers to Lord Hatherley's judgment in *Prance* v. *Sympson*, and says: "There the Vice-Chancellor, as it appears to me, acted strictly in accordance with the rule." Those words are very important, because in what follows I venture to express, with great diffidence, a doubt whether he has quite accurately given the effect of *Prance* v. *Sympson*. But whether he has or not, he says that his version is strictly in accordance with the rule. He goes on: "That was a case of taking an account which could only be taken in a court of equity, and there was a letter admitting that the account must be taken, and that there was a right to have it taken. From that the Vice-Chancellor inferred that there was a promise to pay what might be found due on the taking of that account, just as here we might infer from the promise to refer to arbitration a promise to pay what the arbitrators might have found due if the arbitration had taken place. With that all the other authorities are perfectly consistent." Now I ventured to say that I doubted whether that is a precisely accurate description of *Prance* v. *Sympson*, because it seems to me, if I understand the language of the Vice-Chancellor, that he there found, not merely an admission that there was a pending account

which must be settled, but also words besides which amounted to a promise to pay. But, be that as it may, this case of the *River Steamer Company* (*ubi sup.*) shows in the plainest possible manner that it was Mellish, L.J.'s opinion that if there was an admission that an account must be taken, and that there was a right to have it taken, it would be consistent with all principles, and with the previously decided cases, that you must infer from that a promise to pay. And if I may venture to express my own opinion, that seems quite reasonable. I suppose there is no doubt about the law that, if there be an unqualified admission of a debt, that acknowledgment implies a promise to pay. And surely it seems quite as reasonable where there is an unqualified admission that there is a pending account between two parties—pending that is in the sense that it is not a settled account binding upon them, but an account which either party is at liberty to examine—to say that that is an admission from which you may infer a promise that when the account is settled the balance shall be paid. Now, with that preface, I come to the letters which are in question in this case, and I have to see whether they bring this case within the rule. [His Lordship read the letter of the 28th Aug. 1874.] Now in this letter was inclosed an account which has been put in evidence, and which brings out a balance of 329*l.* 8*s.* 10*d.* due from Berridge to the second mortgagee as representing the mortgagor subject only to a claim entered on the other side, "Griffiths, Tate, and Co's claim, paid on account of *Georgian*, 6th May 1873, 500*l.*" and Hollams' and Co.'s law charges, which are left in blank. So that, on the face of the account sent, there is an admission that upon that account, unless those two claims swept away the balance, there was a balance due to the plaintiff, the second mortgagee. Besides that there is a clear admission that it was a pending account unsettled, because he says, in reference to this account, "I will furnish any explanation required, and all necessary vouchers are at your order for examination." Moreover, there is a reference to "a sum of 839*l.* 1*s.* 1*d.* standing to the credit of Preston and Banner, awaiting final settlement." Therefore, I have no hesitation whatever in holding that this letter and the account sent in it are a most clear admission of a pending account, and more, that they amount to an admission that there will in any event, unless Hollams and Co.'s law charges should be very large, be a balance due to the second mortgagee, because to the 329*l.* has to be added the 839*l.*, which would more than cover the 500*l.* of Griffiths' claim. That letter was written within six years before the commencement of this action, and if the matter stood there I should have no hesitation in holding that it is a sufficient acknowledgment to take the case out of the statute. But the matter does not rest there, because on the same day Berridge writes again to the same persons. [His Lordship read the second letter of the 28th Aug. 1874, set out above.] That would swell the amount due to the second mortgagee. And then comes a letter of the 17th Oct. 1874, from Cooper, who was Berridge's agent, and whose letter since the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 13, may be a sufficient acknowledgment. [His Lordship read the letter set out above.] If there was the smallest doubt as to the meaning of the former letters, that puts it beyond question that now Mr. Berridge was prepared shortly after the letters of the 28th Aug. to pay over the balance. I suppose the claims of Griffiths and Co. and Hollams' law charges had been settled some other way or were abandoned. There are certain other letters which are material. The correspondence seems to have gone to sleep till the 24th Nov. 1879, when the matter was wakened up again by a letter from Messrs. Martin, the plaintiff's solicitors. [His Lordship read the other letters set out above, concluding with Berridge's letter of the 30th Dec. 1879, ending with the words, "The whole matter should be disposed of at the same time."] Now, what does that mean? It can only have one meaning, viz., There is a pending account between you and me. Probably there will be something due to you; perhaps not. The account has to be settled, and the whole matter has to be disposed of at one time; and when you ask me to concur in handing over money to you, I defer doing that until the account is finally settled, and when it is so settled there is to be a proper payment. Then the correspondence continues, and there is only one other letter I care to notice. [His Lordship read Berridge's letter of the 3rd Jan. 1880.] Every line of that letter, the offer to produce vouchers, and the statement that there would be another item to be entered in the shipping account, shows that Berridge treated the account as being a perfectly open and unsettled account. I cannot in the least doubt that the result of this correspondence (and I am entitled to take it altogether if it be necessary) is a clear admission not only that there was a pending account which must be settled in the sense of having the account properly taken and vouched, but also a clear promise which is, I think, sufficiently expressed, that whatever is found due upon the taking of that account will be paid by Berridge. Therefore I do not think it necessary to call in aid the words of Lord Justice Mellish's judgment in *The River Steamer Company's case* (*ubi sup.*), and I have not the least hesitation, looking at this correspondence, in holding that the Statute of Limitations is avoided in this case by there having been sufficient acknowledgment within the six years; and accordingly I shall direct an account to be taken of the *Georgian* mortgage in the usual form against a mortgage in possession, which possession was taken on the 10th Dec. 1874. There are two other questions which I have to dispose of. I am asked to decide whether two items entered in this account are properly chargeable against the second mortgagee. The first of these is for interest in lieu of notice due upon the *Retriever*. Now, the *Retriever* was posted as missing at Christmas 1871, and the insurance upon her was paid to Berridge. Therefore, more than a year before the sale of the *Georgian*, the *Retriever* disappeared altogether. The subject of the mortgage was gone, the moneys which represented it had been received by Berridge, and the only mode by which any moneys due in respect of the *Retriever* would be brought into the *Georgian* account would be on the principle of consolidation. No argument was addressed to me of that sort, and I suppose the case of *Re Raggett, Ex parte Williams* (44 L. T. Rep. N. S. 4; L. Rep. 16 Ch. Div. 116), would be conclusive against it. The short point there decided was that, after one mortgage property had ceased to exist, there could be no consolidation of the

mortgage debt. That would apply to this case, and prevent anything on account of the *Retriever* mortgage being brought into this account. The other point is this. The account claims six months' interest on the balance due on the *Georgian* mortgage from the 1st Jan. 1874, in lieu of notice. The contemporaneous agreement executed the same day as the mortgage provided that interest should be paid upon the sum due upon this security half-yearly, in advance, on the 1st Jan. and on the 1st July. Therefore, on the 1st Jan. 1874, half a year's interest would be payable in advance under that agreement. But before the 1st Jan. 1874, viz., on the 10th Dec. 1873, Berridge had contracted to sell the *Georgian*, and had received the deposit. The purchase was to be completed within thirty days, which would extend over the 1st Jan. 1874. The balance of the money was not actually received until the 3rd Jan. 1874. Now, the question is whether I can allow a mortgagee, who has voluntarily sold the mortgaged property before the day upon which the interest becomes payable in advance, but has not received the money, to claim the interest payable in advance when he receives the balance of the purchase money, more than enough to pay him, two days after the day fixed for payment of the interest in advance. I conceive that—this not being a case in which the mortgagor was paying off the mortgage, or in which he had requested anything to be done at all in the matter, but a case in which the mortgagee was acting of his own mere motion in realising the subject of the mortgage—it would be in the last degree inequitable to allow him to have six months' interest for a period during the whole of which, except two days, he would have the mortgage money in his own pocket. Therefore, upon the ground that it is an inequitable claim, and one of those inequitable claims which the court always watches very jealously in a case between mortgagor and mortgagee, I disallow that six months' interest, and allow Berridge interest down to the 3rd Jan. 1874 upon the moneys from time to time due on the mortgage.

Solicitors for the plaintiff, *Wynn* and *Son*.

Solicitors for the defendant, *Hollams* and *Coward*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

Friday, March 4, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE LOVE BIRD.

Collision—Regulations for Preventing Collisions at sea, Art. 12.—*Mechanical foghorn*—36 *&* 37 *Vict.* 85, *s.* 17—"*Necessary departure*"—"*Possible*" *contribution to collision—Both to blame.*

The neglect of a steamship to stop and reverse in a fog on hearing a mouth foghorn ahead of her will render her to blame for a collision with the sailing ship sounding the foghorn; but the sailing ship is also to blame if she does not use the mechanical foghorn provided for by the sailing rules, art. 12 (*Sept.* 1880), *as such a foghorn might possibly have given the steamship earlier warning, and the neglect to use it cannot be excused unless circumstances rendered a departure from the rule necessary:* (*Merchant Shipping Act* 1873, 36 *&* 37 *Vict. c.* 85, *s.* 17.)

The neglect to use a mechanical foghorn is not excused by the fact that the sailing ship left port before the regulations came into force, if the master at the time of sailing knew that the rules would come into force during the voyage.

THIS was an action brought by Wilhelm August Sarnow and others, the owners of the barque *Pansewitz*, of 333 tons register, against the owners of the *Love Bird*, a screw steamship of 438 tons register, for the recovery of damages caused by a collision which took place between the two vessels about 5.30 a.m. on the 4th Sept. 1880, in the North Sea, about one hundred miles to the south-west of the Skager Rock. There was a thick fog at the time, and the *Pansewitz* stated in her preliminary act that "the foghorn was duly sounded according to the regulations for a vessel with the wind abaft her beam, and on the whistle of the *Love Bird* being heard the horn was again sounded with three blasts in succession, and the *Pansewitz* was kept on her course, and when the *Love Bird* was made out she was loudly hailed;" while the *Love Bird* in the same document admitted that "on hearing the *Pansewitz's* trumpet the second time her engines were stopped and put full speed astern, and directly the vessel was sighted the helm was kept to starboard." The *Pansewitz* charged the *Love Bird* with going at an immoderate speed and neglecting to keep a good look-out, and stop and reverse, and keep out of the way of the *Pansewitz*, while the *Love Bird* pleaded, among other contentions which were not established, that the *Pansewitz* neglected to comply with article 12 of the Sailing Rules, and that as far as the *Love Bird* was concerned the collision was the result of inevitable accident. Article 12 of the rules, which came into operation on the 1st Sept. 1880, is as follows:

> A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstruction, and with an efficient foghorn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar foghorn and bell.

The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85). s. 17, is:

> If in case of collision it is proved to the court that any of the regulations for preventing at sea has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the rule necessary.

It appears that the *Pansewitz* was at Dieppe until nearly the end of August, and that she had a copy of the new sailing rules on board at that time. There was no evidence that a mechanical foghorn could not be obtained at Dieppe.

The further material facts of the case appear in the judgment.

The following cases were also cited:

The Hibernia;
The Fanny M. Carvill;
The Khedive

Butt, Q.C. (with him *Myburgh*) for the plaintiffs.—The *Love Bird* was alone to blame for this collision. In her preliminary act she admits it was not until she heard the *Pansewitz's* trumpet the second time that she stopped. The evidence shows that she heard it quite clearly the first time

and she then knew, and must be taken to have known, that there was a sailing vessel ahead, and that there was a risk of collision, and yet she continued to go ahead, without even slackening her speed. If the *Love Bird* had stopped when first she heard the trumpet, there would have been no collision. She did not, and the sole cause of the collision was her persisting in going on in spite of her knowledge of the position of the *Pansewitz*. Had it been clear weather, and had the *Love Bird* known the position of the *Pansewitz* by actually seeing her, and nevertheless run her down, the *Pansewitz* would not have been to blame for not having a foghorn. In other words, in a case where sufficient warning was given and disregarded, it cannot be said that the absence of greater, that is, more than sufficient warning, could have possibly contributed to the collision. Besides this rule came into operation after the vessel started on her voyage, and at the time she so started. She was not bound to have, and had not such a foghorn on board. Surely this is a case in which the exception contained in the 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) applies, and the court should be satisfied that circumstances rendered a departure from the rule necessary. It was not only necessary to depart from the rule, but impossible to do otherwise.

Clarkson, Q.C. and Dr. *Phillimore* for the defendants.—It is absurd to say that the absence of the mechanical foghorn could not possibly have contributed to the collision. When we heard the trumpet of the *Pansewitz*, we were so near that it was impossible for us to avoid her. The first time the trumpet of the *Pansewitz* was heard it was heard only faintly, and we concluded, and were justified in so doing, that she was at a considerable distance, and that there was no risk of collision. Had the *Pansewitz* been furnished with a mechanical horn, as she ought to have been, she would have conveyed the sound we first heard from a considerable distance—a distance at which there would have been no risk of collision, and from the distance at which she actually was would have conveyed a much greater volume of sound. We were justified in considering that there was no risk of collision when we first heard the trumpet, and when we heard it the second time we did all that was possible, but it was too late to avoid the collision. The collision was on the side of the *Love Bird* inevitable accident. It is no defence for the *Pansewitz* to say that she had not one on board when she sailed. She knew, or ought to have known, the rules were coming into operation, and ought to have provided herself with one beforehand. Besides, she could probably have got one at Dieppe.

Butt, Q.C. in reply.

Sir R. PHILLIMORE.—In this case I have consulted with the Elder Brethren, and we have no doubt whatever that the steamer is to blame for this collision. There was a thick fog from the land, and she heard the foghorn faintly or loudly according to the evidence, three blasts, nearly ahead, and she proceeded on her course, neither stopping or reversing her engines, which it was clearly her duty under the circumstances to have done. She is therefore to blame for this collision. But it remains to consider whether the sailing vessel is not also to blame. Now the rules on this subject came into operation on the 1st Sept. last, and the important rule, the 12th, is to this effect: "A steamship shall be provided with a steam-whistle or other efficient steam sound signal, . . . and with an efficient foghorn to be sounded by a bellows or other mechanical means, and a sailing ship shall be provided with a similar foghorn and bell." There is no dispute that the sailing vessel in this case was not provided with such a foghorn as is provided by this rule. Her case is, that she was at Dieppe on the 28th Aug. when the rules had not yet come into operation. But she was perfectly aware that they would come into operation after she left Dieppe, and her evidence is that she had a copy of the rules on board on the last day of the month at Dieppe. Her excuse, however, is that there was not a foghorn on board at the time she sailed. There is no evidence that there was not one to be got at Dieppe, and the judgment of the court would not excuse a vessel, knowing, as she did, that the rules would come into operation on the day they did, for not having an efficient foghorn on board. I am therefore very sorry to say that though it operates severely upon the sailing vessel, I cannot bring it under the exception in the Act "unless the circumstances of the case made a departure necessary." The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17, enacts' "If in any case of collision it is proved to the court before whom the case is tried that any of the regulations for preventing collisions at sea under the Merchant Shipping Act of 1854 have been infringed, the ship by which such regulations have been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary." There are several judicial decisions which have been applied to this 17th section, and they have decided that, in the absence of evidence to the contrary, if by any possibility a non-compliance could have contributed to the collision, the party neglecting the rule is to blame. I am sorry to say that this section of the statute applies to the case before me. I cannot see, nor can the Elder Brethren of Trinity House see, that by no possibility could the presence of a foghorn have prevented the collision, for it might possibly have given more warning to the other vessel. Therefore I am bound to say that the steamer is to blame, and that the other vessel is equally in fault. There will be no costs on either side.

Solicitors for the plaintiffs, the owners of the *Pansewitz*, *Thomas Cooper* and *Co.*

Solicitors for the defendants, the owners of the *Love Bird*, *J. A.* and *H. F. Farnfield.*

Tuesday, March 29, 1881.

(Before Sir R. PHILLIMORE.)

PREHN *v.* BAILEY AND OTHERS.

Raising wreck in the Thames—Salvage—General average—Contribution by cargo owner—Thames Conservancy Acts.

Where a ship carrying cargo is sunk in the Thames by collision occurring through her own negligence and limits her liability under the Merchant Shipping Acts, and her owner, upon ship and cargo being raised by the Thames Conservancy under their special Acts, pays the cost of raising

to the Conservancy, and hands over the cargo to the owner thereof upon an undertaking by the latter to pay all general average and other charges legally falling on the cargo, the shipowner cannot recover any contribution from the cargo owner in respect of raising the cargo.

The raising of ship and cargo under the Wrecks Removal Act 1877 (40 *&* 41 *Vict. c.* 16) *is not a salvage service giving a claim to general average, and, even if it were, the negligence of the shipowner would preclude him from recovery, as he would thereby profit by his own wrong.*

THIS was an action brought by William Prehn, the owner of the steamship *Ettrick*, of the port of London, against William Bailey and all other the owners of the steamship or vessel *St. Petersburg*, her tackle, apparel, furniture, cargo and freight, and against the master and crew of the *St. Petersburg*, and also against Robert Somenthal and Company, and Ferdinand Duboc, the owners of the cargo on board the *Ettrick* for the limitation of the liability of the *Ettrick* in respect of the losses and damages arising out of a collision which occurred between the *Ettrick* and the *St. Petersburg* on the 5th March 1880 off Gravesend in the river Thames in consequence of which the *St. Petersburg* was damaged, and the *Ettrick* so much damaged that she sank with her cargo.

The plaintiff admitted that the collision was occasioned by the bad navigation of the *Ettrick*, but pleaded that no loss of life or personal injury was caused by the collision, and that the collision occurred without his actual fault and privity, and also paid into court 1972*l.* 6*s.* 6*d.*, being 8*l.* per ton of the registered tonnage of the *Ettrick*, with interest from the date of the collision; and claimed that the liability of the *Ettrick* should be limited to that amount, that all actions against her in respect of the said collision should be stayed, and that directions should be given for ascertaining the several persons entitled to claim against the said sum.

Judgment was given by Sir R. Phillimore, 20th July 1880, in the terms claimed by the plaintiff; and thereupon the plaintiff and defendant, pursuant to Order XXXIV. of the Judicature Act 1875, concurred in stating the following special case:

1. This is an action, commenced on the 25th May 1880, by the owner of the steamship *Ettrick*, to limit his liability in respect of the losses and damages arising out of a collision between the steamships *Ettrick* and *St. Petersburg*, on the 5th March 1880, in consequence of which collision the *Ettrick* sank, with all her cargo, in Gravesend Reach, in the river Thames.

2. The plaintiff is the owner of the *Ettrick*, and Ernest Emil Wendt, D.C.L., is, for the purposes of this special case, to be considered the owner of 293 bales of wool, forming part of the cargo on board the *Ettrick* at the time of the collision, and a defendant in this action.

3. In the present action, the plaintiff admitted that the collision was occasioned by the bad navigation of the *Ettrick*, and claimed (*inter alia*) a declaration that he and the *Ettrick* were not responsible in damages in respect of the loss, or damage by reason of the collision to an amount exceeding 8*l.* per ton of the registered tonnage of the *Ettrick*. A copy of the pleadings herein is marked "A.," and is to be considered as forming part of this special case.

4. The usual judgment in limitation actions was made on the 28th July 1880, a copy of which is to be considered as a part of this special case.

5. By this judgment the plaintiff was pronounced entitled to the limited liability, as claimed on payment by him into court of the sum of 1972*l.* 6*s.* 6*d.*, and certain interest; and inquiries were directed to ascertain the persons entitled to claim upon the said sum.

6. The plaintiff has paid into court the said sum as required, and the inquiries directed were proceeded upon in the Registry, and it thereupon appeared, as the fact was that the said Ernest Emil Wendt, D.C.L., was entitled to claim in respect of the 293 bales, and he has claimed herein accordingly against the said fund so paid into court.

7. In the month of March 1880 the Thames Conservancy, by virtue of the powers vested in them by statute, raised the said vessel *Ettrick*, at the place where she had sunk, and the principal part of the cargo, including the said bales of wool was raised in her, and upon an undertaking being given on behalf of the owners of the *Ettrick* to the Thames Conservancy to pay the costs of raising, the said vessel *Ettrick* and her cargo were handed in their damaged condition to the plaintiff. The wool was damaged, and liable to further deterioration from its wet condition.

8. The said Ernest Emil Wendt, D.C.L., applied to the plaintiff for immediate delivery of his said bales of wool, but the plaintiff as the owner of the *Ettrick*, refused to give up the said bales without receiving an undertaking that the said Ernest Emil Wendt, D.C.L., would pay him freight and all general average and other charges that might legally fall on the said bales of wool.

9. The plaintiff accordingly gave up the said bales of wool to the said Ernest Emil Wendt, D.C.L., on an undertaking being entered into by the said Ernest Emil Wendt, D.C.L., in the terms of the following letter:

March 27, 1880.

To the owners of the *Ettrick*.

Dear Sirs,—In consideration of your giving me delivery order for the bales of wool specified at foot (so far as you are able) for the purpose of immediate sale in London, I hereby undertake to pay you freight on same as though the wool had been delivered at Gravelines. I also undertake to pay all general average or other charges that may legally fall on the wool.

Yours truly, E. E. WENDT.

Bales of Wool referred to:

120	Bales	A.D. M.
33	,,	P.C. F.
87	,,	A.P. D.
21	,,	N.S. L.
11	,,	
15	,,	

10. The value of the *Ettrick* when raised was 1100*l.* The expenses of raising her with her cargo amounted to about 400*l.*

11. The plaintiff has claimed from the said Ernest Emil Wendt, D.C.L., as owner of the said bales of wool, 124*l.* 15*s.* 2*d.*, as the proportion of the expenses of raising the *Ettrick* with her cargo, which he alleged to be due from him as general average, salvage, or otherwise on the said bales or in respect thereof.

12. The expenses of raising the *Ettrick* and

her cargo were not enhanced by any expenses specially incurred for raising the said defendant's bales of wool.

13. The plaintiff has claimed against the fund in court for the amount of 124*l.* 15*s.* 2*d.*, which he alleges to be due for general average salvage or otherwise from the said Ernest Emil Wendt, D.C.L. or to fall on the said wool as aforesaid, and he also claims in the alternative to be paid the said amount by the said Ernest Emil Wendt, D.C.L. as owner of the said goods irrespective of the said fund in court.

The questions for the opinion of the court are (1) Whether under the circumstances above set forth the plaintiff is entitled to the said sum of 124*l.* 15*s.* 2*d.*, or to any and what sum by way of general average, contribution, salvage, or otherwise; and if so (2) Whether the plaintiff is entitled to prove against the said fund in court as aforesaid in respect of such sum or any part thereof or otherwise in respect of the matters aforesaid; (3) Whether the plaintiff is entitled to be paid the said sum or any and what sum by the said Ernest Emil Wendt, D.C.L. personally.

The court is to have power to order such accounts, average statements, or inquiries (if any) as the court may think right to be taken or made; and if the court shall be of opinion in favour of the plaintiff such decree, judgment, or order shall be made as the court shall think right, either for proof against the said fund in court or payment by the said Ernest Emil Wendt, D.C.L. personally of such sum and costs, if any, as the court shall determine. If the court shall be in favour of the said Ernest Emil Wendt, then the court shall make such decree, judgment, or order, in his favour as to the said court shall seem fit.

Dr. *Phillimore* for the plaintiffs.—It is true that before the Merchant Shipping Acts a shipowner by whose negligence a cargo entrusted to him for the purpose of being carried had been sunk would have been unable if he had salved the cargo to recover anything either in respect of salvage in the cargo or personally from the owner, otherwise the law would have been allowing him to profit by his own wrong. But the Merchant Shipping Act alters this by direct legislation. The law as it existed was found to bear heavily on shipowners whose servants were guilty of negligence, and the Merchant Shipping Act was therefore passed and provided directly that under such cases a shipowner should be able and limit his liability to 8*l.* per ton of his ship's tonnage and should then not be liable for anything further, in fact should cease to occupy the position of a wrongdoer. If the owner of the *Ettrick* had offered to pay the ship's proportion of the cost of raising the ship and cargo, and refused to pay anything for the cargo, he would have been entitled to receive his ship; and if Dr. Wendt had refused to pay the cargo share of the costs the Thames Conservancy would have sold the cargo, and taken it, and handed the surplus to Dr. Wendt. In that case Dr. Wendt would not have been able to recover anything more from the owner of the *Ettrick* beyond his proportion of 8*l.* per ton. He would simply have had his claims against the fund in court. The owner of the *Ettrick* is not liable for more than the sum limited by statute in respect of his wrongful account. When he has paid that he has done all that is necessary: (*Chapman* v. *The Royal Netherlands Steam Navigation Company*, 4 Asp. Mar. L. C. 107; L. Rep. 4 P. D. 157.) Having paid this he found himself with a ship at the bottom of the Gravesend Reach and in that ship was a cargo belonging to another person. He paid a certain sum to the Thames Conservancy partly for raising his own ship, which part he clearly had to pay for himself, and the remainder for Dr. Wendt's cargo, which he as clearly paid as Dr. Wendt's trustee, and which he ought therefore to recover from Dr. Wendt. The matter in fact resolves itself into this, a third person salved the plaintiff's ship with Dr. Wendt's cargo in it and the plaintiff is entitled to a general average contribution from Dr. Wendt to repay the salvage expense.

Myburgh (with him *Stubbs*) for the defendants.—The question does not turn upon limitation of liability at all. The plaintiff undertook to convey Dr. Wendt's wool to Gravelines instead of which, by the wrongful act of his servant, it was sunk in Gravesend Reach. Under the Thames Conservancy Act (20 & 21 Vict. c. cxlvii.), and the Wrecks Removal Acts 1877, it then became the duty of the plaintiff to raise the ship or allow the Thames Conservancy to raise it for him and repay them. The ship was raised under these Acts, and it made no difference to the cost that Dr. Wendt's wool was in her. If the Thames Conservancy had then sold the *Ettrick* as they might have done under their statutory powers the ship would have defrayed the cost, and there would have been no charge on Dr. Wendt's cargo. The plaintiff however paid for the raising of the ship and gave up the cargo in order to obtain the freight. The plaintiff undertook to carry the wool to Gravelines, and it was his duty to do all that he could to do so. If he had salved the wool himself he could not so far have profited by his own wrong as to claim salvage. The case is exactly the same now, for the plaintiff has been called upon to pay for the salvage of his ship, and is endeavouring to recover a general average contribution towards it from the cargo, although his own negligence made the salvage of the ship necessary. There were also cited

Schloss v. *Heriot*, 1 Mar. L. C. O. S. 335; 8 L. T. Rep. N. S. 246; 14 C. B. N. S. 59; 32 L. J. 211, C. P.;
Cargo ex Capella, 2 Mar. L. C. O. S. 552; 16 L. T. Rep. N. S. 800; L. Rep. 1 Ad. & E. 356 c;
The Norway, 2 Mar. L. C. O. S. 168, 254; Brown. and Lush. 377; 15 L. T. Rep. N. S. 50; 3 Moore P. C. C. N. S. 245;
Schuster v. *Fletcher*, 3 Asp. Mar. L. C. 577; 38 L. T. Rep. N. S. 605; L. Rep. 3 Q. B. Div. 418; 47 L. J. 530, Q. B.

Cur. adv. vult.

SIR R. PHILLIMORE.—This is a special case which the plaintiff and defendant have concurred in stating pursuant to the Judicature Act 1875, Order XXXIV. The steamship *Ettrick* came into collision in Gravesend Reach with the steamship *St. Petersburg*, and the *Ettrick* sank with all her cargo. The *Ettrick* admitted that she was alone to blame for this collision and claimed in the usual way to limit her responsibility to 8*l.* per ton of her registered tonnage. This sum was found to amount to 1978*l.* 6*s.* 6*d.* with some interest and was paid into court. Inquiries were made to ascertain the persons entitled to claim upon this sum. It appeared that Dr. Wendt, D.C.L. was entitled to claim in respect of 393 bales of wool

part of the cargo, and he has made his claim accordingly.

Shortly after the collision the Thames Conservancy, by virtue of certain statutable powers, raised the *Ettrick* with the principal part of her cargo, including these bales of wool; and, upon an undertaking given by the owner of the *Ettrick*, who is the plaintiff in the liability action, to pay the costs of the raising of the vessel, she and her cargo in a damaged condition were given up to the owner of the *Ettrick*. Dr. Wendt applied to him for the immediate delivery of his bales of wool; and on Dr. Wendt giving an undertaking to pay the freight and all charges that might legally fall on the wool he obtained possession of it. The value of the *Ettrick* when raised was 1100*l*., the expenses of raising ship and cargo amounting to about 400*l*., and these expenses were not enhanced by any expenses specially incurred for raising Dr. Wendt's bales of wool. The owner of the *Ettrick* claims from defendant 124*l*. 13*s*. 2*d*. as the latter's proportion of the expenses of raising the ship with her cargo, and he now claims, not against the fund in court, which alternative his counsel has abandoned, but from Dr. Wendt personally, as owner of the wool; and the questions for the opinion of the court now are, first, whether the owner of the *Ettrick* is entitled to 124*l*. 13*s*. 2*d*., or to any and what sum by way of general average contribution, salvage, or otherwise; and secondly, whether the owner of the *Ettrick* is entitled to be paid the said sum, or any and what sum, by Dr. Wendt personally.

It was contended first on behalf of the owner of the *Ettrick* that, although apart from the statutory limitation of his liability, he would have been liable to have paid this 124*l*. 13*s*. 2*d*. having once paid into court his 8*l*. per ton, he is entirely purged of his liability as a wrongdoer, and stands in the position of an innocent party; and that to hold Dr. Wendt not liable for this 124*l*. 13*s*. 2*d*. would be to make the plaintiff liable in respect of loss and damage to ships' goods and merchandise, and other things by reason of the improper navigation of his vessel, the *Ettrick*, to an amount exceeding the statutory limitation by that sum. In support of this position the case of *Chapman* v. *The Royal Netherlands Steam Navigation Company* (*ubi sup.*) was cited.

It was contended, in the second place, that the owner of the *Ettrick*, having a right to be treated as an innocent party, was entitled to claim from Dr. Wendt the sum in dispute as a general average contribution to defray the expenses of salvage services rendered by a third person, that is to say by the Thames Conservancy.

On behalf of Dr. Wendt it was contended that the case did not turn upon the effects of the statutory limitation of liability. The owner of the *Ettrick* contracted to take the wool to Gravelines, instead of which by the fault of his servants it was sent with the ship to the bottom of Gravesend Reach, and it then became the duty of the owner to raise the vessel, the expenses of doing which it is admitted were not enhanced by raising also the bales of wool. This duty was imposed upon the owner either by the Thames Conservancy Act 1857, a private Act (20 & 21 Vict. c. cxlvii.), or by the Removal of Wrecks Act 1877 (40 & 41 Vict. c. 11) or by both. It was contended that if the Conservancy authorities had, as it was competent for them to have done, sold the ship it would have produced ample funds to defray the cost of raising, and there would have been no charge on Dr. Wendt's cargo. I must here observe that the 6th section of the latter Act (40 & 41 Vict. c. 16) prescribes that the proceeds of sale arising from ship and cargo shall be regarded as a common fund. As a matter of fact, however, the ship and cargo having been delivered up by the Thames Conservancy to the plaintiff the 6th section never came into operation. The cargo, it is to be observed, was given up by the plaintiff to Dr. Wendt in order to get the freight, and an undertaking to pay the freight was given.

It was also contended on behalf of Dr. Wendt that if the owner of the *Ettrick* had himself salved the property he could not have claimed salvage, and that he could not do so now that someone else had salved it. In support of these contentions certain cases were cited. In *Schloss* v. *Heriot* (1 Mar. Law C. O. S, 335: 3 L. T. Rep. N. S. 246; 15 C. B. N. S. 59; 32 L. J. 211, C. P.) the plaintiff was a shipowner, and his actionable negligence was holden to be a bar to a claim against a shipper of goods to recover his proportion of an average loss caused by such negligence. In *Cargo ex Capella* (2 Mar L. C. O. S. 552; 16 L. T. Rep. N. S. 800; L. Rep. 1 A. D. & E. C. 356) Dr. Lushington says: "The question for me to determine is whether, when a collision has taken place between two vessels, and both vessels are held to blame, one of them can sue for salvage, for having saved the cargo of the other from the perils consequent on the collision. I do not seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English court. The application of this rule to the present case is obvious. The asserted salvors were the original wrongdoers; it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision, but the present claim it is to be observed is a demand for salvage against the cargo the owners of which were perfectly innocent. I pronounce against the claim." *The Norway* (2 Mar. L. C. O. S. 168, 254; Brown. & Lush. 377, 404; 12 L. T. Rep. N. S. 57; 13 L. T. Rep. N. S. 50; 3 Moore P. C. C., N. S. 245) was also cited, but in this case the facts were very complicated, and portions of the judgment of the Admiralty Court were reversed on appeal; and although I see no reason to question the soundness of the principles of law laid down by Dr. Lushington, on page 393 of Browning and Lushington's Reports, with respect to the responsibility of a shipowner for cargo jettisoned in consequence of the negligence of his servant, I do not rely on that case.

It was further strenuously denied that there was really any salvage properly so called, but simply the performance of a duty under one or both of the two statutes before mentioned; and if there was no salvage, there could be no general average, and if no general average, then no lien attached to the wool, and the case of *Schuster* v. *Fletcher* (3 Asp. Mar. L. C. 577; 38

L. T. Rep. N. S. 605; 3 Q. B. Div. 418; 47 L. J. 530, Q. B. Div.) was relied on. In that case Cockburn, C.J. said: "Here the shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight, and he cannot be allowed to throw the cost of his proceedings on the shippers. A great deal of what he has done was in performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it became hopeless." These observations appear to me applicable to the present case. If the contention of the owners of the *Ettrick* were well founded the result substantially would be that he having broken his contract by damaging the cargo and not bringing it to the port of destination, and having limited his liability for this wrong, would be entitled nevertheless to a pecuniary contribution from the cargo towards defraying the expenses incident to raising the ship in which the cargo was. Thus the cargo owner would suffer a double injury, first, by limitation of the wrongdoer's liability, which debars him from a *restitutio in integrum;* and, secondly, by compelling him to pay a portion of the cost of repairing the mischief caused by the wrong. At this manifestly inequitable conclusion the court would arrive with great reluctance.

In my judgment, however, there was no salvage service properly so called, but a simple performance of a prescribed duty, and if there were a salvage service the limitation of the owner's liability would not entitle him to demand from Dr. Wendt any contribution to it. Upon the whole and after careful consideration of the argument and the cases relied upon, I am of opinion that the owner of the *Ettrick* is not entitled to the sum of 124*l.* 15*s.* 2*d.*, or to any sum by way of general average, and that he is not entitled to be paid these or any other sum by Dr. Wendt personally. I pronounce therefore in favour of Dr. Wendt, and I condemn the plaintiff in the costs of this special case.

Solicitors for the plaintiff, *Ingledew* and *Ince.*

Solicitors for defendant, *Stokes, Saunders,* and *Stokes.*

Saturday, March 5, 1881.

(Before Sir R. PHILLIMORE and NAUTICAL ASSESSORS.)

THE AID.

Practice—Province of Nautical Assessors—Appeal from County Court.

Where a judge differs from the opinion of the Nautical Assessors, who assist him, he is bound to give judgment in accordance with his own opinion.

The function of the Nautical Assessors is only to advise the judge on questions of nautical science and practice, not to give a verdict on the facts of the case.

THIS was an appeal from the City of London Court, in a cause in which, on the 15th Dec. 1880, the judge of that court had given judgment for the plaintiffs, owners of the cutter yacht *Lily.*

The plaintiffs' particulars in the action alleged that the collision took place between the steam-tug *Aid* and the *Lily,* in Bugsby's Reach in the river Thames, between two and three p.m. on the 31st July 1880.

The *Aid* was going down the river with two barges in tow, and one of the barges struck the *Lily,* and brought her in contact with the tug, and, in consequence, the *Lily* sank. There was a conflict of testimony as to whether the *Lily* had, or had not, asked for a friendly tow down the river from the *Aid.*

The learned judge was assisted by Nautical Assessors, whose presence had been required by the defendants.

After hearing the evidence, and *C. Hall* for the plaintiffs, and *Myburgh* for the defendants, and consulting with the Nautical Assessors, the learned judge delivered a judgment, of which the material parts are as follows:

THE COMMISSIONER.—In this case I regret to find that the Nautical Assessors and I differ in opinion. It is a case involving more than 50*l.*, and I suppose there must be an appeal. I am in an extreme difficulty, and I would prefer not to give either a formal judgment nor any explanation of the points on which we differ or the causes thereof. One of the Nautical Assessors thinks that the yacht was unmanageable, that it was not properly managed, and that it had no steerage way at all. That conclusion he has arrived at from the facts. I venture to differ from him [then, after dealing with the question of the admissibility of certain evidence tendered in the case, he proceeded:] Dealing with the facts, however, before us, there is no doubt that in point of law it was the duty of the tug to avoid the yacht; but the difficult question we have to decide is, whether there was an inducement—what may be called a good-natured invitation—to the tug to come close to the yacht on its way down the river, so as to afford the little yacht (that which, I suppose, every tug would be willing to do) a more rapid passage down the river by giving her a friendly tow. It is not necessary to impute perjury to either set of witnesses; there may have been forgetfulness on both sides; but it is to me difficult to think that this tug and the two barges should for several hundred yards follow this little yacht, and when overtaking it wilfully run it down, for that is what the plaintiffs' case amounts to. I am disposed to believe that the captain of the tug was willing and intended to give the yacht a friendly tow down, and that what followed was the result of accident. Whether it resulted from the yacht approaching too near the tug, or whether it resulted from a misconception of the speed at which the tug was going, or from a misconception of the time that would be required to attach a rope to the tug, so as to enable it to take the yacht in tow, I do not know. [After discussing the evidence for and against the probability of this view of the case, he proceeded:] I am bound to say that the Nautical Assessors are not satisfied that that proposition—as to the towage—is made out affirmatively, and in that opinion I am not sure that I ought to differ from them. It is indeed the great difficulty under which I labour. The Nautical Assessors are just as well qualified as I am to form an opinion on the evidence as to which set of witnesses are to be believed. Now both the Nautical Assessors look at the matter in perhaps a stricter way than I do, and consider the tug ought to have avoided the collision, and that the justification for not doing so, that they were invited to approach, is not made out to their satisfaction. As I have already said I am in this difficulty. Am I to act on my own judgment, or am I to defer to the opinion of the Nautical Assessors who differ from me? Probably the Nautical Assessors draw the correct conclusion from the nautical facts, and probably the conclusion that I draw, which is the view of the defendants, is drawn more from what may be called human nature than from nautical facts. That being so, I think I ought to defer to the opinion of the Nautical Assessors, and allow the judgment of the court to be entered for the plaintiffs; but at the same time it is due to the defendants to say that though I do not dissent from I do not concur in that judgment. I must order judgment in this case to be entered for the plaintiffs. I think the question is a mixed one of nautical conclusion and fact, and therefore I am bound to give all weight to

the opinion of the Nautical Assessors. I am sorry to differ from them, but I unquestionably do so.

On the 22nd Dec. 1870 the court was moved to allow a new trial, and reference was made to the case of *The Granton* (70 LAW TIMES, p. 63); but on the judge expressing an opinion that the way in which judgment should be entered where the judge differed from the assessors should be decided by the Court of Appeal, the motion was dismissed, costs to be costs in the cause, and the appeal was brought.

March 5.—The appeal came on for hearing.

Myburgh for appellants, defendants in court below.

C. Hall for respondents, plaintiffs in court below.

The following cases were referred to in the course of the appellants' argument:

The Alfred, 7 Notes of Cases, 354;
The Magna Charter, 1 Asp. Mar. L. C. 153; 25 L. T. Rep. N. S. 312;
The Speed, 2 W. Rob. 25;
The Philotaxe, 2 Asp. Mar. L. C. 141; 37 L. T. Rep. N. S. 540.

At the close of the appellants' argument,

Sir R. PHILLIMORE said:—I need not trouble the counsel for the respondents. This is an appeal from the decision of the learned judge of the City of London Court in an action of collision. The collision took place between the yacht *Lily* and the steam-tug *Aid*, which was towing two barges. Both vessels were going down the river Thames, and the collision took place off Blackwall. The parts of the vessels that came into contact were the stem of the port barge with the taffrail of the *Lily*. No lives were lost, but the *Lily* sank in consequence of the collision.

The first question to be decided is, on which vessel was the duty of getting out of the way cast. Clearly it was the duty of the steam-tug to get out of the way of the yacht. The owners of the steam-tug do not deny this, and, indeed, by their evidence they practically admit it; but their defence is, that those on board the *Lily* invited the *Aid* to give the *Lily* a friendly tow, that in consequence of this invitation in these circumstances the *Aid* kept on her course, and that the *Lily* is to blame for having brought about the collision. There is a conflict of evidence in this case. [His Lordship, after reviewing the evidence at length, proceeded:] I put it to the Elder Brethren whether this evidence affords proof of any conduct on the part of the yacht that contributed to the collision, and in their opinion the yacht was in no way to blame. The opinion that the yacht was not to blame was in the judgment of the court below a wrong judgment. The opinion of the learned judge of the court below was that it had been proved that there had been a friendly invitation by those on board the yacht for a tow. In fact, the learned judge of the court below believed the story of the steam-tug, and the Nautical Assessors by whom he was assisted disbelieved it. The learned judge was bound to give a judgment in accordance with his own opinion, but he took an erroneous view of his duty, and ordered judgment to be entered in accordance with what was not his own opinion.

It is clear that in all these cases the responsibility of the decision rests upon the judge. It may have been his duty, according to the circumstances of the case, to give more or less weight to the opinion of the Nautical Assessors. On questions of nautical science he would be guided by their opinion, but not contrary to his own opinion. In cases of what may be called common evidence, it is not his duty to ask the opinion of the assessors at all. He may ask their opinion on questions within their nautical experience, but in this case it appears that the Nautical Assessors were of a different opinion to the opinion formed by the learned judge himself on the whole case. This is the view I take on this part of the case; but I must remember that, apart from all questions as to the duty of the learned judge of the court below, and the manner in which the decision of that court was arrived at, the main question to be decided in this appeal is whether that decision was or was not, in the opinion of this court, wrong either in law or in fact, and in the result, after consultation with the Elder Brethren, I have arrived at the conclusion that the decision was right, though the reasoning was wrong, and therefore I must dismiss the appeal with costs.

Solicitors for the appellants, owners of the *Aid*, *J. A.* and *H. E. Farnfield*.

Solicitors for the respondents, owners of the *Lily*, *Prior*, *Bigg*, *Church* and *Adams*.

June 21 *and* 27, 1881.

(Before Sir J. HANNEN and Sir R. PHILLIMORE.)

THE KESTREL.

APPEAL FROM WRECK COMMISSIONER.

Wreck—Report — Decision—Reasons — Annex to report—Merchant Shipping Act 1854, *s.* 242—*Merchant Shipping Act* 1862, *s.* 23—*Merchant Shipping Act*, 1876, *s.* 29—*Shipping Casualties Investigation Act*, 1879, *s.* 2; *Shipping Casualties Rules* 1878, 20, 22, *App. Form No.* 3—*Shipping Casualties* (*Appeals and Rehearings*) *Rules* 1880, *rr.* 5, 6—*Practice—Evidence of experts.*

The decision given by the judge after an investigation into a casualty dealing with the certificate of an officer must be given in open court, but need not be accompanied by reasons, and if he gives reasons the officer is not entitled to a copy of the shorthand writer's notes of those reasons, for the purpose of an appeal. The court when hearing an appeal will look to the report and the annex thereto.

Where the court is assisted by assessors, the evidence of experts as to the propriety of steering a certain course will not be received.

Quœre, whether the court will consider matters of default not referred to in the report or annex.

THIS was an appeal from a decision of the Wreck Commissioner, by which he had, on the 25th May 1881, found the master of the *Kestrel* in default for the stranding of that vessel, and suspended his certificate for three months.

On the 21st June 1881 the court, Sir J. Hannen and Sir R. Phillimore, were moved by *Butt*, Q.C. on behalf of the appellant (1) to allow fresh evidence to be given on the hearing of the appeal; (2) for a copy of the shorthand writer's notes of the judgment delivered by the Wreck Commissioner in court; and (3) for an early day to be fixed for the hearing of the appeal.

Verney appeared for the Board of Trade.

The following were the rules, &c., referred to in the argument:

The Shipping Casualties Rules 1878.

R. 20. Except when the certificate of an officer is cancelled or suspended, in which case the decision shall always be given in open court, the judge may deliver the decision of the court either *viva voce* or in writing; and if in writing it may be sent or delivered to the respective parties, and it shall not be necessary to hold a court merely for the purpose of giving the decision.

R. 22. At the conclusion of the case the judge shall report to the Board of Trade. Form of the report will be found in the Appendix, No. 3.

Appendix.

The following forms shall be used as far as possible, with such alterations as circumstances may require, but no deviation from the prescribed form shall invalidate the proceeding, unless the judge shall be of opinion that the deviation was material.

No. 3.—Report of Court.

In the matter of a formal investigation held at on the [here state all the days on which the court sat] days of , before , assisted by , into the circumstances attending the . The court having carefully inquired into the circumstances attending the above-mentioned shipping casualty, finds, for the reasons stated in the annex hereto, that the [here state finding of the court].

Dated this day of 18 .

Judge.

We [or I] concur in the above report.

Assessor.

Assessor.

Annexed to the Report.

[Here state fully the circumstances of the case, the opinion of the court touching the causes of the casualty, and the conduct of persons implicated therein, and whether the certificate of any officer is to be either suspended or cancelled, and if so for what reasons.]

The Shipping Casualties (Appeals and Rehearings) Rules 1880.

R. 5. Copy of Report where Certificate Affected. Where the certificate of a master, mate, or engineer has been cancelled or suspended, the Board of Trade shall, on application by any party to the proceedings, give him a copy of the report made to the Board.

R. 6. Appeals.—Every appeal under sect. 2 of the Shipping Casualties Investigation Act 1879 shall be subject to the conditions and regulations following, namely:

. . . . . .

(*g*) The evidence taken before the judge from whose decision the appeal is brought shall be proved before the Court of Appeal by a copy of the notes of the judge, or of the shorthand writer, clerk, secretary, or other person authorised by him to take down the evidence, or by such other materials as the Court of Appeal thinks expedient; and a copy of the evidence, and of the report to the Board of Trade, containing the decision from which the appeal is brought, and of the notice of the general grounds of the appeal, shall be left with the officer for the time being appointed for that purpose by the Court of Appeal before the appeal comes on for hearing. For the purpose of this rule, copies of the notes of the evidence and of the report shall be supplied to the appellant on request by the judge or other person having charge thereof, on payment of the usual charge for copying.

(*h*) The Court of Appeal shall have full power to receive further evidence on questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Evidence may also be given, with special leave of the Court of Appeal, as to matters which have occurred since the date of the decision from which the appeal is brought.

. . . . . .

Butt, Q.C., in support of the motion.—It appears from the Shipping Casualties (Appeals and Rehearings) Rules 1880, No. 6 (h.), that fresh evidence of matters occurring before the original investigation may be given, as a matter of course; but, as there is no established practice as yet, and as it is clear that leave must in certain cases be obtained, we thought it better to apply for direction as to the fresh evidence.

The second part of the motion is, however, more important; the decision in this case most certainly affected the certificate of an officer, and therefore, by Rule 20 of the Shipping Casualties Rules 1878, the decision was obliged to be given in open court; and the appellant is, under the Shipping Casualties (Appeals and Rehearings) Rules 1880, r. 5, entitled to a copy of that decision. I have affidavits from persons present at the investigation which say that the report absolutely made to the Board of Trade varies in important particulars from the decision given in court; and I desire to lay before the court on the appeal the reasons for which the judge below suspended this officer's certificate, as I contend those reasons were erroneous or insufficient. We can only obtain from the Board of Trade the report ultimately made to them concerning this casualty, and cannot get the judgment delivered in court to which we say we are entitled.

Verney, for the Board of Trade, did not oppose the application for leave to bring fresh evidence, saving all just exceptions to the evidence when tendered, and it was agreed that the appeal should be heard on the 27th June. He was not called on as to the second part of the motion.

Sir J. HANNEN.—I am of opinion that although the first ground of the application—namely, leave to adduce further evidence on the appeal—should be granted, the second, for a copy of the shorthand writer's notes of the judgment, should be rejected. The Shipping Casualties Rules 1878 (No. 20) say that, where the certificate of an officer is cancelled or suspended, the decision shall be given in open court; but that does not require that all the reasons for the decision which should be so delivered are subsequently to be embodied in the report; (Shipping Casualties Rules 1878, No. 22, and Appendix, Form. 3.) The judge may of course explain at the time the reasons for his decision, but he is under no obligation to do so. If the judge gave some reasons when delivering his judgment which he afterwards came to the conclusion were not sound, but was able to support the judgment by reasons which were perfectly sound, then when an appeal is brought the Court of Appeal would have to determine on the evidence brought before it under the provisions of the Shipping Casualties (Appeals and Rehearings) Rules 1880, r. 6 (g), with such assistance as it could get from the report to the Board of Trade, that is, not from the bad reasons which the judge had abandoned, but from the good ones which he had retained.

Sir R. PHILLIMORE.—I am of the same opinion, and have no doubt whatever on the subject.

June 27.—The appeal came on for hearing. The following is a copy of the report to the Board of Trade containing the decision appealed from:

KESTREL (S.S.)

The Merchant Shipping Acts 1854 to 1876.

IN the matter of the formal Investigation held at Westminster on the 25th May 1881, before H. C. Rothery, Esq., Wreck Commissioner, assisted by Capt. Hight and Capt. Methven, as assessors, into the circumstances attending the stranding of the steamship *Kestrel*, of

London, on Burhou Island, west of Alderney, on the 15th April 1881.

Report of Court.

The court, having carefully inquired into the circumstances of the above-mentioned shipping casualty, finds, for the reasons annexed, that the stranding of the said ship was due to the negligent navigation thereof by Robert Cox, the master, in having set and steered a course from the *Royal Sovereign* lightship so as to pass too near to the Caskets, instead of keeping her well out in mid-channel; and, having thus been brought within the range of the indraught of the race of Alderney, she was set by the current to the southward on to Burhou Island.

For these wrongful acts and defaults the court suspends the certificate of the said Robert Cox for three months from this day.

The court is not asked to make an order as to costs.

Dated this 25th day of May 1881.

(Signed) H. C. ROTHERY,
Wreck Commissioner.

We concur in the above report.

(Signed) EDWARD HIGHT, } Assessors.
R. METHVEN, }

Annex to the Report.

This case was heard at Westminster on the 25th May 1881, when Mr. Verney appeared for the Board of Trade, Mr. Batham for the owners, and Mr. Nelson for the master of the *Kestrel*. Six witnesses having been produced by the Board of Trade and examined, Mr. Verney handed in a statement of the questions upon which the Board of Trade desired the opinion of the court. Mr. Nelson having produced a witness, was then heard on behalf of the master; and Mr. Verney having replied for the Board of Trade, the court proceeded to give judgment on the questions on which its opinion had been asked. The circumstances of the case are as follows:

The *Kestrel* is an iron screw steamship, belonging to the Port of London, of 956 tons gross and 615 tons net register, and is fitted with engines of 155 horse power. She was built at Dundee in the year 1878, and at the time of the casualty which forms the subject of the present inquiry she was the property of the General Steam Navigation Company, Mr. Richard Cattarns, junior, being the managing owner. She left London at about 1.15 p.m. of the 14th April last, bound to Bordeaux, with a crew of twenty-six hands all told, twenty passengers, and about 500 tons of cargo, and at about 12.40 a.m. of the following day was abreast of the *Royal Sovereign* lightship, bearing north, distant about half a mile. She was then laid upon a W. ½ S. course by the wheelhouse compass, and was kept going at full speed, making ten knots, the weather being fine, the sea smooth, and the wind light from the S.W. At about 9 a.m. there was a haze upon the water, with occasional patches of fog, but the vessel was continued on a W. ½ S. course, still going full speed, until 12.30 p.m., the master and chief officer being on the bridge, and a look-out man stationed forward on the top gallant forecastle, when land was suddenly observed ahead at the distance of only a ship's length, upon which the master immediately ordered the helm to be put hard aport, and signalled to the engine room to "Stop, and reverse full speed;" but they had not time to get the helm hard over before the vessel struck. The place where she had grounded was afterwards found to be on Burhou Island, a little to the westward of the Island of Alderney. As the tide was falling, all attempts to get the vessel off then proved fruitless; but no time was lost in launching the boats and in putting the passengers ashore on Burhou Island, whence they were shortly afterwards transported to Alderney. At about 5.30 p.m. the same day, the tide having arisen sufficiently, the vessel floated, and she was thereupon taken into Alderney. The cargo was then taken on in another ship to Bordeaux, but the vessel herself was obliged, after some temporary repairs had been done to her, to return to London, where, on being docked, it was found that she had two holes in her forehold and one in the double bottom, under the main hold, and that a portion of the keel had been knocked off.

These being the facts, the first question upon which our opinion has been asked is, "Whether, after passing the *Royal Sovereign* lightship, a due and proper course was set and steered?" It is admitted that the course set and steered from off the *Royal Sovereign* lightship was W. ½ S. by the wheelhouse compass. The master, however, told us that, owing to the deviation of the wheelhouse compass, that course would be equivalent to a west course magnetic. His evidence, however, was not quite consistent on this point; for, in the first place, the deviation card for the wheelhouse compass showed no deviation on a west course, so that to make a west course magnetic it would seem that he should have steered a west course by the wheel house compass. Again the master stated that it was his intention to pass within eight or ten miles of the Caskets; now a W. ½ S. course magnetic would take him from eight to ten miles of the Caskets, whereas a west course magnetic would take him some twenty miles from them, which is a further proof that the course which the master intended to make was W. ½ S., and not west magnetic. Now I am advised by the assessors that W. ½ S. magnetic, which would take him from eight to ten miles of the Caskets, was not a proper course, and that the proper course from the *Royal Sovereign* lightship was west magnetic, which would take him some twenty miles from the Caskets, right down mid-channel, where the tide was fair up and down and clear of the indraught of the race of Alderney. It was said by Mr. Nelson that at the distance of twenty miles the lights at the Caskets could not be seen, nor indeed would they have been visible at only eight or ten miles in the then state of the weather, there being, as we are told, a haze on the water with occasional patches of fog, which would prevent objects being seen until they were at a comparatively short distance off, Barhou Island, as we know, not having been seen until they were within a ship's length of it. The assessors are of opinion that the vessel should have been kept on a west course from the *Royal Sovereign* lightship, which would have taken them some twenty miles to the north of the Caskets, and that that was the extreme southerly limit of the vessel's proper course, and that in steering W. ½ S., so as to pass within eight or ten miles of those dangerous rocks, as the master says he intended to do, he was going quite out of his course.

The next question that we are asked is, "Whether those responsible for the navigation of the *Kestrel* took proper measures to ascertain her position from time to time during the morning of the 15th April?" Within a very short time after leaving the *Royal Sovereign* lightship they would pass Beachy Head, and from that point there would be no land, and no light to guide them. The lead, too, would not help them, as there is deep water close to Burhou Island, the same as there is in mid-channel. But this only made it the more necessary that a proper course should be set and steered from the *Royal Sovereign* lightship, a course which would take them well down mid-channel, with the tide fair up and down the Channel, and out of reach of the set of the current to the south.

The third question which we are asked is, "Whether, having regard to the state of the weather, the *Kestrel* was being navigated at too great a rate of speed, and whether there was any neglect of the precautions required by the ordinary practice of steamers, or by the special circumstances of the case?" It appears to us that the master is in this dilemma: either the weather was so foggy that it was not possible to see the island until they were within a ship's length of it, and in that case he would not have been justified in going at full speed, which we are told was 10 knots an hour; or it was not very foggy, and in that case it is difficult to account for the island not having been seen until they were within a ship's length of it, unless, indeed, there was a very bad look-out being kept on board. In either case the master would seem to have been guilty of a neglect of the ordinary precautions required from seamen for the safe navigation of their vessels.

The fourth question upon which our opinion is asked is, "Whether the master and officers are or either of them is in default?" It is not pretended that any person other than the master is to blame for this casualty, he having been on the bridge and in charge of the vessel at the time when she ran aground. Accordingly the Board of Trade has asked that his certificate should be dealt with. We were told that this master has made the voyage from London to Bordeaux, as master, no less than 81 times (55 times being in this vessel) and that for three years before that he had

served as chief officer on board vessels running on the same line. The way in which he accounted for the casualty was this: he said that there had been five or six weeks of easterly winds, and that two days before leaving London there had been westerly winds; that the long continuance of easterly winds had drained the Channel, and that with the westerly winds the water would come in with a rush, and taking the vessel on the starboard bow, as she was heading down the Channel, would set her to the southward, and thus bring her within the range of the race of Alderney. Seeing, however, that according to the master's own statement the easterly winds had ceased, and westerly winds prevailed for two days before he left London, and that one tide would be sufficient to adjust the difference in the water levels caused by the long-continued east winds, the explanation hardly appears to be satisfactory. The true cause of the casualty would rather seem to be that the master chose to lay the vessel on a course to pass too near to the Caskets, instead of keeping her at a distance of at least twenty miles from those dangerous rocks. This, too, was the more incumbent at that time, as it was very near full moon, so that the tides would be at their highest, and consequently the southerly set of the current through the race of Alderney at its strongest. The assessors tell me that every book of instructions warn mariners not to approach too near to the Caskets; and bound as he was outside of Ushant, he had no right to have approached within twenty miles of them. Seeing, however, that the master appears to have behaved extremely well after the vessel struck, and that he received a certificate from the passengers speaking in high terms of his conduct, after the casualty, we shall suspend his certificate for only three months.

At the conclusion of the case the master was requested to give up his certificate, but, by the advice of his solicitor, Mr. Nelson, he refused to do so, it being, Mr. Nelson stated, his intention to enter an appeal from the order of suspension.

The court was not asked to make any order as to costs.

(Signed) H. C. ROTHERY,
Wreck Commissioner.

We concur.

(Signed) EDWARD HIGHT, } Assessors.
R. METHVEN, }

In addition to the rules already set out, the following enactments were referred to in the argument on the appeal:—

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104).

Board of Trade may cancel or suspend Certificates in certain Cases.

CCXLII. The Board of Trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases; (that is to say,)

(2.) If upon any investigation conducted under the provisions contained in the eighth part of this Act, or upon any investigation made by a naval court constituted as hereinafter mentioned, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default.

The Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63).

S. 23. The following rules shall be observed with respect to the cancellation and suspension of certificates; (that is to say,)

(1.) The power of cancelling or suspending the certificate of a master or mate (by the 242nd section of the principal Act conferred on the Board of Trade) shall . . . . vest and be exercised by the Local Marine Board, magistrates, Naval Court, Admiralty Court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade.

(3.) Every such board, court, or tribunal shall, at the conclusion of the case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence, to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their report.

(4.) It shall be lawful for the Board of Trade, if they think the justice of the case require it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade, in place of any certificate which has been cancelled or suspended.

The Merchant Shipping Act 1876 (39 *&* 40 *Vict. c.* 80).

S. 29. . . It shall be the duty of a wreck commissioner, at the request of the Board of Trade, to hold any formal investigation into the loss, abandonment, damage, or casualty (in this Act called a shipping casualty), under the eighth part of the Merchant Shipping Act 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on the justices, and all provisions of the Merchant Shipping Acts 1854 to 1876, with respect to investigations conducted under the eighth part of the Merchant Shipping Act 1854, shall apply to investigations held by a wreck commissioner.

The Shipping Casualties Investigation Act 1879 (42 *&* 43 *Vict. c.* 72).

S. 2. *Rehearing of and appeal against investigation into shipping casualty or misconduct of officer.*—(1) Where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act 1854, or any Act amending the same, or under any provision for holding such investigation in a British possession, the Board of Trade may, in any case, and shall, if new and important evidence which could not be produced at the investigation has been discovered, or if for any other reason there has in their opinion been ground for suspecting a miscarriage of justice, order that the case be reheard, either generally or as to any part thereof, and either by the court or authority by whom it was heard in the first instance, or by the wreck commissioner, or in England or Ireland by a judge of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases, or in Scotland by the Senior Lord Ordinary, or any other judge in the Court of Session whom the Lord President of that court may appoint for the purpose, and the case shall be so reheard accordingly.

(2) Where in any such investigation a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts; namely,

(*a*) If the decision is given in England or by a naval court, the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice:

(*b*) If the decision is given in Scotland, either division of the Court of Session:

(*c*) If the decision is given in Ireland, the High Court of Admiralty, or the Judge or Division of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases.

(3) Any rehearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may from time to time be prescribed by general rules made under sect. 30 of the Merchant Shipping Act 1876.

Butt, Q.C. and Dr. *W. G. F. Phillimore* for the appellant.—The report of the court suspends the master's certificate for the specific act of setting and steering a course from the *Royal Sovereign* lightship to pass too near the Caskets. It is for this wrongful act or default, and no other, that the certificate is suspended; and that is a wrong finding. The wreck commissioner finds on this part of the case that the master ought to have shaped a course to pass twenty miles from the Caskets; but, if he passed at that distance, he would see neither the rocks by day nor the lights by night; the light is only visible fifteen or sixteen miles. (He proposed to call evidence

to show that the court below was wrong in supposing that one tide would equalise the level of the waters in the Channel after a long continuance of easterly winds, and also to show that the course steered was a usual one.) [Sir J. HANNEN.—As to the first point proposed to be proved by fresh evidence, I may say that it does not appear from the annex to the report that that opinion of the wreck commissioner was arrived at by the advice of his assessors, and I may say that our assessors do not agree in the opinion expressed; and, on the second point, I understand the practice of the Court of Admiralty to be—and it is a practice which commends itself to my mind—where the court is assisted by assessors, as we are, that it is not proper to have the evidence of individuals on points like this as to whether or not they have steered such and such a course. It may be that such a course was, under the circumstances in which they were placed, a right and prudent course. What we have to decide is whether, under the circumstances in the present case, the course was a proper one; and on that point our assessors will give us their advice.]

If the court should be of opinion that it is not imprudent to steer within eight or ten miles of the Caskets, there is no other charge against the master. We are appealing from "the decision which shall always be given in open court" (Shipping Casualties Rules 1878 No. 20; Merchant Shipping Act 1826, sect. 23, sub-sect. 3)—that is, from the report itself. The annex is "the full report upon the case" spoken of in the same section, but it does not concern us. The wreck commissioner's duty is not only to deal with officers' certificates; he may hold an inquiry, and must then make a report even when certificates are not touched. This certificate is not suspended on the ground that it was imprudent to continue at so high a rate of speed in the intervals of fog antecedent to the stranding; besides, as the certificate of no officer could be touched unless there is a "loss or abandonment, or serious damage to any ship, or loss of life" (Merchant Shipping Act 1854, sect. 242, sub-sect. 2), such imprudence, even if proved, could be no ground for suspending a certificate. The powers of the wreck commissioner are still the same as those conferred on the Board of Trade by the Act of 1854. They are transferred first from the Board of Trade to magistrates and others by the Merchant Shipping Act 1862, sect. 23, sub-sect. 1, and finally vested in the wreck commissioner by the Merchant Shipping Act 1876, sect. 29. This is decided by the case of *Ex parte Storey* (3 Asp. Mar. L. C. 549; 3 Q.B. Div. 166; 38 L. T. Rep. N. S. 29).

Middleton and *Verney*, for the Board of Trade, on the court expressing some doubt as to what their powers were of modifying a sentence, pointed out that the Board of Trade had always power under the Merchant Shipping Act 1862, sect 23, sub-sect. 4, to modify a sentence, and expressed a strong opinion that the Board would use that power in the event of any expression of opinion by the court. The court is not confined to the reasons given in the report itself for the suspension of an officer's certificate. It is not necessary to give any reasons at all in that report or in the decision given in open court. In the form of report (Shipping Casualties Rules 1878, Appendix, No. 3) no reasons are given, but all the reasons are to be contained in the annex to the report; therefore the reasons which are given in the report itself are mere surplusage. But, even if the court were confined to the reasons given in the report, it is quite sufficient to support the judgment that the appellant was found to blame, not only for setting the course he did, which under the circumstances might be quite justifiable, but for keeping it, notwithstanding fog and other circumstances which rendered it imprudent. But the court was not so confined. The ship was stranded and lost by the default of the master, and the court will look at the reasons which led the wreck commissioner to consider a default proved.

Butt, Q.C. in reply.

Sir J. HANNEN.—I would have desired for personal and other reasons to have taken a little time to put my judgment into better shape than I can do now; but having regard to the fact that the master is in a state of suspense as to whether or not his certificate be kept from him, and as my learned brother and myself are agreed upon the principle on which our decision is to proceed, I give my judgment and the reasons without further delay.

Now, there is a subsidiary question here as to what is the decision from which the appeal takes place; that undoubtedly may, under some circumstances, be a question of considerable importance. It seems to me that it would be a great hardship upon the master if the decision were limited to a simple finding that he had been guilty of wrongful acts and defaults for which his certificate was suspended. It has been contended that the statute would be complied with if the decision contained no more than that, but it is not necessary for us to determine whether it be so or not, because there can be no doubt that, if the report is distinguished from the annex to the report, it contains a finding that the master had been guilty of particular wrongful acts and defaults that is to say, in the negligent navigation of the vessel, "in having set and steered a course from the *Royal Sovereign* lightship so as to pass too near to the Caskets, instead of keeping her well out in mid-channel; and having thus been brought within the range of the in-draught of the race of Alderney she was set by the current to the southward on to Burhou Island." Now we have come to the conclusion upon the advice as to certain questions of fact given to us by the assessors, that the master was guilty of a wrongful act and default in steering; that is to say, in continuing to steer the course he did from the *Royal Sovereign* lightship instead of keeping the vessel more out in mid-channel.

Now an attempt has been made to put a certain construction upon the language used by the commissioner in the annex to his report. It has been argued—but if the argument can be sustained it leads to an absurdity—that the commissioner meant to say that, under no possible circumstances, even in broad daylight, smooth water, and freedom from haze, it was safe to go at a less distance than twenty miles from the Caskets. That appears to be a forced construction of the language. The wreck commissioner was directing his attention to the fact that the master says he was steering a course which would take him

seven or eight miles in one point of view, and in another point of view twenty miles from the Caskets. The vessel did, in fact, in a fog run aground upon this island. Then the master's justification is this—not the justification he intends to put forth, but—that "I had such and such reasons to believe this was a safe course, and there was no necessity for me to make any deviation in my course or slacken the speed at which I was going." It is with reference to that supposed contention of the master that the decision of the commissioner is given, namely, that this was not the proper course to steer if it was to be persisted in under all circumstances.

Now, we are advised by the assessors that this was not a wrong course originally, because if it were fine weather, in the ordinary course of things it would bring him within sight of the light of the Caskets during the night, or within sight of the rocks if approached during the day in clear weather. But we are advised that, if it were right for him to start upon that course, it was not right for him to continue that course during a fog and at the speed he did. Then, with regard to the admitted fact of the accident, we are advised that, having regard to the state of the weather, the *Kestrel* was being navigated at too great a speed, and that this was the cause of the disaster.

I am therefore of opinion that the disaster arose from the wrongful act of the master in navigating the vessel at this full speed, and that he had continued to steer that course in circumstances which, whatever justification there might have been for shaping it, ought to have led him to deviate from it and to give a greater berth to the rocks, which he must have known he was in danger of being driven near to on that course. It is obvious that the only reason why the distance of seven or eight miles is given is to allow for contingencies, one of which was the cause of this disaster. The only object of giving the finding of the court is to guard against contingencies of this kind. The question we have to consider is whether the commissioner is wrong under the circumstances, and whether the master had a right to persist in that course without deviating from it, though the circumstances had materially been altered, as the vessel was in a fog; and we are of opinion that he ought not to have continued that course. For these reasons I am of opinion, and my learned brother agrees with me, that the decision of the commissioner must be affirmed, but he is of opinion—and I see no reason to differ from him, and my experience on questions of this kind is not so great as his—that the punishment was more severe than the circumstances warranted. We therefore recommend that the remainder of the suspension be remitted, seeing that the master has already had his certificate suspended for a month or thereabouts, and that that is a sufficient punishment to mark the extent of the wrongful act of which he has been guilty.

Sir R. PHILLIMORE.—I concur in the judgment, and for the same reasons.

Middleton.—I have no authority now for saying what the Board of Trade will do, but I have no doubt they will give effect to your Lordship's suggestion. Will you allow costs?

Sir J. HANNEN.—I think, under the particular circumstances of this case, as we have considered the sentence was more severe than the circumstances called for, there should be no costs allowed.

Solicitors for appellant, *Lowless, Nelson, Jones,* and *Thomas.*

Solicitor for respondents, *Murton,* Solicitor to Board of Trade.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

May 6, 9, 10, *and June* 14, 1881.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.

THE MILANESE.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Collision—Evidence.

THIS was an appeal from a judgment of the Court of Appeal (James, Brett, and Cotton, L.JJ.), reported in 4 Asp. Mar. L. C. 318; 43 L. T. Rep. N.S. 107, which had varied a judgment of the judge of the Admiralty Court.

The action arose out of a collision between the steamship *Milanese* and the sailing ship *Bokhara,* which took place off Folkestone about 6 p.m. on the 10th Nov. 1879, by which the *Bokhara* was sunk. The facts and evidence are fully set out in the judgments in the court below.

The judge of the Admiralty Court found that the *Milanese* was alone to blame for the collision, and decreed accordingly, but, on appeal, the Court of Appeal found that both vessels were to blame.

The owners of the *Bokhara* then appealed to the House of Lords.

Butt, Q.C., *Clarkson,* Q.C. and *Stokes* appeared for the appellants.

Webster, Q.C., and *Phillimore* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 14.—Their LORDSHIPS held, upon the facts and evidence, that the judgment of the Court of Appeal was right, and dismissed the appeal, with costs.

Solicitors for the appellants, *Stokes, Saunders,* and *Stokes.*

Solicitors for the respondents, *Lowless* and *Company.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs. Barristers-at-Law.

Tuesday, July 19, 1881.

(Before Jessel, M.R., Brett and Cotton, L.JJ., with Nautical Assessors.)

The Libra.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damage—Collision—Rules for navigation of river Thames—Steamships passing points in river—Waiting—Stopping.

A steamship navigating the Thames against the tide is always bound to obey Rule 23 *of the Thames Conservancy Rules* 1880, *and on approaching one of the points there named to wait until vessels then approaching it with the tide have passed clear of her.*

Whether vessels are also to observe Rule 22 *and pass port side to port side, depends upon whether the vessel navigating against the tide is close to the shore when waiting for the one approaching with the tide to pass her, or so far out as to allow the latter to pass port side to port side.*

The expression "passed clear" in Rule 23 *means "passed clear of the waiting ship."*

Semble, where the point to be passed is on the north side of the river, with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, the 23*rd Rule alone applies, and the vessels will pass clear starboard side to starboard side; otherwise both rules apply.*

Steamships rounding a point in the river Thames are not bound to stop or reverse because at one moment they are approaching a vessel coming in the opposite direction where there is no risk of collision if both vessels continue the curvilinear courses they are then on.

This was an appeal from the decision of Sir R. Phillimore, by which on the 1st Feb. 1881 he had found the *Libra* alone to blame for a collision which took place between that vessel and the *Joseph Ricketts* off Tilburyness, in the river Thames, about 5.30 p.m. on the 11th Nov. 1880.

The circumstances of the collision appear sufficiently from the judgment given in the case. The principal question argued was as to the construction of the following Rules and Bye-laws for the Regulation of the Navigation of the River Thames, sanctioned by Order in Council of the 18th March 1880.

Bye-laws and Rules for the Navigation of the River between Yantlet Creek and Teddington Lock.

Rules as to Speed and Mode of Navigation.

14. Every steam-vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, and shall stop and reverse if necessary.

Bye-laws and Rules regulating the Navigation of the River between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek.

Steering and Sailing Rules.

22. When two steam-vessels, proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

23. Steam-vessels navigating against the tide shall, before rounding the following points, viz. Coalhouse Point, Tilburyness, Broadness, Stoneness, Crayfordness, Cold Harbour Point, Jenningtree Point, Halfway House Point, or Crossness, Margaretness, or Tripcock Point, Bull Point or Galleonsness, Hookness, and Blackwall Point, ease the engines, and wait until any other vessels rounding the point with the tide have passed clear.

The action was brought by the owners of the s.s. *Joseph Ricketts*, which vessel was coming up the river with the flood tide, against the s.s. *Libra*, which was going down against the tide, the *Libra* counter-claiming for the damages she had sustained.

Myburgh and Dr. *W. G. F. Phillimore* for the plaintiffs.

Butt, Q.C. and *Clarkson* for the defendants.

The case was heard on the 28th Jan. and 1st Feb. by Sir R. Phillimore and Trinity Brethren.

Sir R. Phillimore.—This is a case of collision of some importance, because it calls upon the court for the first time to put a construction upon some of the new steering and sailing rules for the river Thames.

The collision took place in the Northfleet Hope, between five and six o'clock on the evening of the 11th Nov. last year. The state of the weather appears to have been fine and clear, and the tide was first quarter flood, and running about two knots an hour. The vessels that came into collision were the *Joseph Ricketts* and the *Libra*, both steamships. The blow was dealt on the starboard side of the *Libra*, in front of the bridge, by the stem of the *Joseph Ricketts*. The *Joseph Ricketts*, which is owned by the plaintiffs in this case—there is a counter-claim—was a steamship of 449 tons, with engines of 90-horse power, and manned by a crew of sixteen hands, and she was proceeding in the river Thames on a voyage from Hartlepool to London, with a cargo of coal. The *Libra* was a steamship of 617 tons register, and she was going from London to Hamburg in ballast, with a crew of thirty hands, in charge of a duly licensed pilot. One of these vessels therefore—the *Joseph Ricketts*—was going up the river; the other—the *Libra*—was coming down, and the tide, as I have already observed, was the first quarter flood. Now the collision took place somewhere about 200 yards or 250 yards above Tilburyness. (*a*) Those on board the *Joseph Ricketts* observed the masthead and red light of the *Libra* about three-quarters of a mile off, and about two points on the port bow, coming down the Reach. The *Joseph Ricketts* ported and then steadied, and was proceeding, as she says, to pass the *Libra* port side to port side, when the *Libra* opened her green light; the helm of the *Joseph Ricketts* was thereupon put hard a-port, and her engines stopped and reversed, but the *Libra* shut in her red light and struck the stem of the *Joseph Ricketts* with her starboard side just in front of her midships. The *Libra* says that she was proceeding down Northfleet Hope, and that she saw the masthead light of a steamship, which proved to be the *Joseph Ricketts*, over Tilburyness, from half to three-quarters of a mile off, and bearing on the port bow of the *Libra*.

(*a*) Tilburyness is on the north shore, therefore vessels coming up the river round it under a port, and vessels going down under a starboard helm.

The statement of these facts introduces the consideration of the rules which apply to the case, and in my judgment both the 22nd and 23rd of the Rules for the Navigation of the River Thames apply. The 23rd rule should be read first, according to the history of this case, and so far as is material the rules are in these words. [His Lordship here read Rules 22 and 23 which are set out above and continued:] The object of these rules appears to the court to be, to get rid of the many former difficulties with respect to vessels rounding points, and also as to vessels meeting each other so as to involve risk of collision.

In our judgment the *Libra* did ease her engines, but did not wait, as required by the 23rd rule. She pleads in the 12th paragraph of her preliminary act (Supreme Court of Judicature Act 1875, sch. 1, Order XIX., r. 30 (*m*), that she was kept on her course, and that when she saw the red light of the *Joseph Ricketts*, her helm was put, when about 300 or 400 yards off, hard a-starboard, and her engines reversed full speed astern. This appears to have been half a minute before the collision, and she had at that time way enough on her, it is to be observed, to run into the shore. By the manœuvre of starboarding, the *Libra* ran across the bows of the *Joseph Ricketts*, and thereby, in our judgment, occasioned the collision.

It is complained on behalf of the defendant that the *Joseph Ricketts* ported too much and into the slack tide; but in our opinion the *Libra* was not justified in attempting to cut in between the *Joseph Ricketts* and the shore. It appears by the evidence that the *Libra* had gone off two points under her starboard helm at the time of the collision. Now, had she put her helm a-port when she saw the red light of the *Joseph Ricketts*, she would have gone off two points to starboard, and the collision would in all probability have been avoided. It appears from the evidence that the *Libra* well knew all along that the *Joseph Ricketts* was rounding the point under the port helm. The pilot of the *Libra* says that, when the *Joseph Ricketts* got two and a half points on the *Libra's* starboard bow, he saw all three lights of the *Joseph Ricketts*, showing that the *Joseph Ricketts* was under a port helm, and it was apparent that when the *Joseph Ricketts* had passed the point, she was still continuing under a port helm. In pursuing that course she—the *Joseph Ricketts*—obeyed, in our judgment, the 22nd rule, and intended to pass port side to port side, which she would have done but for the *Libra* starboarding. I pronounce the *Libra* alone to blame.

From this decision the owners of the *Libra* appealed, and the appeal came on for hearing before Jessel, M.R., Brett and Cotton, L.JJ., and Nautical Assessors, on July 19.

Butt, Q.C. and *Clarkson*, Q.C. for the appellants.

Webster, Q.C. and *Myburgh* for the respondents.

Jessel, M.R.—In this case the first point for consideration is on the construction of the rules for the navigation of the river Thames; and the second point as to the conduct of the respondents.

The point of construction is this—whether, when the 23rd rule applies, the 22nd does or does not. Now, in the first place, it must be remembered what these rules are; they are Rules and Bye-Laws for the Navigation of the River Thames, issued under an Act of Parliament, and, therefore, to construe them is simply to read them literally and apply to them the same construction as to every other instrument; and you must not, notwithstanding any inconvenience it may occasion, give up the literal meaning; they must be construed literally, if possible. Are the rules themselves inconsistent? One is, "When two steam-vessels, proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side." That is the general rule, but it does not necessarily mean that it shall be applied to every case. The next rule is, "Steam-vessels navigating against the tide shall, before rounding the following points (which are named), ease their engines, and wait until any other vessels rounding the point with the tide have passed clear." I think that means till vessels have passed clear of the waiting vessel. That seems to me to be the fair meaning of the rule; because it is to pass clear. What, then, is the meaning of the rule, that the vessels are to wait? They may wait and ease their engines in slack water out of the way of vessels coming up with the tide. In that case it may be that the 22nd rule does not apply, because the event contemplated by the rule has not happened; they are not approaching so as to involve risk of collision. Then there is no inconsistency in the case, for Rule 22 does not apply, because, as I said before, there is nothing for it to apply to. But if, instead of being close to the shore, the vessel has to wait in mid-channel, then I can understand that the rule applies, because a vessel coming up may be approaching so as to involve a risk of collision, and, if so, there is no reason why we should not apply the rule. It may very well pass the other vessel port side to port side. I can see no inconsistency or any difficulty in that.

Upon the facts of the case as found by the judge, and very probably not disputed, he has found that the *Libra* was nearer mid-channel than to the shore, and that she starboarded her helm, and by doing that caused the collision. If that is so, it was her conduct that was the cause of the collision.

The second point was this It was said that under Rule 14, "Every steam-vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, and shall stop and reverse if necessary," and the question was whether the *Joseph Ricketts* came under this rule at any time before the *Libra* starboarded her helm. As I understand the evidence, she did not; for I understand that there was no danger of collision, no chance or any risk of collision involved until the *Libra* starboarded her helm; and the moment that happened the engines of the *Joseph Ricketts* were stopped and reversed. Therefore it appears to me that the 14th rule does apply, and was obeyed by the *Joseph Ricketts*. Under all the circumstances the decision of the court below ought to be affirmed.

Brett, L.J.—I think that the evidence proved that the two vessels sighted each other when one was above and the other below the point, and that they were so near the point that the 23rd rule applied, and I think that the *Libra* was not at that

time close to the north shore, and in slack water; in fact, it must be taken, according to the finding of the judge of the court below, that she was so far off that if she had done nothing at all there was room for the *Joseph Ricketts* to have passed port side to port side; and I think that when the *Joseph Ricketts* had come round the point under a port helm, she found the *Libra* so far out from the north shore that she was somewhere on her port side, and if the *Joseph Ricketts* had been going on a straight course when they were seen near to each other, it would have been right for the *Joseph Ricketts* to have stopped and reversed. The peculiarity of the case is that the *Joseph Ricketts* was coming round under a port helm, and those on board the *Libra* could see at the moment that she was on the port side. Under those circumstances there was no danger of a collision if both vessels had remained as they were.

It has been argued by Mr. Butt that the *Libra* did nothing wrong; that she obeyed the 23rd rule; and if she was within that rule, the 22nd rule did not and could not apply. It is argued that the rules are inconsistent with each other. I do not think that that is a right construction. I think the intention of the 23rd rule is this, when vessels are approaching points in the river Thames, to prevent, if possible, the state of things arising that will make the 22nd rule applicable; but, nevertheless, if a state of things does arise to make the 22nd rule applicable, there is nothing in the 23rd rule to prevent the 22nd rule applying. It was said, if the 23rd rule was obeyed, the vessel going against the stream must always be waiting in slack water. I do not say that it cannot be obeyed without that result. All that the 23rd rule says is—When it is likely that they may meet on the point, that the vessel which is going against the tide shall wait. I think the meaning is that the shall so far check her speed as to prevent her coming to the point at the same time as the other vessel; and therefore the one going against the tide, and which has not come up to the point, is to wait on that side of the point, and not only wait until the other has passed the point, but until the other vessel has passed her. If she was in such a situation as to obey the rule when the other vessel was coming round this point, it is obvious that if she was close under the point where her green light would be to the southward, the other vessel coming round will come round outside her, and they will be green light to green light, the vessel going against the tide being close in shore. Under those circumstances the 23rd rule would be obeyed, and the 22nd not applicable. Then there is nothing for the vessel coming with the tide to do but to keep on; but if the vessel coming against the tide is not close in, but so far off that there is room for the other vessel to pass port side to port side, then the vessel coming against the tide may obey the 23rd rule and wait, but she is waiting so far out in the river that there is room to pass port side to port side. If that is so, the 22nd rule is applicable because they may be approaching so as to run risk of collision, and their duty is to pass port side to port side. Therefore it is true to say the 23rd rule applies whether the 22nd does or not. The truth is that they are independent rules, and that it depends on the circumstances of each case whether the 22nd rule does apply after the 23rd is obeyed.

It seems to me that these vessels ought to have passed port side to port side. That is what they were doing, and if they had continued their courses they would have passed port side to port side. The vessel found to blame does not content herself with obeying the 23rd rule, but she broke the 22nd, and broke it by starboarding her helm and preventing the other vessel from going port side to port side. It has been urged upon us that, in obeying the 23rd rule, the vessel could not obey the 22nd; in other words, if brought to a complete standstill, in order to obey the 23rd rule, it would not have any effect on her, either by starboarding or porting, if she had no motion in the water. But no vessel is bound to do impossibilities.

COTTON, L.J. concurred.

Appeal dismissed with costs.

Solicitor for appellants, owners of *Libra*: *William Butham.*

Solicitors for respondents, owners of *Joseph Ricketts*: *Thomas Cooper and Co.*

SITTINGS AT WESTMINSTER.

Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

May 9, *June* 3 *and* 20 1881.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

AKERBLOM *v.* PRICE.

APPEAL FROM THE EXCHEQUER DIVISION.

Ship—Salvage—When pilot entitled to salvage reward—Practice—Verdict—New trial—Judgment.

To entitle a pilot to salvage reward the ship he assists must be in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward.

Where an uninjured vessel is off a coast unknown to the crew, in a gale, and cannot beat to windward, and is being driven towards dangerous sands, and pilots put to sea at considerable risk, and guide her to a safe anchorage, money paid to the pilots for their services is a payment for salvage, and the owners of the vessel are entitled to general average contribution from the owners of cargo.

Where in such a case a jury finds that the services are pilotage, and a Divisional Court directs a new trial, the Court of Appeal will, if it appears that all the materials are before it upon which to decide the case, go farther than the Divisional Court, and set aside the verdict for the defendants the owners of the cargo, and enter judgment for the plaintiffs without another trial.

Judgment of the Divisional Court, directing a new trial, varied by entering judgment for plaintiffs.

THIS was an action brought by the owners of the Norwegian brigantine *Ailo* against the owners of cargo to recover a general average contribution.

In Sept. 1878 the *Ailo*, bound for Barrow-in-Furness, was driven by a heavy gale past her port and into Morecambe Bay. She was there assisted and guided to a safe anchorage by pilots, who put out to her assistance under circumstances which are fully stated in the judgment of the court.

The only question before the Court of Appeal was whether, as between the plaintiffs and the defendants, a sum of 100*l.* paid by the plaintiffs to the pilots for their services ought legally to be treated as a payment for pilotage services, in which case the plaintiffs would have no claim against the defendants; or as a payment for salvage services, in which case the plaintiffs would be entitled to recover.

At the trial Pollock, B. left this question to the jury, who found that the services were only pilotage services.

A rule for a new trial was made absolute by Denman, J. and Pollock, B., and the defendants appealed.

May 9.—*Henry Matthews*, Q.C. and *J. A. Cross*, for the defendants, argued in support of the appeal.

Day, Q.C. (*Pollard* with him), for the plaintiffs, did not conclude his argument, being stopped by the Court. The arguments are stated in the judgment. The following cases were referred to:

The Frederick, 1 W. Rob. 17;
The Bomarsund, Lushington, 77;
The Joseph Harvey, 1 Ch. Rob. 306;
The Æolus, 1 Asp. Mar. Law Cas. 516; 28 L. T. Rep. N. S. 41; L. Rep. 4 A. & E. 29;
The Jonge Andries, Swa. Adm. Rep. 226;
The Anders Knape, 4 Asp. Mar. Law Cas. 142; 40 L. T. Rep. N. S. 684; 4 P. Div. 213.

BRAMWELL, L.J.—There must be a new trial unless on consideration we think that we have materials before us to decide the case.

Cur. adv. vult.

June 3.—BRAMWELL, L.J.—All we will say now is, that we are of opinion that the judgment must be that the plaintiffs recover. A written judgment stating our reasons will be delivered.

June 20.—The judgment of the court was delivered by BRETT, L.J,—In this action, brought by the plaintiffs as shipowners to recover from the defendants, as assignees of cargo, a general average contribution, the question in dispute was reduced to be whether a sum of 100*l.* paid by the plaintiffs to certain pilots could be legally treated by the plaintiffs as against the defendants as a payment for salvage services, or whether the plaintiffs as against the defendants were entitled to say no more than that the payment was for services which, however meritorious, were only pilotage services. If the first case were made out the plaintiffs would be entitled to succeed; if the second, the whole payment must be borne by the plaintiffs as the shipowners, and the defendants would be entitled to succeed.

The case was tried before Pollock, B. and a special jury. Two questions were left to the jury, with one only of which it is necessary to deal. The jury found that the services were only pilotage services. Upon a rule for a new trial on the ground of misdirection, and as for a verdict against evidence, the Divisional Court made the rule absolute. The appeal is against that order. Upon the hearing, it appearing to us that we had all the materials before us upon which to decide the case—that is to say, that we had all the evidence of direct facts before us, and that there remained only the question of what inferential fact ought to be drawn from those facts—we considered ourselves bound to go further than the Divisional Court, and to order that the verdict for the defendants should be set aside, and judgment should be entered for the plaintiffs without another trial.

The facts proved beyond controversy were, that the vessel, bound for Barrow-in-Furness, was by the violence of the wind and sea driven to leeward of her port into Morecame Bay; that by reason of the same violence of wind and sea the vessel could not beat to windward so as to make her port, or even remain where she was, but was being driven more and more to leeward towards dangerous sands; that her captain and crew were ignorant of the locality; that the vessel, unless guided to some part of the bay in which she might take the ground or lay in comparative safety, must almost inevitably have been lost; that the pilots, seeing her peril, put to sea from harbour in order to assist her; that by going to sea in such a storm they ran no inconsiderable danger of losing their own vessel and their lives; that being unable, by reason of the height of the sea, to board the vessel, they led her, by preceding her and signalling to her, to a safe anchorage in the bay; that (and it is a strong indication of the opinion of all present of the urgency of the position) no mention was made from the vessel or by the pilots of any port to which the vessel should be steered. The vessel had a pilot signal flying when the pilots put off and when they approached the vessel; and the vessel had not suffered any damage to her hull, spars, or sails.

Upon these practically undisputed facts it was argued for the plaintiffs that the jury ought in reason to have found for them, on the ground that the ship was in distress, and that from that fact alone, when it exists, however great or small the distress, pilots are not bound to render any service to a ship, except upon the terms of receiving salvage reward, and that the pilots in this case had not agreed to render services on any other terms.

It was argued for the defendants that the jury were entitled, and even bound, to find for them, because the vessel was not herself damaged; and that unless a ship be herself damaged, pilots are bound to serve her on request as pilots, and, if they do serve her, are entitled to be paid only for pilotage service.

Cases were cited from the Admiralty reports on behalf of the plaintiffs, in order to support in its entirety the proposition enunciated for them. These cases were criticised on behalf of the defendants, in order to show that in all of them there was in fact some damage to the ship itself besides its being otherwise in distress. It cannot be denied that the terms used by Dr. Lushington in *The Frederick* (1 W. Rob. 16) and *The Elizabeth* (8 Jurist, 365), and several other cases, if accepted literally, support the plaintiffs' view. Equally, it cannot be denied that the criticism on them made on behalf of the defendants is in fact correct.

The difficulty of dealing with Admiralty reports by way of authority is, that there is no necessity in that court that the judge should, in the exposition of the grounds of his judgment, discriminate strictly between the proposition of law, which is to be satisfied by all the facts of the case, and the rule of interpretation of the direct facts of maritime vicissitudes given in evidence, by which he desires to bind himself and his successors as to the inference of fact he and they ought as a general

rule to draw from those facts. The latter use of authority is inapplicable as such to a trial by jury, because a jury does not disclose the reason why its members have drawn any particular inference of fact, but a jury may be well assisted by having the reasoning of great judges of the Admiralty Court explained to them.

Upon careful consideration we cannot adopt, as a rule of law, or as a proper rule for drawing an inference of fact, the abrupt rule suggested for the defendants. The rule enunciated by Dr. Lushington requires to be divided into its elements of law and fact before it can be applied to a trial by jury. The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the court is called upon to decide between contending parties upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement the court will decide primarily what is fair and just. The rule cannot be laid down in less large terms, because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes of which *à priori* rules can be predicated. If the parties have made an agreement the court will enforce it, unless it be manifestly unfair and unjust but if it be manifestly unfair and unjust, the court will disregard it and decree what is fair and just. This is the great and fundamental rule.

In order to apply it to particular instances the court will consider what fair and reasonable persons in the position of the parties respectively would do, or ought to have done, under the circumstances. In the case therefore of pilots claiming salvage reward, the ultimate proposition with regard to the pilots to be determined by the tribunal which has to decide between the pilot and shipowner is, would a fair and reasonable owner, and a fair and reasonable pilot, if they had had to agree, have agreed under the circumstances that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? Would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? Would a fair pilot have refused to perform the necessary services unless upon the terms of a salvage reward? In such a dispute to be determined by a judge and jury, these, besides the question of the position of the ship, are the questions to be left to the jury. In this case for instance, the questions for the jury were: Was the ship in a position of imminent danger of being lost? Was she saved from such danger by the acts of the pilots? Were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or responsibility from the ordinary acts of service of pilots as that no fair and reasonable owner would have insisted on requiring such service for other than salvage reward? In a dispute to be determined by a judge, in a court of admiralty or otherwise these are the propositions which are to be applied to the particular facts of the case. It follows that there can be no such rigid rule of law, or of interpretation of facts as is suggested on behalf of the defendants. It follows that the meaning of the phrase "in distress" used by Dr. Lushington is not to be interpreted in the rigid manner suggested on behalf of the plaintiffs. Suppose a ship previously reduced by accident to such a stage of unseaworthiness as makes it expedient or necessary that she should enter a port of refuge, as by a leak or the loss of a mast, but is approaching such port in moderate weather, and so that she can enter it, if steered a right course, with ease, notwithstanding the damage done to her, can it be pretended that it would be reasonable and just, within the tests above enunciated, that a pilot conducted her into port should be treated as a salvor? Yet she would be an unseaworthy ship, a damaged ship, a disabled ship, and in a sense a ship "in distress." Suppose, on the other hand, the ship, as a ship, to be intact, no damage to hull, spars, or sails, but driven by the most violent weather, without power of resistance, within half a mile of an ironbound leeward coast, with no possibility of escape from immediate total destruction but by entry into a narrow, and to the crew unknown, haven of the coast, and suppose the weather and position to be such that, with all the knowledge and skill of the best pilot, there would still be the greatest danger that he and the ship might be lost; could any fair person say that a fair master would ask a pilot to come on board and assume such a responsibility and risk, or consider that, being on board, he should exercise such a responsible duty and run such a risk as has unexpectedly arisen for any other than salvage reward? These hypothetical cases show that it is not the mere fact of injury to the hull, masts, or sails of the ship which is to govern, but that the tribunal must determine whether, under all the circumstances of the particular case, the service which the pilot has entered upon, or has unexpectedly found imposed upon him, was rendered so different in responsibility, or danger, or kind from the ordinary service of a pilot as to make it impossible that any fair owner should have insisted upon his being paid otherwise than by a salvage reward; or whether, although there was some increased responsibility or danger or unusual kind of service, any fair pilot would have refused to enter upon the service, or to continue to perform the service, unless paid otherwise than by a fair compensation for pilotage services. That a pilotage service may be turned by subsequent casualties into a service to be compensated by salvage reward is thus laid down by Dr. Lushington: "The law I have laid down in more than one instance on this point is, that if, in the performance of a contract of towage, an unforseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render her the necessary assistance, and thereupon is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties and the true interests of owners of ships. A similar law holds with respect to a pilot; certain emergencies occurring which require extraordinary service, he is bound to stay by the ship, but becomes entitled to salvage remunera-

tion, and not a mere pilotage fee:" (*The Saratoga*, Lush. Rep. p. 231.) It must be remembered that, in order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, and should by the service be saved from such danger. It may be said, therefore, and we think would be truly said in fact, in almost every, if not in every case, that whenever the ship is in such danger the service of the pilot must necessarily be different in kind, responsibility, or danger from the ordinary service of a pilot. That, however, is a different proposition from either the one suggested for the plaintiffs or that suggested for the defendants. It is consistent with the view that the true interpretation of the phrase used by Dr. Lushington is that the ship must be, not merely in distress in a general sense, but in such distress as to alter the service of the pilot to the extent above suggested. It leaves the rule of law to be that in order to entitle a pilot to salvage reward, he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward.

It seems to us perfectly clear that the services of the pilots in this case were within the rule thus laid down, and that the payment to them ought to be considered, as between the plaintiffs and defendants, as a payment of salvage reward. We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render. It was a danger they were not bound to encounter. Next, that the service was not one of pilotage. It was not a piloting to any port or place, but a taking out of—a salving from—danger.

Judgment for the plaintiffs.

Solicitor for plaintiffs, *Robert Greening.*

Solicitors for defendants, *Norris, Allens,* and *Carter,* for *Simpson* and *North,* Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by H. D. BONSEY and W. P. EVERSLEY, Esqrs. Barristers-at-Law.

June 18, 25, *and July* 4, 1881.

(Before LINDLEY, J.)

PITMAN *v.* THE UNIVERSAL MARINE INSURANCE COMPANY LIMITED.

Marine insurance—Time policy—Partial loss—Principle upon which loss is to be ascertained.

Where an insured vessel is stranded and got off, and the owners, on the underwriters refusing to accept abandonment, sell her, this being the best for all concerned, the correct mode of ascertaining the proportion of loss to be made good by the underwriters is to compare the value of the sound ship at the port of distress with her value there when damaged, and to apply this proportion to her real value at the commencement of the risk if the policy be open, or to her agreed value if the policy be valued.

The estimated cost of repairs, though rejected as a direct measure of loss, may be the measure of the difference between the ship's sound and damaged values if no other measure can be found for arriving at the loss really sustained, but if more reliable evidence of the amount of such loss exists, the estimated cost of repairs ought not to be adopted for the purpose of arriving, even indirectly, at the measure of the loss sustained.

The assured is never bound to abandon; he can always repair if he chooses, and refrain from insisting on a total loss.

If the assured does repair the ship, bonâ fide and with reasonable discretion, the cost of the repairs be the measure of the loss.

FURTHER CONSIDERATION.

The plaintiffs were the owners of the barque *Thracian,* 530 tons register, which in Oct. 1871, being classed A 1 at Lloyd's until 1879, sailed from Newport, in Monmouthshire, on a voyage to Launceston, in Tasmania, where she arrived on the 15th Feb. 1875 and discharged her cargo.

By a policy of insurance bearing date the 3rd June 1875 the plaintiffs caused themselves to be insured at and from the date of vessel sailing from Launceston for and during the space of twelve calendar months, in port or at sea, in docks and on ways, at all times, in all places, upon the ship, valued at 3700*l.*, against perils of the seas and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the ship, or any part thereof, the ship being warranted free from average under 3*l.* per cent. unless general or the ship stranded; and the defendants, for a premium of 105*l.*, paid to them by the plaintiffs, subscribed the policy for 1000*l.* and became insurers thereon to the plaintiffs for that amount on the ship; and it was agreed between the plaintiffs and defendants that the insurance should commence and be from the 23rd March 1875 to the 22nd March 1876, both days inclusive as appeared by a memorandum inscribed on the policy.

The vessel sailed on the 23rd March 1875 for Launceston in ballast for Newcastle, in New South Wales, where she arrived on the 3rd April 1875 and she sailed thence with a cargo of coals on the 6th May 1875 for Singapore, where she arrived and discharged her cargo in the month of June 1875.

Being then at Singapore, she was on the 16th June 1875 chartered to proceed to Moulmein, and there take in a cargo of teak and proceed to Queenstown or Plymouth for orders, which charter would have produced a gross amount to the plaintiffs of 4750*l.*

The vessel sailed on the voyage under the charter from Singapore to Moulmein on the 24th July 1875, and arrived off that port on the 10th Aug. 1875, and while in charge of a duly licensed pilot, in passing up the river to the port of Moulmein, took the ground, and remained aground until the 14th of the same month, when she was got off and towed up to Moulmein.

The plaintiffs determined to abandon the vessel, but the underwriters declined to accept her. The plaintiffs then obtained the best advice they could as to the cost of repairing her, and decided not to do so, but to sell her, and, having made some

slight repairs, they sold the ship and stores for 3897*l.*

In the statement of claim the plaintiffs alleged that the ship was by perils insured against by the policy injured and damaged to an extent exceeding three per cent. within the meaning of the policy, and the defendants' proportion of the average loss and of the expenditure necessarily incurred by the plaintiffs in consequence of grounding, getting off, and towage of the vessel, and in docking, undocking, and otherwise in consequence of the injury for which the defendants as insurers were liable to the plaintiff in respect of the sum of 1000*l.* insured by them, amounted to the sum of 781*l.* 7*s.* 10*d.*, and they claimed this sum as a partial average loss under the policy. The defendants paid 245*l.* into court, and denied that the plaintiff had sustained any loss or damage in respect of the subject-matter of insurance by perils insured against.

The question in dispute between the parties was the principle upon which the loss was to be ascertained, the plaintiffs contending that it was to be measured by what it would have cost to repair the ship and make her as good as she was before she was injured, deducting one-third to allow for new materials instead of old; and the defendants, that it was to be measured by the difference between the value of the ship when sound and what she sold for when damaged.

Butt, Q.C. and *Pollard* for the plaintiff.

Cohen, Q.C. and *Hollams* for the defendants.

The arguments sufficiently appear from the judgment, and the following authorities were cited:

Knight v. *Faith*, 15 Q.B. 649; 19 L. J. 509 Q.B.;
Lohre v. *Aitchison*, 5 Asp. Mar. L. C. 445; 4 Asp. Mar. L. C. 11, 168; 3 Q. B. Div. 538; 4 App. Cas. 755; 36 L. T. Rep. N.S. 794;
Stewart v. *Steele*, 5 Scott N. C. 927; 11 L. J. 155, C.P.
Brooks v. *MacDonnell*, 1 Y. & C. 500;
Atwood v. *Sellar*, 4 Asp. Mar. L. C. 153; 5 Q. B. Div. 286; 48 L. T. Rep. N.S. 83; 48 L. J. 465, Q. B.;
Lidgett v. *Secretan*, 1 Asp. Mar. L. C. 95; L. Rep. 6 C. P. 616; 22 L. T. Rep. N. S. 272; 39 L. J. 196, C. P.;
Arnould on Insurance, 5 ed. 891, 901.

July 4.—LINDLEY, J.—This is an action on a time policy for a partial loss, and the question I have to decide is the principle upon which the loss is to be ascertained, it being agreed that all questions of figures shall be referred to some gentleman versed in adjustments. The facts which are material are few and simple [reads the statement of claim, sects. 1, 2, 3, 4, 5, and 7, containing the facts above set out].

The vessel injured grounded on her way to Moulmein, and after remaining aground four days in some peril, she was got off and towed to Moulmein. She was there examined and was found to be seriously injured. The plaintiffs resolved to abandon her to the underwriters, and gave notice of abandonment. The underwriters, however, declined to accept her, and required the plaintiffs to repair her. The plaintiffs did not insist on their abandonment, but, acting on the best advice they could obtain, determined not to repair her, but to sell her, and, after making some slight repairs, they accordingly did sell her and her stores for 3897*l.*

Upon the evidence before me, and having regard to the want of proper dock accommodation and appliances at Moulmein, and the high charges there, I have come to the conclusion that the cost of repairing her so as to make her as good as she was before she grounded would have been about 5500*l.*, which is more than her value when repaired, such value being 4500*l.* or thereabouts. I have further come to the conclusion that it was not practicable to examine her bottom and to repair her temporarily so as to enable her to continue her voyage in safety without docking her and expending much more upon her than such temporary repairs would justify. In other words, I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling her in her damaged state, and substantially as she was when brought into a place of safety.

Under these circumstances the plaintiffs have brought an action against the defendants to recover the amount of the loss sustained by the plaintiffs by reason of the injury to the ship by her stranding. The plaintiffs are clearly entitled to recover something, and the question is how much? The plaintiffs claim 781*l.* 7*s.* 10*d.* The defendants have paid into court 245*l.* The difference between the parties is attributable not to any dispute about figures, but to the circumstance that they differ entirely as to the principle upon which the calculations are to be based. The plaintiffs contend that the loss to be made good is to be measured by what it would have cost to repair the ship and make her as good as she was before she was injured, but deducting one-third of that cost so as to allow for new materials instead of old; whilst the defendants contend that this is an entirely erroneous principle, and that the loss to be made good is to be measured by the difference between the value of the ship when sound and what she sold for when damaged. The question for my decision is, which of these two principles is correct. It is certainly remarkable that the question thus raised should never have been yet decided. But such seems to be the case, and it consequently becomes necessary to consider the question on principle.

The first thing which strikes the mind on a consideration of the foregoing statement is that, apparently at least, if not really, the plaintiffs are contending for a right to be indemnified against a loss which they have not in fact sustained. The repairs, the cost of which the plaintiffs seek to make the measure of their loss, were not in fact made. It becomes necessary, therefore, to be careful before a hypothetical as distinguished from an actual loss is held to be the loss in respect of which the plaintiffs are entitled to indemnity.

The plaintiffs' contention is based upon the following assumptions: (1) that they might have repaired if they had chosen; (2) that if they had repaired the cost of repairs would be the measure of their loss; and (3), that it is immaterial to the defendants whether the repairs were actually effected or not.

The first of these assumptions I take to be well founded: the assured is never bound to abandon; it is for him to determine whether he will do so or not; he can always repair if he chooses, and refrain from insisting on a total loss: see *Peele* v. *Merchants Insurance Company* (3 Mason, 27), a

case in which the rights of an assured in the event of stranding were elaborately examined by Mr. Justice Story.

The second assumption is also well-founded if the repairs are made *bonâ fide* and with reasonable discretion. Nothing can be stronger than the language of Mr. Justice Story on this point. In the case just cited he says (p. 63); "The insured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriters, and if he acts *bonâ fide* and with reasonable discretion, there is no decision yet pronounced which declares that he shall not be entitled to a full compensation, however great it may be, even if it should equal or even exceed the original value of the ship, and until such a decision is made the direct terms of the policy seem strong enough to justify such a claim." (See also 2 Arn. Ins. 1022, 3rd ed. 2; and 2 Phill. Ins. sect. 1426.) But although this unquestionably is true, still, if the repairs are so extensive and so out of proportion to the value of the ship when repaired as to show a want of *bonâ fides*, or a total disregard of what is reasonable, it is by no means clear that their cost could be thrown on the underwriter. In fact it is tolerably plain that they could not. The language of Maule, J. on his head in *Stewart* v. *Steele* is extremely cogent and valuable. He said: "As to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy; and the frequent statement of the proposition will not make it less fallacious; the law casts no such duty upon them. The assured is entitled to recover the amount by which the ship is deteriorated in consequence of the accident." This appears to me to be perfectly accurate, and I adopt it accordingly.

The third assumption, viz., that, as the plaintiffs had the right to repair the ship and to recover the cost from the underwriters, it is immaterial to them whether the right is exercised or not, is in my opinion entirely erroneous and opposed to the true principles of contracts of indemnity. Against what do the underwriters agree to indemnify the assured? Surely against such losses as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the insured can only claim for a total loss; he cannot claim both for a total loss and for the previous partial loss, as he may, if the damage has been actually repaired. Compare *Stewart* v. *Steele* (5 Scott, N. R. 927); *Livie* v. *Janson* (12 East, 648); *Lidgett* v. *Secretan* (*ubi sup.*) These cases are conclusive to show that the events which have happened, and not those which might have happened, are to be regarded. Apart from all authority, I should have thought it plain that a loss actually sustained under circumstances which did happen is to be preferred as a measure of indemnity to a loss which would have been sustained under circumstances which did not happen, and the cases to which I have referred show that this principle is recognised as well in cases arising under marine insurance policies as in other cases of indemnity.

Upon principle, therefore, it appears to me that the plaintiffs' contention cannot be supported.

It is, however, said to have authority and practice in its favour. The authorities referred to are *Knight* v. *Faith* (*ubi sup.*) and *Lidgett* v. *Secretan* (*ubi sup.*); the practice is that of underwriters. In *Knight* v. *Faith* the ship was damaged and sold unrepaired for 72*l.* 10*s.* The assured claimed for a total loss, but as there was no destruction of the ship, and no notice of abandonment, it was held that the assured could only recover for a partial loss. The proper mode of ascertaining the amount of this loss was not discussed, but there is a passage in Lord Campbell's judgment at p. 669 which I will read: "We therefore think that in this case the ship insured sustained a partial loss from which the assured ought to be indemnified. But they have left us entirely in the dark as to the amount of that indemnity; their counsel has contended that even on the footing of a partial loss the verdict ought to stand for the full amount of the sum insured and interest. However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon them to show the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing, and from this there would be the usual deduction of one-third new for old. There having been no notice of abandonment, although the ship subsisted as a ship, we cannot proceed upon the supposition that she could not be repaired, and the partial loss must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired soon after the policy expired. 'Such a calculation,' says Benecke, vol. 2, p. 449, 'cannot be governed by any general rule, but must be decided according to circumstances and upon a casual estimate in which no great precision can be expected, since it is extremely difficult after the ship has perished to obtain a precise knowledge of the condition in which the ship was at the termination of the fixed time. But this difficulty can never be a ground for freeing the insurer from liability.' The difficulty is not greater than was experienced in *Hare* v. *Travis* (7 B. & C. 14), where there having been a policy upon pearl ashes at and from Liverpool to London, and the ship having deviated by going into Southampton, and the pearl ashes having been injured by sea damage both before and after the deviation, but never having been examined till they arrived in London, it was left to the jury to say what amount of damage they had sustained while protected by the policy." What ultimately became of this case I have not been able to ascertain; but I cannot regard it as an authority for the proposition that the estimated cost of repairs is in all cases the true measure of loss to the owner of a ship injured and sold without being repaired. Such estimated cost may or may not be the best measure of loss, and in *Knight* v. *Faith*, where the ship sold for next to nothing, it is quite possible that the estimated cost of repairs was a juster measure of the

assured's right to indemnity than any other which could be suggested. Where such is the case the estimated cost of repair will naturally be the basis of the underwriter's calculation, and it may so often happen in practice that this is the proper basis as to lead to the habit of regarding the estimated cost of repairs as the true basis in all cases of the kind under consideration. But care must be taken not to be misled by this circumstance, and not to mistake the rule for the principle on which it is founded. In *Lidgett* v. *Secretan* (*ubi sup.*) the court does not appear to sanction the proposition contended for by the plaintiffs. In that case the ship was insured by two policies for two successive voyages, viz., out and home. On the voyage out she was stranded and injured. She was partially repaired, and after the risk covered by the first policy had expired, and after the risk covered by the second policy had commenced, but before her repairs were completed, she was destroyed by fire. The court decided that, although the ship was ultimately lost, and the plaintiff was entitled to recover under the second policy for a total loss, he was also entitled to recover under the first policy the diminished value of the vessel occasioned by her stranding. The estimated cost of repairs was merely referred to as a mode of estimating such depreciated value; and so far is this case from being an authority for the plaintiffs that it amounts in my opinion, to a strong authority against them. Mr. Justice Willes, on p. 526, says: "The true principle I apprehend to be this: the owners are not to get anything which they did not lose by the vessel striking on the reef, they are to get the amount of the diminution in value of the vessel at the end of the first risk—the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of the value at the expiration of the risk. That, of course, must be subject to all just allowances." The judgment of Sir Montague Smith in that case is to the same effect. The practice relied upon by the plaintiffs was not proved; indeed, the witnesses called to prove it said they had no experience of any settled usage applicable to the case of a damaged ship sold without being repaired.

For the reasons and under the circumstances above stated I am of opinion that the principle contended for by the plaintiffs is erroneous, and that, in substance, the principle contended for by the defendants is correct. The loss sustained by an assured by the stranding of the ship is *primâ facie* the depreciation in her value caused by the stranding. Before she stranded she was worth a certain sum; after she stranded she was worth less; the difference between these sums, if it can be ascertained, will be the true measure of the assured's loss, unless he can be shown to have sustained a greater or less loss between the stranding and the expiration of the risk covered by the policy. That this is so in the case of goods is well established; but in point of principle, and for this purpose, there is no distinction between ships and goods, except that goods being saleable, their sound and damaged values can be readily ascertained by a sale, whilst the values of sound and damaged ships have generally to be ascertained by estimates. This is the view taken by the best text writers (2 Arnould on Ins. 2nd edit. sect. 365; and see the rule as to ascertaining damage to the extent of 50 per cent. in America, 3 Kent's Com. 330 & 331; Phillips on Insurance, sect. 1539); and by Story, J. in *Peele* v. *Merchants' Insurance Company* (3 Mason, 27) already referred to. So also the judgments in *Stewart* v. *Steele* and *Lidgett* v. *Secretan* support the same view.

Whether the values to be ascertained and compared are the values at the same place or at different places, and whether they are to be ascertained at the commencement of the risk, or at its termination, or immediately before and immediately after the injury is sustained, are questions to be considered; and, having regard to the authorities just referred to, the correct mode of ascertaining the proportion of loss to be made good by the underwriter appears to be to compare the value of the sound ship at the port of distress with her value there when damaged, and to apply this proportion to her real value at the commencement of the risk if the policy be open, or to her agreed value if, as in the present case, the policy be valued.

Such being the principle by which to be guided, it remains to apply it to the case before the court, and to ascertain the value of the ship at Moulmein in her sound and damaged states and to consider the effect of her sale. For these purposes the declared value in the policy must be disregarded; for although such value is conclusive for the purpose of determining how much the defendant may ultimately have to pay, it does not preclude either party from proving the true amonnt of loss sustained: (*Young* v. *Thuring*, 2 Man. & Gr. 593.) The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values if no other measure could be found for arriving at the loss really sustained; but in this case other and more reliable evidence of the amount of such loss exists, and the estimated cost of repairs ought not therefore to be adopted for the purpose of arriving even indirectly at the measure of the loss sustained. The evidence as to the value of the ship when sound stands thus. The plaintiffs say she was worth 4000*l.* at the commencement of the risk; the defendants are content to adopt this statement. At this date the ship was at Singapore. The time which elapsed between the commencement of the risk and the stranding of the vessel was very short; and the time which elapsed between her stranding and sale was also very short; and there is no reliable evidence to show that the value of the sound ship at Moulmein at either of these two periods was greater than her value a short time before when she was at Singapore, and the risk commenced. In the absence of such evidence her sound value at Moulmein ought, in my opinion, to be taken to be 4000*l.* In coming to this conclusion I do not forget that her value when thoroughly repaired has been estimated at 4500*l.*, nor do I overlook the argument that, as she fetched 3800*l.* in her damaged condition, she must have been worth at Moulmein, when sound, much more than 4000*l.* I regard the

estimate of 4500*l.* as little better than a guess, and I cannot assume that, if she had been thoroughly repaired, according to Mr. Hopper's estimate, she would not have been more valuable than she was before she stranded, even after making the customary allowance of one-third new for old. The argument deduced from the price she fetched is plausible, but not convincing. I am not at all sure that she did not fetch more than she was worth, and although what she did fetch is conclusive as regards one element in the calculation, I do not regard it as a reliable starting point from which to draw an inference as to her sound value. Upon the evidence before me I hold that value to be 4000*l.*

The value of the ship when damaged has next to be ascertained. But the object of this inquiry must not be lost sight of. That object is to ascertain the loss sustained by the plaintiffs, and they have fixed this element in the calculation by what the ship actually sold for. The underwriters may, no doubt, show, if they can, that their loss has not been so great as they allege, but the assured cannot possibly increase his actual loss by saying that he would have lost more if the ship had not sold for so much as she in fact realised. This, I apprehend, is what the present Lord Justice Lush meant when he said in *Lohre* v. *Aitchinson* (*ubi sup.*): "If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for." For these reasons it ought to be held that for all the purposes of this action the value of the ship when damaged cannot exceed what she actually sold for. But even for the purposes of this action the actual price she fetched will not be her exact value, for the price was no doubt enhanced by the repairs done to her before sale, and a proper allowance for these must be made. I merely mention this to prevent its being overlooked.

The sound value of the ship being taken at 4000*l.*, and her damaged value being what she sold for, less such deduction as ought to be made in respect of her repairs before sale, the proportion of loss sustained by the plaintiffs by reason of the depreciation in value of the ship will be ascertained. To this will have to be added whatever other sums are properly chargeable against the underwriters; and when the final proportion of loss on this basis has been arrived at, it must be applied to a ship of the declared value of 3700*l.*, and the defendants' proportion of the loss thus calculated will be what he will have to pay.

Having now explained the principle upon which the amount payable by the defendant is to be ascertained, so far as that amount depends on the point submitted to me, I give judgment for the plaintiffs for such sum as the arbitrator agreed upon shall award to be payable by the defendants, regard being paid to this decision; and I reserve the costs of the action until after he shall have made his award.

Solicitors for the plaintiffs, *Lyne* and *Holman*.

Solicitors for the defendants, *Hollams, Son,* and *Coward*.

Saturday, May 14, 1881.

(Before Lord COLERIDGE, C.J.)

ROBERTSON *v.* AMAZON TUG AND LIGHTERAGE COMPANY LIMITED.

Contract—Ship and shipping—Agreement to perform services with instruments supplied by other party—Implied contract of fitness—Warranty.

Where one party to a contract engages to perform certain services for the other party with the means to be provided by such other party, there is an implied warranty that such means are reasonably fit for the purpose for which they have been provided.

The plaintiff R. R. made an agreement with the defendant company that he would take out from H. to P. a steam-tug towing six barges, together with a small assisting steamer. The defendant company was to provide both the steamers, and R. R. certain of the crew of the steam-tug. The limit of time for the voyage was seventy days. The steam-tug was proved to be quite unfitted for the task of towing the barges across the Atlantic, and the small steamer took refuge at B. during the first storm, and her captain refused to rejoin R. R. In consequence, the voyage lasted 105 *days, and three of the barges never reached their destination. R. R. brought this action for loss of time and profit, to which the defendant company answered that he had no cause of action, as he had undertaken the risk of the voyage, and counter-claimed against him for losses alleged to be due through his default or negligence.*

Held, that under the circumstances the defendants when providing the means for enabling the plaintiff to carry out his portion of the contract, impliedly undertook that they were reasonably fit for the purpose for which they were supplied, and that the plaintiff had a good cause of action.

FURTHER CONSIDERATION.

This was an action tried before Lord Coleridge, C.J. at Westminster, in April 1878, and reserved for further consideration.

The facts of the case are as follows:

The plaintiff is a master mariner of the merchant navy, and the defendants a registered company; and in June 1877 the defendants were desirous of having six barges towed from the Humber to Para, in the Brazils.

The plaintiff in undertaking the superintendence and management of the voyage signed the following document:

I, Robert Robertson, hereby agree to take steam-tug towing six sailing barges from Hull, and one small steamer from the Downs, the latter named, to assist when required, to Para, Brazils, providing and paying crews of officers, sailors, stokers, and trimmers (forty-one men all told), also provisions for all on board for seventy days, and finding nautical instruments and charts for the navigation of the above said steam tug, steamer, and six barges, the company paying pilotage from Hull to sea. All surplus stores to be left on board to be taken over by and to be the property of the company. I hereby undertake to do all the above, and hold the company harmless in regard to the return of the above crew from Para. Expenses for which shall be borne by me wholly from the date of the arrival of the vessels in Para for the sum of ten hundred and twenty pounds, £100 of which shall be payable to me on signing contract, and a further sum of £600 before leaving Hull, for which I shall give guarantee satisfactory to the company. The balance of £320 to be paid by the company's agent in Para on their being satisfied that no claims exist against the company in regard to me, Captain Robertson, or my crew.

(Signed) ROBERT ROBERTSON.

The defendants provided the steamer *Villa Bella* as the towing steamer, and the *Galopin* as assistant steamer. It was proved at the trial that the boiler and engines of the *Villa Bella* were very much out of order and repair, and that altogether she was not reasonably efficient for the purposes of the voyage.

It was also proved that the *Galopin* was a small steamer of about three tons burthen, and that when caught in a storm in the Bay of Biscay, her captain left the towing steamer *Villa Bella*, and put in for shelter at Brest, and refused to join the plaintiff, though subsequently ordered by the defendants to do so. Owing to the slowness of the *Villa Bella*, the voyage was protracted to a period of 105 days, and frequent stoppages were necessitated. Three of the barges never arrived out at Para, but one was left at Vigo, and two broke away and drifted to Barbados.

The defendants paid the expenses incurred by reason of the voyage being delayed over the seventy days, and had paid the plaintiff the sum of 856*l*. The plaintiff claimed in this action the balance of the 1020*l*., and 1000*l*. as further damages, while the defendants denied their liability to the plaintiff, but counter-claimed against him for a considerable sum as expenses to which they had been put by reason of the non-fulfilment of the contract by the plaintiff, and paid 10*l*. into court as sufficient to satisfy the plaintiff's claim.

Butt, Q.C. (*E. Pollock* with him) for the plaintiff.—The plaintiff is clearly entitled to maintain this action, and the defendants have no real defence to it; they have brought an action against the shipping company for selling them such a worthless vessel as the *Villa Bella*, and when they were successful in it the plaintiff brought this action. There are no authorities strictly on this point, but ordinary principles of law would support the plaintiff's contention. The defendants gave the plaintiff a steamer wholly inefficient for the purposes intended, and the small assisting steamer was unfit, and she deserts at the moment when most she is required; either she was unfit, or she improperly deserted; and when ordered to rejoin her captain refused. So utterly unfit were the plaintiff's means for carrying out his part of the contract that the voyage lasted 105 days, and only three of the barges were brought safely to Para. It is not contended that the *Villa Bella* was reasonably fit. There is no real difference between the present case and that of a charterer chartering a ship which turns out wholly unseaworthy. Are the defendants entitled to send a ship wholly unfitted for the purposes of the voyage?

K. E. Digby for the defendants.—The real contract was that the plaintiff should take out a particular steamer to Para, and it was only an incident that she should tow out these barges with it. The question then is, were the defendants bound to furnish a ship fitted for the voyage, *i.e.*, was there any undertaking on the part of the defendants to the plaintiff that the boilers and engines of this ship were in a fit and proper state for the purposes of the voyage. The plaintiff, if he is to recover at all, must recover on a warranty of reasonable fitness, for the first time. [Coleridge, C.J.—Yes; you go on the general law, but I wish to see if this specific contract is to be so construed. Suppose after entering into this agreement, the plaintiff had come to the conclusion that he could not safely take this ship across the Atlantic, you say he would be bound to go?] Yes; prior to signing the contract he might have seen and examined the ship, but he did not. There is nothing to take this agreement out of the ordinary contract of shipowner and captain:

Couch v. *Steel*, 23 L. J. 121, Q. B.; 3 El. & Bl. 402.

[Coleridge, C.J.—This is a case of a person engaging to do a particular act with a specified instrument to be supplied by another person.] The plaintiff was hired by the defendants and was to be paid for by the run. Another case in point is

Steel v. *Lester and Lilee*, 3 Asp. Mar. L. C. 537; 35 L. T. Rep. N. S. 642; 3 L. Rep. C. P. Div. 121; 47 L. J 43, C. P.

[Coleridge, C.J.—I do not think it is.] The *Villa Bella* was not primarily a steam-tug, but was intended for the river Amazon traffic, and as before said, the towing of the barges was a mere incident of the voyage. As to the *Galopin*, the contract was that she should assist when required; she was under independent command, but to assist when required; there is, however, no warranty or undertaking that she shall continue the whole voyage:

Taylor v. *Caldwell*, 3 B. & S. 826.

Butt, in reply.—This case differs from *Couch* v. *Steel* (*ubi sup.*). The plaintiff is no servant of the defendants, but a responsible person who is to provide a crew and provisions for a whole fleet; the plaintiff employed his crews, and was their paymaster. The *Villa Bella* is described in the contract as a "tug," so that disposes of her not being supplied for the purposes of towing these barges to Para. The argument of the defendants amounts to this, that though it was impossible for the plaintiff to perform the contract, yet he may be sued for the non-performance. As to the *Galopin*, the defendants have clearly committed a breach of contract.

Coleridge, C.J.—The point raised in this case is one of considerable importance, and the contract to be construed is, as far as I am aware, to be construed by the courts for the first time. If there had been any authorities on the point I should have taken them into account as to what judgment I should deliver, and so would have taken time to consider my judgment; but none of the cases cited have any bearing on this case, and I decide at once. This is a most peculiar contract, and I must decide the case on the construction of the contract *inter partes*; it involves the relationship of one party to a contract who undertakes for a consideration to perform within a specified time certain services with the instrument or means supplied by the other party to the contract for such services. The only two points that arise are, first, whether or not there was any implied contract or undertaking on the part of the defendants that the *Villa Bella*, the steam tug in question, should be reasonably fit for the duty for which she was to be employed; secondly, have the defendants broken their contract or not by not assisting by means of the second steamer, the small one, the plaintiff when requiring its assistance, as by the contract he was entitled to require. As to the first point we must look to the circumstances of the case for its construction; for such construction

it is necessary to consider the different possible interpretations. Its words might receive a different interpretation to that put on them by the plaintiff, and if so looked at might alter the conclusions at which one might arrive. Now the plaintiff was a man who had performed a similar voyage two years before, but with a smaller number of barges, two, I think, and had performed it in safety. It was agreed that he should take this particular steam-tug, the *Villa Bella*, and it was a contract to take her from Hull to Para. Was there then any contract on the part of the defendants that the *Villa Bella* was fit for the voyage? I do not wish to represent that there is an absolute warranty that the ship was seaworthy in the general sense of the word. The case of *Couch* v. *Steel* (*ubi sup.*), decided on very good grounds the contrary. The plaintiff undertakes to conduct the fleet across the Atlantic; that is to do under particular circumstances particular work. He furnishes a great deal of the necessaries incidental to the voyage—not the engines or engineers—but he engages the sailors, stokers, and trimmers, from Hull to Para. There must be an undertaking on the part of the defendants that the *Villa Bella* was reasonably fit to do the work on which she was to be engaged. The plaintiff was entitled to say, "I had an instrument supplied by the defendants to do this work, and such instrument ought to have been reasonably fit to do it." The contrary contention seems full of difficulties, insuperable difficulties to my mind. Suppose the *Villa Bella* undoubtedly incompetent to fulfil the task assigned to her, and with terrible danger to life, occupies a period beyond all time in the contemplation of the parties, a year we will say, instead of seventy days; yet the captain would be liable, and he would be met with the statement, "You took the risk and must abide by it," so that nothing could he recover for the valuable time spent by him, and for losses incurred by making good the defects, and paying for expenses brought about by the protracted voyage. If the plaintiff at an earlier stage had made himself acquainted with the state of this steamer, and had refused to perform the duties imposed on him on the ground of the impossibility of carrying out the contract, it was said in argument that he would be held liable for such refusal. Now, either the grounds of his refusal would be no answer—the impossibility being short of a physical impossibility; or they would be an answer to an action at the suit of the defendant company. This shows that there was an implied contract on the part of the defendants that the *Villa Bella* should be fit for the purposes of the voyage, and, therefore, an undertaking on the part of the defendants that the *Villa Bella* should be reasonably fit for the services the plaintiff undertook to perform in her. Secondly, as to the *Galopin*. The defendants did agree to provide a steamer to assist the plaintiff in towing the barges, but the *Galopin* did not assist, but on the first rough weather left him and steamed back to Brest, because, it is said, it would have been dangerous to the lives of those on board to continue out in the open while such a storm was raging. This reason might be valid between the captain of the *Galopin* and his employers, but not between the plaintiff and the defendants. She was required to assist but did not. Further, should I be wrong as to that particular incident of the *Galopin's* conduct, and the reason assigned be an answer to the plaintiff's contention, there is yet the other point to be considered, namely the refusal of the *Galopin's* captain to rejoin the plaintiff which is a complete answer. If the defendants sued the master of the *Galopin*, he might have an answer to the suit; but what in his mouth might be a good defence to such action cannot avail the defendants in resisting the claim now made upon them by the plaintiff. On both grounds, therefore, I must give judgment against the defendants, to the effect that this action is maintainable. The question of amount must be considered elsewhere.

Judgment for plaintiff.

Solicitors for the plaintiff, *Lumley* and *Lumley*.

Solicitors for the defendants, *Ashurst, Morris, Crisp*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, Nov. 3, 1881.

(Before JESSEL, M.R., BAGGALLAY, BRETT, and LINDLEY, L.JJ.

SWANSTON *v.* LISHMAN.

ON APPEAL FROM SIR R. PHILLIMORE.

Shipowners—Co-ownership—Action against managing owner—Discovery of documents—Partnership.

In an action against a managing owner of ships for an account he cannot protect himself against setting out books and documents relating to the ship accounts in his affidavit of documents, or in answer to interrogatories, by alleging that the account and books are kept by a firm of which he is a member, and that the action is brought against him in his individual capacity only, but he must discover all documents, whether in his possession or in that of his firm.

THIS was an appeal against a decision of Sir R. Phillimore, sitting in the Probate, Divorce, and Admiralty Division, refusing to order further and better answers to interrogatories.

The action was brought by the plaintiff as part owner in several ships against the defendant as managing owner of the same ships, for an account. The statement of claim alleged that the defendant was managing owner of the ships, and as such received the earnings and made the disbursements thereof, and also received insurance moneys and purchase moneys in respect of certain of the ships, and that the defendant had been applied to for accounts, and had refused to render them, and that accounts were outstanding between the plaintiff and the defendant, and the plaintiff claimed that the defendant should be ordered to file proper accounts in the registry, or render the same to the plaintiff, and that the accounts should be referred to the registrar and merchants, and the balance (if any) found due to the plaintiff should be paid to the plaintiff by the defendant. In his statement of defence the defendant admitted that he was managing owner of the ships,

but denied that he had ever received any moneys or made any disbursements in respect of them, and he denied that any application had been made to him by the plaintiff for accounts, and that there were any accounts outstanding.

On the 6th April 1881 the defendant made the usual affidavit of discovery, in which he said that the only documents in his possession were the papers in the action, and further that "all accounts relating to the ships mentioned in the writ herein were kept by Messrs. John Hall & Co., the brokers and agents employed by the ships named in the writ herein, and the said John Hall and Co. have the said accounts and documents," and that, "in my individual capacity, in which alone I am sued in this action, I have had no transactions with the plaintiff respecting the matters in question in this action."

The plaintiff thereupon administered to the defendant interrogatories, in the answers to which the defendant admitted that he was a member of the firm of John Hall and Co., that he was registered as managing owner of the ships in question, but only nominally; that he did not individually manage the ships, but the firm of John Hall and Co. managed them on behalf of the co-owners, and that the said firm received all the moneys, and made all the disbursements relating to the said ships. The fifth and sixth interrogatories were as follows:

5. Did not the said firm during the periods in the statement of claim mentioned, and do they not now keep certain, and if so what, books, papers, and documents containing entries and particulars of all receipts and disbursements relating to the ships in the statement of claim mentioned, or to some, and which of them, and by what names or titles does the said firm call the said books, papers, and writings, and each of them respectively?

6. Are not the said books, papers, and writings, in your custody, or under your control as a member of the said firm, and have you not as such member access to the same, and if not, why not?

The defendant answered these interrogatories as follows:

5. I decline to answer the fifth and sixth interrogatories, as they are irrelevant to the subject-matter of this action, which is brought against me in my individual capacity, and not as one of the members of the said firm of John Hall and Company.

The plaintiff then took out a summons, calling upon the defendant to show cause why he should not deliver further and better answers to the fifth and sixth interrogatories. This summons was heard in court on the 5th July 1881, and the judge, after hearing counsel on both sides, refused to make any order, and condemned the plaintiff in the costs of the summons.

From this decision the plaintiff appealed.

J. P. Aspinall, for the appellant, stated the facts, and was then stopped by the Court.

Dr. *Phillimore* for the respondent.—It cannot be material to this action to set out what books are in the possession of John Hall and Co. The action is against the defendant alone, and the fact that he is a member of the firm does not oblige him to discover his firm's books. [Jessel, M.R.—You admit that the defendant is an accounting party. Can you refuse to discover books because some other persons are also accounting parties with you? You cannot get rid of your obligation in this way.] The books would only show that John Hall and Co. had an account with the plaintiff, not that the defendant alone had an account. [Jessel, M.R.—How can you say that? The plaintiff may find, on opening the books, that an account was kept between the plaintiff and the defendant. He must have the chance of seeing that. There is no rule plainer than that a person, whether a partner or not, must discover all books which relate to the matters in question, whether he is accountable alone or with others.] In the case of *Murray* v. *Walter* (Craig & Phillips, 114), it was held that discovery would not be enforced against a partner of documents which were in the joint possession of himself and of the other partners. [Jessel, M.R.—That related to production of documents, and not to discovery. The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession, whether you are bound to produce them or not, and I have even known a Chancery judge threaten to order a defendant to set out *verbatim* all relevant portions of documents where he attempted to protect himself against production by alleging joint possession of himself and partners. Besides, in this case the plaintiff really sets up that the firm of John Hall and Co. were the defendant's agents to keep the ship's accounts.] I submit that the court will not order discovery where production will not be ordered hereafter.

The Court ordered that the defendant should make further and better answers to the fifth and sixth interrogatories setting out all the documents in the possession of John Hall and Co. relating to the ships in question, and that the plaintiff should have the costs of the appeal and of the summons in the court below.

Solicitors for the appellant, *Stokes, Saunders*, and *Stokes*.

Solicitors for the respondent, *Wright* and *Tilley*.

SITTINGS AT WESTMINSTER.

Reported by A. H. Bittleston, Esq., Barrister-at-Law.

March 15 *and May* 16, 1881.

(Before Lord Coleridge, L.C.J., Bramwell and Baggallay, L.JJ.)

Wright *v.* Marwood and others; Gordon *v.* Marwood and others.

Ship and shipping—Jettison of deck cargo—Claim to contribution—Contract with shipowner.

Where a general ship is carrying cargo both above and below deck, and there is no custom to carry goods on deck and the voyage is not a coasting voyage, the owner of the deck cargo that has been necessarily jettisonep in the course of a voyage can have no claim for contribution against the shipowner or the other cargo owners, although the contract between him and the shipowner specifies that the goods are to be carried on deck.

Johnson *v.* Chapman (2 *Mar. Law Cas. O. S.* 404; 19 *C. B. N. S.* 563) *distinguished.* (a)

Judgment of Lush and Manisty, JJ. reversed.

These were two actions brought by cattle-dealers carrying on business in America against the

(a) Take the instance of a ship in ballast carrying a deck cargo only by agreement with shipowner; which is to govern such a case, *Johnson* v. *Chapman* or the present decision?—Ed.

owners of the British steamship *Gladys* for a general average contribution under the following circumstances. In April 1878 the following agreement was entered into between the plaintiff Wright, and Tucker and Co. acting for the defendants:

It is this day mutually agreed between Joshua T. Tucker and Co., agents of the British steamer *Gladys*, now lying in the port of New York, of the first part, and George Wright, party of the second part, that the party of the first part agrees to let to the party of the second part, the upper deck of the steamer *Gladys*, except so much as is necessary for the proper working of the vessel in the master's judgment, for a cargo of cattle to be landed at Portsmouth, England; and the party of the second part agrees to furnish the said vessel not exceeding one hundred (100) head of cattle, or as many as the master decides to take, and to pay the said vessel in advance, on signing bills of lading, the sum of four pounds fifteen shillings (4*l.* 15*s.*) per head. Vessel not responsible for mortality or accident of any nature or kind, and only to supply necessary water for the cattle—the party of the second part furnishing fodder, fittings, and attendants, vessel giving free passage and victual to attendants, not exceeding five, and cabin passage and fare for one superintendent. The said party of the second part also agree to pay the master a gratuity of twenty pounds (20*l.*) Br. stg. on signing bill of lading.

Cattle to be put on board and landed at risk and expense of party of second part, and to be taken from alongside vessel immediately on arrival at Portsmouth.

New York, 17th April 1878.

In pursuance of this agreement the plaintiff Wright shipped on board the *Gladys* fifty-three head of cattle. The plaintiff Gordon, under an agreement with Wright and the defendants, shipped forty-seven head of cattle. The plaintiffs received a bill of lading in the ordinary form, providing that the cattle should be delivered in good order and condition, "the dangers of the seas only excepted." It contained in the margin the following memorandum:

Not accountable for mortality, or for any accident or injury of any kind or nature whatever.

During the voyage a storm arose, and the master threw overboard all the cattle; they having been shipped on the deck in accordance with the contract.

The action came on for trial before Brett, L.J., but, there being no dispute as to the necessity of the jettison of the cattle for the safety of the ship, the facts were not gone into, and the Lord Justice directed a verdict and judgment to be entered for the plaintiff, on the authority of *Johnson* v. *Chapman* (19 C. B. N. S. 563; 2 Mar. Law Cas. O. S. 404).

The Queen's Bench Division (Lush and Manisty, JJ.) having refused a rule for a new trial, the defendants appealed.

The Court of Appeal (Lord Coleridge, L.C.J., Bramwell and Baggallay, L.JJ.) granted a rule for a new trial on the ground that the Lord Justice had misdirected the jury, by telling them that the plaintiffs were legally entitled to claim general average for the jettison of the deck cargo under the contract between the parties.

The rule now came on for argument.

March 15.—*C. Russell*, Q.C., and *Bigham*, for the plaintiffs, showed cause.—The first question is, whether the defendants escaped liability by reason of this being a deck cargo. All the cases go upon some usage, which amounted to notice to the shipowner that the goods were being carried on the deck, except *Johnson* v. *Chapman* (2 Mar. Law Cas. O. S. 404; 35 L. J. 23, C. P.), which went upon contract. It was held that the shipowners had assented in that case. In 2 Parsons on Marine Insurance, c. 5, s. 3, p. 218, n. 2, it is said that "the reason why, for goods laden on deck, neither contribution nor general average in case of ejection can be claimed, is, that they themselves increase the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed, if it be necessary to eject." Again, in *Goold* v. *Oliver* 2 M. & Gr. 225, n.): "The reason why this article refuses compensation for goods on the deck being damaged or thrown overboard is that, as they must necessarily embarrass the working of the ship, the presumption is that they were thrown overboard before any absolute necessity of so doing, and merely because they hindered and embarrassed the working of the ship." These reasons do not apply where the deck-load does not increase the danger of navigation, as in the case of steamers; and, where the reasons do not apply, the rule does not. Secondly, if the jettison of the deck cargo gives rise to a claim in general average, what interests must contribute? There does not seem any ground for saying that owners of cargo under the deck must contribute. But, if the principle is that the calculation of general average is to be, not of the interests saved, but of the interests saved of those that were parties to the arrangement, it seems to follow that each of these parties to the arrangement should contribute to the loss according to their respective shares as if there were no other interests saved. They cited

Goold v. *Oliver*, 2 Man. & Gr. 208; 4 Bing. N. Cas. 134;
Johnson v. *Chapman*, 2 Mar. L. C. O. S. 404; 15 L. T. Rep. N. S. 70; 35 L. J. 23, C. P.;
Crooks v. *Allan*, 4 Asp. Mar. L. C. 216; L. Rep. 5 Q. B. Div. 38; 41 L. T. Rep. N. S. 800;
Milward v. *Hibbert* 3 Q. B. 120; 11 L. J. 137, Q. B.

Benjamin, Q.C., and *Myburgh* (with them *Gully*, Q.C.), for the defendants, in support of the rule.—The owner of a deck-load is not entitled to general average. The underwriters think it is of the utmost importance that the law on this point should be the same in England as it is in all other civilised countries. This is not so much a contract of carriage as a demise of the upper deck. The law does not encourage the carrying of a deck cargo, except where there is a custom, and therefore does not allow a claim for contribution to the owner of deck cargo except by custom. In all the cases cited, except *Johnson* v. *Chapman* (*ubi sup.*), there was a custom: the custom rebuts the impropriety. The only question argued in *Johnson* v. *Chapman* was whether the timber had become a wreck before it was jettisoned; the dictum of Willes, J. was not the ground of the decision. [Lord Coleridge, L.C.J.—In *Milward* v. *Hibbert* (*ubi sup.*) Lord Denman says: "The practice appears to have been, not to lay it down as law, that as to goods stowed on deck, the owners of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of trade, the general understanding of those engaged in it, and in insuring, which may obviously vary, and require from time to time fresh evidence and different explanations. . . . . Now it is obvious that there may be valid reasons for stowing goods on deck; indeed some goods could be stowed in no other place, such as timber, and, on some

voyages, live animals; and they may certainly be there stowed with proper skill and care, so as not to be in the way of the crew in their operations. These matters of fact may vary with every different trade, or even with every single adventure. The danger of a crew being tempted to throw overboard goods on deck before the ship is in danger is quite insufficient; that danger must depend on their weight and bulk, the manner of stowage, and many other particulars. The argument would prove too much; for it would apply to whatever goods may be nearest at hand, and consequently likely to be the soonest sacrificed." That is quite as much in point as *Johnson* v. *Chapman* (*ubi sup.*). There was no custom alleged there.] All that was held in *Millward* v. *Hibbert* was that the mere fact of goods being stowed on deck is not a good plea, because they may be stowed on deck under a usage which will entitle them to general average. In an American case, decided in 1854, *Lawrence* v. *Minturn* (17 Howard Rep. 100), Curtis, J., delivering the judgment of the Supreme Court of the United States says: "The courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship, in case of jettison. The received law on the point is expressed by Chancellor Kent, with his usual precision, in 3 Com. 240: 'Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding them, and then he would be chargeable with the loss.' . . . . The law which we intend to lay down is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all possibility, would have produced no injurious effect on the vessel if not thus laden." [Lord Coleridge, C.J.—But he says afterwards: "His right to contribution is not involved in this case."] The principles laid down are as applicable to a claim to contribution as they were to the claim in that case, which was against a shipowner for damages for non-delivery of a deck cargo on the ground of the breach of an implied contract that the ship was able to carry a particular deck load. It is said here that the consent of the shipowner has the same effect as usage; but the two things are entirely different. It would really be a subject of regret if England stood alone in her jurisprudence on this subject. They cited

Smith v. *Wright*, 1 Caines, 43 (in 1803) (Amer.);
Dodge v. *Bartol*, 5 Greenl, 286 (in 1827) (Amer.);
The Milwaukee Belle, 2 Bissell, 197 (in 1869) (Amer.);
The Paragon, Ware, 322 (in 1832) (Amer.);
Emerigon, c. 12, p. 42;
2 Arnould on Marine Insurance, 5th edit., pt. 3, c. 4, pp. 824-5;
1 Park on Marine Insurances, c. 7, pp. 294-5;
Parson's Maritime Law, pp. 307-8;
Lowndes on General Average, 2nd edit., preface, pp. 28-9.

Cur. adv. vult.

May 16.—The judgment of the court (Lord Coleridge, L.C.J., Bramwell and Baggallay, L.JJ.) was delivered by

Bramwell, L.J.—In these cases the plaintiffs seek to recover against the defendants, ship and freight owners, a contribution as or in the nature of general average in respect of the goods of the plaintiffs jettisoned for the safety of ship and cargo. It is all-important to note that the plaintiffs' goods were deck cargo, loaded on deck with their assent, on a general ship, not one chartered to them, no doubt at a lower freight than if they had been, as we suppose they might have been, below deck; and that there is no custom alleged bearing upon the case. Now, when such sacrifice is made, as was here, for the common good, as a rule it comes within general average, and must be borne proportionately "by those interested." It is not necessary to say what is the origin or principle of the rule, but, to judge from the way it is claimed in England, it would seem to arise from an implied contract *inter se*, to contribute "by those interested." To this rule there is an exception, viz., deck cargo jettisoned is not entitled to general average contribution. There, again, the reason or principle is perhaps not important. Such is the law. The reason, amongst others, however, assigned is, that deck cargo is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it when cargo under hatches would not be. So that if we treat general average as matter of implied contract, that ought not to be implied where risk and benefit are not in fair proportion. If as a matter of positive law that is the reason which caused the exception, then if the goods jettisoned are loaded on deck without the shippers' consent, the shipowner is liable to the goods' owner; if with his consent, still other cargo owners will not be. To this exception, however, there are two exceptions, which perhaps resolve themselves into one, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and perhaps also from the port. It is said that there is a further exception, viz., where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion. In the first place the exception is stated by all writers and authorities as extending to the case of deck cargo, whether loaded on deck with or without the owner's consent. It is put in a dilemma: that if without, there is a remedy against the shipowner; if with, it is the act of the cargo owner that has made his goods subject to extra risk, so that it is not fair that other cargo should be on a footing with his. No reason can be given for the claim as of general average. It struck me for the moment that there was no difference between a custom and a particular agreement, because customs are incorporated in agreements, unless expressly negatived, and are therefore part of them. But to this the obvious answer was given by Mr. Benjamin that, whatever may be the agreement between deck cargo owner and shipowner, the other cargo owners are no parties to it, nor bound to inquire into it, or notice it, as they are bound to take notice of a custom. Then it is said that it is established by authority. We think it is not. We are dealing now with the plaintiffs' claim as one of general average, that is to say, of a right to contribution from ship, freight, and cargo. The

first case relied on is *Milward* v. *Hibbert* (3 Q.B. 120). That was an action against underwriters by shipowners to recover what the shipowners had had to pay as a contribution by way of general average for goods jettisoned; and all that was decided was, that a plea saying that it was a deck cargo which was jettisoned was bad, "for not shewing that such loading was improper under the circumstances." It may be observed that the voyage was a coasting voyage, viz., from Waterford to London. The judgment begins (p. 131): "The plea assumes that in no case whatever can the shipowner recover from the underwriter the value of goods loaded on deck." It then discusses a passage in an edition of Lord Tenterden on Shipping, published after his death, showing it varies from what was said in editions in his lifetime, and says that the general rule is not so large as is stated in the later edition. The judgment then proceeds (p. 136): "Now it is obvious there may be other and valid reasons for stowing goods on deck," and finishes thus: "It seems to the court, for the reason assigned, that the mere fact of stowing them on deck will not relieve the underwriter from responsibility, inasmuch as they may be placed there according to the usage of trade, and so as not to impede the navigation or in any way increase the risk." It was not averred in the plea that there was no such usage and that the risk was increased, and so the plea was held bad. That case has no bearing on the present: consistently with the plea there might have been and in fact probably was, the custom. Here we know there was none. The other case relied on by the plaintiffs was *Johnson* v. *Chapman* (19 C. B. N. S. 563). That was not a case of general average. The plaintiffs had chartered the defendants' ship, loaded the whole cargo, part of which by the charter was to be and was deck cargo, and were held entitled to a contribution from the ship, and with reason. They were not seeking it from other cargo owners, but from the shipowner, who shared the benefit and ought in reason to share the risk of the deck cargo. As Mr. Benjamin pointed out the counsel for the shipowner never contested the plaintiffs' right if it was a case of sacrifice. The counsel for the plaintiffs indeed did contend for what was not contested: why one cannot see, unless to show that though deck cargo, it was not wreck but sacrificed. But what is the judgment. "The question is, what is wreck?" (p. 581). Willes, J. discusses that. Then he says (p. 583): "In this case there was a deck cargo, and the first observation naturally would arise upon its being a deck cargo, and upon the exception with regard to deck cargoes, but that is taken out of the case most effectually by reference to the charter-party. This is an action by the shippers of cargo against the shipowner, and the charter-party contemplates a deck cargo. It is not suggested that there is any statute to make a deck cargo illegal, therefore it seems something more than custom to have deck cargoes. I think it was from Quebec, but it is not necessary to refer to any custom affecting the voyage, because according to the contract between the parties, there was to be a deck cargo. Then immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average." Now certainly that last sentence gives some colour to the plaintiffs' contention. But the learned judge should be understood as speaking in relation to the subject-matter. It was not a claim for general average as against any other than the shipowner. It was a particular claim against him, and it is said to be subject to the "rule" of general average. If Willes, J. had said that it could have been maintained against other cargo owners, had there been any, it would have been wholly extra judicial, for there were none. But he did not say nor mean to say so. For he says, "The deck cargo was within the contemplation of the parties," which would not be true of other cargo owners. The case then was not one of general average. It was as though the plaintiffs were owners of such cargo, and A. owner of other cargo, and A. had agreed to contribute if deck cargo was jettisoned. In the case before us Mr. Russell felt the difficulty of maintaining the claim as one of general average, viz., one to which ship and other cargo should contribute. "For," said he "if you hold other cargo not liable to contribute, at all events do not take it into account as diminishing what ship and freight are to contribute." Now, it seems to us, there is positively no reason nor colour of authority for saying other cargo owners should contribute here. They are bound by no agreement they have made. But then it may be said, and Mr. Russell so contended in the alternative, "Let ship and freight contribute in some proportion." It remains to consider whether the claim in this form can be maintained; that is to say, not as one of general average, but of particular right against the shipowner to contribution. It is put in two ways: first, as though there was not other cargo; secondly, as though there was the value, though not liable to contribute, to be taken into account in ascertaining what ship and freight should contribute. First let us consider the claim to contribution against ship and freight owner as though there was other cargo not, however, to be made liable. Now, why should the shipowner be taken to have agreed, that when deck cargo was sacrificed, not for his exclusive benefit, but for the benefit of him and others, he would bear a proportion of loss as though he alone was benefitted? There is no general law or rule of general average applicable to such a case. To maintain the plaintiff's claim one must imply a particular agreement by the defendants; that if the plaintiffs' cattle were jettisoned for the common good, the defendants would bear a loss proportioned to the value of their ship and freight as compared with the cattle, *i.e.*, ship and freight worth 99,000*l.*, cattle worth 1000*l.*, other cargo 1,000,000*l.*; defendants are to pay ninety-nine per cent. of the loss. Why? We see no reason. In the case of *Johnson* v. *Chapman* (*ubi sup.*), the plaintiffs and defendants got all the benefit from the jettison; not so here. In that case all subject to general average was brought into the account; here it would not be. Then take the other way the claim is presented, viz., the claim to recover from ship and freight owners such a sum as the plaintiffs would get from them if entitled to general average from all. To take the figures as before, plaintiffs' cattle 1000., ship and freight 90,000*l.*, other cargo 1,000,000*l.* plaintiffs would be entitled to about 90*l.* from defendants. Again we ask why, and for what reason? There

cannot be a doubt that the cattle freight was less than it would have been if they had been, as we have said we suppose they might have been, under deck. Here again there is no general law or rule applicable to the case, an agreement must be implied, and we ought not to imply agreements, which parties can expressly make if they please, without some very strong reason for so doing. We see none, nor authority. We prefer to hold that the plaintiffs shipped their cattle as they did, without bargaining for compensation from any one if they were jettisoned, and must bear all the loss themselves, at least without such rights to contribution as they are now claiming. We must add, we think it very undesirable our law should differ from that of other nations, as we think it would if we decided otherwise. There is no authority in our law that we can find to justify the claim in any of the three ways in which it is made, while the law and practice of foreign countries are decidedly to the contrary: (Parsons' Maritime Law, 307; Emerigon, c. 12, s. 42.) The latter expressly says there is no remedy against the master, if with consent of the merchant the goods are on deck. See also Lowndes on Average, and the various codes cited by him, some of which, however, seem to make no distinction as to deck cargoes. It is to be remembered that the plaintiffs make no complaint of any breach of the contract to carry, no complaint that their goods were improperly jettisoned, or that other goods might have been jettisoned with equal advantage to the ship, the owner of which might have been entitled to general average, or the jettison of which or part of which might have diminished the necessary jettison of the plaintiffs' goods. Their claim is for general average or contribution in the nature of general average. We are of opinion that the judgment must be reversed. This judgment is not in opposition to any opinion of the learned judge at the trial. He expressed none; the facts were not even stated to him. He was asked to and did give judgment for the plaintiffs, to raise the question which has been discussed here.

Judgment reversed.

Solicitors for the plaintiffs, *Chester, Mayhew, Holden,* and *Browne,* for *Haigh, Son,* and *Ayrton,* Liverpool.

Solicitors for the defendants, *Johnsons, Upton, Budd,* and *Askey.*

March 1, 3, *and April* 1, 1881.

(Before BRAMWELL, BAGGALLAY, and BRETT, L.JJ.)

BRADFORD *v.* SYMONDSON.

Marine insurance—Re-insurance—Policy made after ship's arrival—Lost or not lost—Contract made in ignorance of facts—Risk—Attachment of risk—Insurable interest.

A voyage policy effected by way of re-insurance on the cargo of a vessel, lost or not lost, which has, unknown to both parties, arrived at the port of destination, and landed her cargo undamaged before the making of the policy, is a good contract of insurance, and the underwriter is entitled to the premium which the assured has agreed to pay.

A. insured a cargo by the Alata, *lost or not lost, from P. to R. Subsequently, and after the* Alata *was due at R., A. effected a re-insurance of the cargo with B. for the same voyage and risk at a high premium. At the time of the re-insurance the Alata had arrived at R., and discharged her cargo undamaged, but both A. and B. were in ignorance of this. In an action by B. for the premium which A. had agreed to pay:*

Held, that B. was entitled to recover: (1) *The voyage having commenced under the conditions necessary to make the underwriters liable, the risk attached, although the chance of loss during the performance of the voyage was at an end.* (2) *(Bramwell, L.J. dubitante) As the risk attached, it followed that A. had an insurable interest, his interest as soon as the second policy attached being precisely the same as that of the cargo-owner under the first policy.*

THIS was an action by an underwriter at Lloyd's to recover a premium of seventy-five guineas per cent. upon a policy of marine insurance effected by the defendant.

The statement of claim alleged that on the 23rd Dec. 1879 the defendant effected a policy of marine insurance, in the ordinary form, for 1500*l.*, at a premium of seventy-five guineas per cent., on cargo by the vessel *Alata,* lost or not lost, at and from Philadelphia to Rochfort, against risks and perils of the seas, and all other perils, losses or misfortunes that had or should come to the hurt, or detriment or damage of the said subject-matter of re-insurance or any part thereof, and the said policy was therein declared to be a re-insurance.

The 5th paragraph of the statement of defence was as follows:

On the 14th of November 1879 the *Alata* arrived at Rochfort, and the said insured voyage was at an end, and the risk under the said policy had run off, and there was no longer any risk or liability of any kind under the said policy, and neither the defendant nor the Phœnix Insurance Company had any interest at risk, or was under any liability of any kind in respect of the *Alata* or under the said policy.

The following admissions were agreed upon between the parties:

1. That, on the 3rd of October 1879, the Phœnix Insurance Company of New York executed the policy of insurance of that date, marked "A." on cargo by the *Alata,* from Philadelphia to Rochfort, and became liable to the assured in respect of the risks covered thereby.

2. That, on the 23rd of December, the defendant, a broker at Lloyd's, effected with the plaintiff the policy marked "B.," which was executed by the plaintiff.

3. That the said policy, marked "B.," was effected by the defendant, as agent for the said Phœnix Insurance Company of New York, for their use and benefit, and on their account, as a re-insurance on the said cargo which they had so insured by the policy marked "A."

4. That the *Alata* sailed from Philadelphia to Rochfort on the 1st of October 1879, with the said cargo on board, and that, after she had sailed, nothing had been heard of her by any of the said parties until after the policy marked "B." was effected.

5. That the ordinary course of a voyage from Philadelphia to Rochfort is six weeks.

6. That the said vessel arrived safely at Rochfort on the 14th of November 1879, discharged the cargo, and sailed thence on the 18th of December 1879, no claim of liability having arisen on the said policy marked "A.," and that, at the time of effecting the said policy marked "B.," the plaintiff and the Phœnix Insurance Company did not know of the arrival and of the safety of the said vessel and her cargo.

7. That the defendant has not paid to the plaintiff the premium of seventy-five guineas per cent.

The action was tried by Lord Coleridge, C.J., without a jury, and he gave judgment for the plaintiff. The defendant now appealed.

Benjamin, Q.C. and *French* for the defendant.—The plaintiff ran no risk, as the goods had arrived safely long before the re-insurance was effected; he cannot, therefore, recover the premium. In *Tyrie* v. *Fletcher* (2 Cowp. 666) Lord Mansfield says that there is a general rule established that "Where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the assured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands fails, and therefore he ought to return it." [Bramwell, L.J.—There is a distinction between the cases supposed there and this case. Lord Mansfield is referring to cases where the risk has never attached. Brett, L.J.—The question here would be lost or not lost within the time mentioned in the policy; it does not matter when the policy is made.] If the party insuring can possibly lose at the time that the policy is made, then it is good. [Brett, L.J.—You do not rely on the fact of the vessel having returned, but on the fact of the vessel having returned in safety.] Exactly. In *Oom* v. *Bruce* (12 East, 225) Lord Ellenborough says: "There is no reason why they should not recover back the premiums which they have paid for an insurance from which, without any fault imputable to themselves, they could never have derived any benefit." It is admitted that if a loss had occurred during the voyage the policy would have attached. That is provided for by the insertion of the words "lost or not lost;" and it is put upon that ground in *Sutherland* v. *Pratt* (11 M. & W. 296), by Baron Parke, who says, "The simple question is, whether it is any answer to an action on a policy on goods (lost or not lost), that the interest in them was not acquired until after the loss. We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all past as well as all future losses sustained by the assured, in respect to the interest insured. It operates just in the same way as if the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that, if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good." In 1 Parsons on Insurance, 505, the law on the subject is thus laid down: "The premium, although due and payable in one sense as soon as the policy is made, is, in another, not due unless that risk is incurred for insurance against which the premium is paid. If, therefore, there be no such risk, the premium cannot be claimed if it has not been paid, and, if it has been paid by cash or by a note, it must be returned. This rule gives to the insured the power of avoiding the contract, in whole or in part, after it is made; because this contract is, substantially, a promise by the insurers to indemnify the insured against a certain risk, if that risk be incurred, and a promise of the insured in return to pay the premium to the insurers if their promise of indemnity attaches. If no part of the risk attaches, either because no part of the goods is shipped, or because no part of the voyage takes place, or because the insurance was predicated on a fact about which the parties were mistaken, or because the insured had no interest, or because the vessel was unseaworthy and consequently the risk never attached, the whole premium is returnable. And, generally, the premium is to be returned if the risk never commenced on account of a breach of warranty." The same author recognises the fact that an insurer may be liable for a loss that has already been incurred: "The insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made" (2 Parsons on Insurance, 44). But that rests, as he says, on the express agreement of the parties. In 2 Arnould on Insurance, 5th edit. 1057, the law is laid down as follows: "In case the risk had no inception, whatever may have been the cause, even the neglect or fault of the assured himself, provided it be not his actual fraud, the premium is by law to be returned. The general law maritime agrees with our own on this point, and is based on the same principles." In 1 Arnould on Insurance, 5th edit., 235, speaking of the clauses of the policy, it is said. "As policies are frequently effected on ships and goods whilst they are in foreign ports, or at sea, it being then uncertain whether they be not actually lost before the policy is effected, these words, 'lost or not lost,' are inserted as a matter of course." It is true that the author goes on to say, "The clause, however, though never omitted, does not appear to be in all cases strictly necessary." On the other side, the following passage in 2 Park on Insurance, c. xix., 8th edit., p. 766, will be relied on: "If the ship be arrived before the policy is made, and the underwriter is acquainted with the arrival, but the insured is not, it should seem the latter will be entitled to have his premium restored, on the ground of fraud. But, if both parties be ignorant of the arrival, and the policy be (as it usually is) "lost or not lost," I think, in that case, the underwriter should retain it, because, under such a policy, if the ship had been lost at the time of subscribing, he would have been liable to pay the amount of his subscription." That is the doctrine of Pothier, Emerigon, and the other civil law writers, but it does not prevail here. If it did, *Oom* v. *Bruce* and *Hentig* v. *Staniforth* (5 M. & S. 122; 4 Camp. 270) were wrongly decided. [Brett, L.J.—Here the risk was run during the time insured, but was not running at the time the policy was made. In *Oom* v. *Bruce* the risk was never run.] The second point is, that the ship having arrived, the defendant's interest in it was at an end; he had, therefore, at the time of the making of the policy, no insurable interest. If so, he cannot be called upon to pay the premium. "The rule in fact is, that, if through mistake, mis-information, or any other innocent cause, an insurance be made without any interest whatsoever, the assured is entitled to recover back the whole premium:" (2 Arnould on Insurance, 5th edit., p. 1066.) [Bramwell, L.J.—If the defendant had known of the arrival of the ship, he had no insurable interest, and could not have insured. Does it make any difference that he did not know?] It is submitted that it does not. When he agreed to pay this premium he had no insurable interest. The two questions—viz., whether the risk ever attached, and whether the defendant had an insurable interest—are not the same. Because, if as a matter of fact the risk was over, then there was

no insurable interest. The state of a man's mind cannot be looked to to see if he has an insurable interest. That depends on the facts. That both parties thought the ship still ran a risk cannot really affect either question. [Baggallay, L.J.—We must regard the fact of the high premium that was paid. Will not a reasonable construction of the words "lost or not lost" cover the facts of this case? No doubt it would be something in the nature of a wager; but is not that what it really amounts to?] They also cited

Routh v. *Thompson*, 11 East. 428.

Cohen, Q.C. and *Hollams* for the plaintiff.—A policy of insurance covers past as well as future losses. It is said that the cargo having arrived safely the policy is void. There is no such condition expressed in the policy, and none such will be implied by the law. In the cases of *Oom* v. *Bruce* and *Hentig* v. *Staniforth*, cited on the other side, the policy had never attached. Here it did attach. For the purpose of the argument the defendant may be treated as the owner of the cargo, it makes no difference that he was only the insurer. [Brett, L.J.—Can a time policy be made to cover a time which is at an end when the policy is made?] Yes, unless the Stamp Acts prevent it. It is said that it makes no difference what is in the mind of the parties; but it makes all the difference. Concealment or even innocent misrepresentation makes the contract void. It is not a question whether any risk is in fact run or not. No risk is run if the ship has gone to the bottom before the insurance is made; yet in such a case the policy is admittedly good. It is said that the consideration has wholly failed here; but it has not. The consideration for the premium is the undertaking to indemnify against past and future losses; and the underwriter in this case did undertake so to indemnify. The consideration is not that he will in any event indemnify, because there may be nothing to indemnify. *Sutherland* v. *Pratt*, and the passage cited by the other side from Parke, B.'s judgment in that case, is directly in favour of the plaintiff's contention here. It shows the construction to be put on the words "lost or not lost." In 3 Kent's Commentaries, 12th edit., p. 259, there is the follwing passage: "The form of the policy in England and the United States contains the words 'lost or not lost;' and if the subject insured be lost or has arrived in safety when the contract is made, it is still valid if made in ignorance of the event, and the insurer must pay the loss or not pay it as the case may be. This is laid down by the foreign jurists as a general principle of insurance, without reference to those words which are said to be peculiar to the English policies." In many French policies there occurred, according to Emerigon, the words *bonnes ou mauvaises nouvelles*; and it is said that "lost or not lost" is merely a translation of that. In 2 Arnould on Insurance, 5th edit., 1064, the author says: "It never has been doubted, and indeed on principle is abundantly clear, that the premium must be returned whenever the policy is rendered void by the fraud of the underwriter. As if an insurance be made on a certain voyage 'lost or not lost, when the underwriter, at the time he subscribes the policy, privately knows that the ship has arrived safe, he will be bound to restore the premium." The instance there given is from the case of *Carter* v. *Boehm* (3 Burr. 1905, 9), where Lord Mansfield says: "The policy would equally be void against the underwriter, if he concealed; as if he insured a ship on her voyage which he privately knew to be arrived; and an action would lie to cover the premium." It is a fair inference that, in the opinion of Lord Mansfield and of Arnould, if the fact of arrival was not known to the underwriter, the premium would not be recoverable. The French and German law is in accordance with the plaintiff's contention: (French Code de Commerce, Art. 366, 7; German Code, Art. 789.) There is also an authority in English law directly in point, but not reported. (*a*) In the present case it is not accurate to say that the insurance was effected upon the supposition that the voyage was not at an end; it was doubtful. The evidence at the trial was that the underwriter said, "I think there is a very good chance of the ship's arrival not having been reported. I will do it on the chance." [*Benjamin*, Q.C.—That evidence was objected to as being conversation. Brett, L.J.—I suppose Mr. Cohen says that a policy made on a ship overdue is always made on the assumption that she may have arrived. But is that so? Is not the assumption that she has not arrived, but that she may not be lost? Bramwell, L.J.—Supposing she was not overdue, but by a very fast passage she had arrived the day before? Brett, L.J.—Does not overdue mean that she has not arrived?] No, overdue only means not yet heard of. As to the admissibility of the evidence that is objected to, there is no contract in writing here to pay the premium. The policy says that the premium is paid. It has been held that the underwriter cannot recover the premium from the assured, even if he is a party to the policy. The contract to pay the premium is a contract on the part of the broker who effects the insurance, and the policy is not the contract, although it is evidence of it. As to the other point, there was an insurable interest here. There is no distinction between the owner and the underwriter of the cargo. If no goods are shipped the premium (if it has been paid) is recoverable, because there never was a time when the assured could have suffered loss. [Baggallay, L.J.—The argument on the other side goes to this extent, that if there was found to be 20*l.* worth of damage to the goods, the plaintiff would be entitled to receive the premium; but if no damage, he is not entitled to it.] A policy of re-insurance attaches from the moment that the original policy of insurance attaches. There is no distinction, such as is

(*a*) That was a case of *Natusch* v. *Hendewerk*, which was an action against insurance brokers to recover back the premium paid in respect of a policy of insurance, lost or not lost, effected by them for and at the request of the plaintiff on the *Friede*, a German vessel, on a voyage from Dantzic to Hull, during the war of 1870 between France and Germany. Some few hours before the policy was effected the *Friede* had arrived safely at her port of destination, but the insurance was ordered and effected in ignorance by either party of such arrival, and upon the supposition that the vessel was still at sea. By arrangement the action was not tried at Nisi Prius, but left to the decision of Willes, J., who heard the case at Chambers in April 1871, where it was argued on the admitted facts by Cohen, Q.C. for the plaintiffs, and J. C. Mathew for the defendants. The learned judge took time to consider, and eventually held that the premium was irrecoverable.

attempted to be drawn on the other side, between loss and liability. Whether a loss has happened or the liability has terminated makes no difference. A wager is good, though the event be over. A policy of insurance is only a wagering contract that is legal. In Emerigon, c. xv., s. 3, edit. translated by Meredith, p. 635, it is said, "If there is no fraud, and one of the parties is not better informed than the other, the least uncertainty of the event, fortunate or unfortunate, suffices to render the insurance valid."

Benjamin, Q.C. in reply.—Emerigon confuses fraud and want of interest. The passage last cited continues at p. 636. He there states that he was consulted in 1781 on an insurance made at Marseilles on the cargo of a vessel already arrived in the port of that town, and that the insurer contended that the premium was due to him, because at the time of signing the policy he did not know of the return of the vessel, but that he (Emerigon) was of a contrary opinion, stating that the risk on goods of a vessel already arrived at the port of its destination had never been made by itself the subject of a maritime insurance. According to the contention on the other side, the policy of re-insurance attached before it was made. A policy cannot attach before it is made, although it may create a liability for an antecedent loss. By English law, if one party agrees to pay a premium in consideration of the other party accepting a liability when in point of fact there is no liability, there is no consideration and the contract is at an end.

Cur. adv. vult.

April 1.—Brett, L.J.—This was an action for the recovery of the premium on a policy of insurance, and it is defended on the ground that the policy never attached. The plaintiff underwrote the policy in question by way of re-insurance of the cargo of the *Alata* from Philadelphia to Rochfort, which had been originally insured by the defendant. At the time that the reinsurance was effected the *Alata* had sailed from Philadelphia to Rochfort, and had arrived in safety and (as we must now assume) without any damage whatever to the goods on board. The cargo had been landed undamaged, and the voyage was at an end. At that time both parties supposed that the *Alata* had not arrived, and that she was overdue. The great question that was argued was whether the policy by which the re-insurance was effected ever attached. Now, it is true that at the time that this policy was entered into the risk which was the subject-matter of the policy was determined in fact, and was determined in fact to this extent that there could be no loss. But this was a policy of re-insurance by the defendant to cover his liability for any loss incurred by the original assured. The risk insured by him was in terms the risk under which he stood by the policy made by him during the voyage described in such policy. During the whole time of the voyage described in the original policy the risk of the defendants continued. Therefore, the risk described in this policy did exist during the whole time of the voyage. Is it, then, a good objection to the claim for this premium, that when the present policy was in fact made the question of loss or no loss was in fact determined? I think it is not, because the objection would apply equally to the case of a policy on a ship being entered into, lost or not lost, where that question had been in fact already determined. Take the case of such a policy. If the vessel is lost when the policy is made, the risk which is the subject-matter of the policy is determined in fact, because the loss has already occurred before the policy is entered into. Consequently, if the argument is true, the fact of the vessel being lost at the time of the policy being entered into would destroy the policy. But that is not so. The dicta go as far as this, that if both parties knew that the subject-matter was lost at the time when they entered into the policy, and the policy in terms covers that loss, the policy is good. It was said by Lord Mansfield that if a ship had been passed (at the time when the passing of a ship had no effect other than an honourable undertaking) when the parties where ignorant of the loss, and when the loss was known to both parties a policy was entered into, it would be a good policy. Therefore, the fact that the question of loss or no loss has been determined before the making of the policy is no objection to the policy upon principle. As to authority Mr. Benjamin was bound to admit that almost every writer on insurance law was against his contention. Emerigon was against it. Mr. Benjamin objected to Emerigon, but he is always cited as an authority, although he is not always correct, and his opinion is to be carefully considered before it is rejected. Park on Insurance was against it, and Park on Insurance has always been considered as an authority. Phillips is against it, and of all authorities on insurance law Phillips is the most to be relied on. Arnould is against it. Then we have the high authority of Willes, J. in the case of *Natusch* v. *Hendewerk*, which is directly in point. That was an action for the premium paid on effecting a policy, and it was held that the fact (unknown to both parties at the time) of the voyage being ended did not prevent the risk from attaching. Therefore, it seems to me both on principle and authority that the mere fact of the voyage insured having been at an end did not prevent the policy of re-insurance from attaching. But if so, the premium is due. When a policy has once attached, the premium is due, and no relief can be given in respect of it. Then it was said that the defendant had no insurable interest. But if this policy attached, it attached in respect of the voyage insured under the first policy. The question of insurable interest therefore comes to be the same question as whether the policy did attach. If it attached, the defendant's interest attached at the same time and for the same period as that of the original assured. The conclusion I come to is this, that where the subject-matter insured has been or will be at risk when the policy is made, the policy attaches, if the risk has been properly described in the policy. The judgment for the plaintiff was therefore right.

Baggallay, L.J.—I am of the same opinion.

Bramwell, L.J.—I will add a few words in confirmation of what has been said by my brother Brett. On the question of whether the policy attached, I think it did. The fallacy in the defendant's argument arises from the double meaning of the word risk. That means both the voyage commenced with necessary conditions to make the underwriters liable, and also the chance of loss during its performance. In the latter sense

there was no risk at the time of re-insurance. But that is not the sense in which the word is used by the authorities. It is used in the first sense I have mentioned, and in that sense it clearly existed in this case. There was therefore a risk such that if the premium had been paid the defendant could not have recovered it back. Suppose it had been known to both parties that the ship had arrived for twenty-four hours, and still the defendant had been minded to re-insure, and had done so at a low premium, it cannot be doubted that the premium would have to be paid. If that is true of twenty-four hours, it is equally so of twenty-four or any other number of days, and if it is true when both parties know, it is equally true when they do not. I think, therefore, the policy attached. All the authorities, as my brother Brett says, who have expressed an opinion on the matter are in favour of this view; and the utmost that can be said of the others is, that they do not decide it one way or the other. It is said that the same considerations determine the other question in favour of the plaintiff. On this I confess I am not so clear. It is said that the interest of the defendant was in his possible liability, and that the existence of a loss being uncertain to his knowledge, he might insure against it. I am not altogether satisfied on this. Suppose an insurance warranted free from capture, and suppose a re-insurance on the same terms on the same voyage, but the ship was captured before re-insurance, would the insurer have an insurable interest? I doubt it. But as my brethren do not, and as I only doubt, I concur on this point also.

Judgment affirmed.

Solicitors for the plaintiff, *Waltons, Bubb* and *Walton.*

Solicitors for the defendant, *Field Roscoe,* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR Esq., Barrister-at-Law.

Wednesday, June 22, 1881.

(Before Lord COLERIDGE, C.J. and MANISTY, J.)

HUGHES (app). *v.* SUTHERLAND (resp.).

Shipping — Equitable owner — Exemption from penalty for engaging seamen or apprentices— 17 & 18 Vict. c. 104, *ss.* 55, 100, 146, 147—25 *&* 26 *Vict. c.* 63, *s.* 3.

Where a person has bonâ fide purchased one sixty-fourth share of a British ship, but the share has not been transferred to him by bill of sale, nor has he been registered as owner, and he has engaged and supplied an apprentice to be entered on board the said ship, he is not liable to be convicted under the Merchant Shipping Act 1854, *s.* 147, *sub-sect.* 1, *on the ground that he is, by reason of the Merchant Shipping Amendment Act* 1862, *s.* 3, *an owner of the ship.*

The word "owner" must be construed with reference to the subject matter and context of each provision of the Merchant Shipping Act.

THIS was a case stated under 20 & 21 Vict. c. 43, by Sir. R. Carden, Alderman and Justice of the Peace for the City of London, upon his refusal to convict the defendant Sutherland upon the information of the appellant, an officer of the Board of Trade, in a penalty for breach of sect. 147, sub-sect. 1 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

By sect. 55 of that Act:

A registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale.

By sect. 100:

Whenever any person is beneficially interested, otherwise than by way of mortgage, in any ship or share therein registered in the name of some other person or owner, the person so interested shall, as well as the registered owner, be subject to all pecuniary penalties imposed by this or by any other Act on owners of ships or shares therein, so nevertheless, that proceedings may be taken for the enforcement of any such pecuniary penalties against both or either of the aforesaid parties, with or without joining the other of them.

By sect. 146:

The Board of Trade may grant to such persons as it thinks fit, licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom, to continue for such periods, to be upon such terms, and to be revocable upon such conditions as such Board thinks proper.

By sect. 147:

The following offences shall be punishable as hereinafter mentioned (that is to say);

(1) If any person not licensed as aforesaid, other than the owner or master, or a mate of the ship, or some person who is *bonâ fide* the servant, and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds.

(2) If any person employs any unlicensed person, other than persons so excepted as aforesaid, for the purpose of engaging or supplying any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds, and if licensed shall in addition forfeit his licence.

(3) If any person knowingly receives or accepts to be entered on board any ship any seaman or apprentice who has been engaged or supplied contrary to the provisions of this Act, he shall for every seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds.

Of this act, Part ii., Registry, consists of sects. 17 to 108 inclusive, and Part iii., Masters and Seamen, consists of sects. 109 to 290 inclusive.

By the merchant Shipping Amendment Act 1862 (25 & 26 Vict. c. 63), sect 1, the Act is to be construed with, and as part of, the Merchant Shipping Act 1854, thereinafter termed the principal Act.

By sect. 3:

It is hereby declared that the expression "beneficial interest," whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.

It was found, as facts in the case, that on 8th Dec. 1880 Messrs. McIntyre being the registered

owners of forty-eight shares, and Mr. Grimond, being the registered owner of the remaining sixteen shares of the registered British ship *Aphrodita*, Messrs. Oswald, Mordaunt and Co., the actual owners of the whole ship, although not then nor at any time the registered owners, entered into a contract with Mr. Price for the sale of the ship.

On the following day (9th Dec.) Price agreed with the respondent and defendant Sutherland to sell him one sixty-fourth share for 150*l.*, and this was found, as a fact, to have been a *bonâ fide* purchase by Sutherland, who on 1st Jan. 1881 paid to Price 5*l.* on account of the said share.

On the 29th Jan. 1881 Grimond, the registered owner of sixteen shares, transferred his interest by bill of sale to Price, but continued to be registered owner with Messrs. McIntyre.

On the 3rd Feb. 1881 the respondent Sutherland, who was not licensed by the Board of Trade under the 146th section of the Merchant Shipping Act 1854, advertised for apprentices, and, in consequence, on the 12th Feb. a man named Axtell called upon him with the view to apprentice his son. The respondent stated that he had a ship sailing in a fortnight, and sent him to Price, with whom the premium was agreed. On the 19th Feb. the amount of agreed premium was paid to Price, and the apprenticeship deed was entered into by Price and the two Axtells, father and son.

On the 28th Feb. Messrs. McIntyre transferred their forty-eight shares to Price by bill of sale, but their names were not then removed from the register.

On the 3rd March, Price, by bill of sale, transferred one sixty-fourth share in the ship to the respondent, and afterwards the respondent paid Price the balance of the 150*l.* agreed upon, but this share was never registered in Sutherland's name.

On the 4th March Price registered himself as sole owner of the whole ship, and on the 7th March he registered himself as managing owner, describing himself as registered sole owner.

The Alderman at the hearing decided that Sutherland was, upon those facts, an owner of the ship, and refused to convict him. The question for the court was whether this decision was right.

A. L. Smith argued for the Board of Trade.—The facts are not sufficient to exempt the respondent from the penalty imposed by sect. 147, subsect. 1 of the Merchant Shipping Act 1854. He was not the owner of the ship on the 12th Feb., for at that time he had not fulfilled the preliminaries required by statute, and could not have obtained specific performance of the contract to make him owner. An equitable mortgage upon shares in a ship was held to be invalid under the Merchant Shipping Act 1854 in the *Liverpool Borough Bank* v. *Turner* (1 J. & H. 159; affirmed on appeal, 2 D. F. & J. 502); and the case of the *Union Bank of London* v. *Lenanton* (3 Asp. Mar. L. C. 600; L. Rep. 3 C. P. Div. 243) is a further confirmation that no interest in a British ship can be transferred except by bill of sale. The Amendment Act of 1862, sect. 3, does not touch this point, because it relates only to part of the principal Act, and does not include this section 147, which is in the third part. The decision of the *Liverpool Borough Bank* v. *Turner* was not questioned in either of the two cases subsequent to the Amendment Act 1862: *European and Australian Royal Mail Company Limited* v. *Peninsular and Oriental Steam Navigation Company* (2 Mar. L. C. O. S. 351; 14 L. T. Rep. N. S. 704) and *Stapleton* v. *Haymen* (2 H. & C. 918). No doubt it has been held in *Meiklereid* v. *West* (3 Asp. Mar. L. C. 129; L. Rep. 1 Q. B. Div. 428) that the word "owner" does not necessarily mean registered owner; but it has never been held for any purpose that a person can be an owner of a ship unless legally constituted by the transfer required by statute.

Besley for the respondent.—This case is concluded against the apellant by the finding of fact that the respondents purchase was *bonâ fide*. The quantity of his interest was of no consequence. Here Price's position was the same as the respondent's, and, if the appellant's contention be good, Price ought to have been convicted under this 147th section. But it has been held that even a registered owner is no longer an owner so as to be liable for an allotment note under sect. 169 if the temporary ownership be entirely handed over by a charter-party. In *Meiklereid* v. *West*, and more recently in *Batthyany* v. *Bouch* (4 Asp. Mar. L. C. 380; (50 L. J. 421, Q. B.), it was held that the case of *Liverpool Borough Bank* v. *Turner* has no application, at all events since the Amendment Act of 1862, to agreements to transfer, whatever effect it may continue to have upon mortgages. It could never be supposed that a charterer of a ship was bound to obtain a license in order to engage a crew.

A. L. Smith in reply.

Lord COLERIDGE, C.J.—I am of opinion that the decision of the magistrate was right and should be affirmed. The section of the Merchant Shipping Act (147th) was passed to prevent crimping, and it interferes with freedom of contract in order to protect a class of persons peculiarly subject to imposition. The construction of the section therefore ought not to be narrowed so as to exclude a matter clearly within the mischief aimed at. Here the state of things on the 12th Feb., when the respondent did an act which was clearly prohibited by the statute, unless he comes within the exception, appears to have been this: the registered owners of the ship were quite different persons from and in no way connected with, the respondent. It is admitted that he was not then or ever afterwards a registered owner of any share in the ship; it is also admitted that at the time he was not a legal owner in the sense that the share which he afterwards held had not then been transferred to him by bill of sale according to the requirement of sect. 55 of the Act 1854. He had, however, before the transaction in question *bonâ fide*, and not colourably, purchased a share in the ship from a man named Price who, although not at the time of the purchase, before the alleged offence, had become legal owner of a third of the ship and subsequently acquired the remaining shares, and also, became registered owner of the whole ship. The question for us is whether the respondent, being neither registered nor legal owner, was yet such an owner of this ship on the 12th Feb. as to give him a claim for exemption from the application of the first clause of this 147th section. I think he was such an owner. Under the Merchant Shipping Act 1854 in *Liverpool Borough Bank* v. *Turner* (1 J. & H. 159, and 2 De G. F. & J. 502), the question

how far equities could be enforced arose before Wood, V.C. who, in an elaborate judgment, held that under an agreement for sale or mortgage not accompanied by the formalities prescribed, no such interest passed as would justify the court in decreeing specific performance. Lord Campbell on appeal affirmed the decision of the Vice-Chancellor, and the case is therefore one of high authority. In 1862, probably in consequence of that case, it was by sect. 3 of the Amendment Act of that year "declared," not further enacted, "that the expression beneficial interest, whenever used in the second part of the principal Act, includes interests arising under contract, and other equitable interests; and the intention of the said Act is that without prejudice," amongst other things . . . . "to the powers of disposition and of giving receipts conferred by the said Act or registered owners or mortgagees" . . . . "equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property." Since that Amendment Act equitable interests in ships have been recognised, and I gather from *Stapleton v. Haymen* (2 H. & C. 918) that Pollock, C.B. and the other members of the court concurred in holding that an equitable right of property can be created in a ship by an unregistered bill of sale. In the present case, therefore, we must take it that the respondent was an equitable part owner of the ship in having a contract enforceable in equity for the purchase of one sixty-fourth share. For the purpose of another proceeding under this Act it has been held that for the issue of an allotment note a registered owner, when he has assigned all his interest in the ship temporarily by a charter-party is not liable, although the words of the section applying thereto (the 169th) name the persons upon whom the liability is cast as "the owner or any agent who has authorised the drawing of the note" (*Meiklereid* v. *West*, 3 Asp. Mar. L. C. 129; L. Rep. 1 Q. B. Div. 428). This case is effectual so far as it shows that the word owner, for which the Act gives no definition, must be construed with reference to the subject matter and the context of each provision in which it is used. With regard to the point raised here, the respondent's position is the same as that of a charterer, and it is difficult to suppose that where, under a charter-party of a large ship for a long period, the charterer has a real interest in and the whole management of the ship and crew, he could be convicted in a penalty of £20 for every seaman and apprentice whom he might engage. It seems clear to me that a wide meaning must be given to the word "owner" in this exception, and that a person having an equitable interest in a share of a ship must be exempt from the penalty as much as a legal or even a registered owner. For these reasons this appeal must be dismissed.

MANISTY, J.—I am of the same opinion. By sect. 147 sub-sect. 1, several persons are exempted from the penalty imposed, and amongst them the owner of the ship. It is admitted that a person who had by law a share in the ship duly transferred to him although not a registered owner, might be exempted by these words, but it is contended that the merely equitable holder of a share cannot be included. A charterer by demise would, upon this contention, be liable to a penalty for engaging a seaman. I cannot imagine a stronger illustration of the difficulty which such an interpretation might cause. Some light may be gathered as to the meaning intended for the word "owner" from the exemption of a "person who is *bonâ fide* the servant and in the constant employ of the owner." Such an owner must be any person having a beneficial legal or registered interest in the ship.

Judgment for the respondent.

Solicitor for appellant, *The Solicitor to the Board of Trade.*

Solicitors for respondent, *Wontner* and *Son.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

Tuesday, March 15, 1881.

(Present: Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER, and Sir RICHARD COUCH.)

THE BRINHILDA.

Practice—Appeals — Time — Preemption — Jurisdiction and practice of Calcutta High Court in Admiralty and Vice-Admiralty.

The time for appealing from the judgment of a Vice-Admiralty Court is governed strictly by the rules and regulations made by Order in Council June 27, 1832, *no rules having been made as yet under* 25 *Vict. c.* 24, *ss.* 23, 24, *and* 30 *&* 31 *Vict. c.* 45, *s.* 18.

The time for appealing from any Court of Admiralty jurisdiction is also limited to fifteen days by the practice of the court.

In any Admiralty or Vice-Admiralty cause the right of appeal to the Privy Council is perempted by any proceedings being taken by the appellant under the decree to be appealed from.

THIS was a motion by the respondents, the British Steam Navigation Company, owners of the ship *Ava*, to dismiss an appeal by the owners of the ship *Brinhilda* from a decree of the High Court of Calcutta finding both vessels to blame for a collision which took place in the Bay of Bengal. The case has been heard in the first instance before a single judge of the High Court, who found that the collision was the fault of both vessels, and that the *Brinhilda* was liable to answer for half the damage done to the *Ava*, the whole of the damage done to that vessel being agreed at 50,000*l*. From this decree an appeal was carried to the High Court, consisting of Garth, C.J. and Pontifex, J., who on the 23rd July 1880 varied the order of the court below by directing that the owners of the *Brinhilda* should be allowed to deduct half the damage sustained by that vessel. Subsequently to this decree the owners of the *Brinhilda*, the present appellants, summoned the owners of the *Ava* before the registrar to assess the amount of the said damages.

The notice of appeal was given, as set out in the judgment of the court, on the 2nd Sept. 1880, and subsequently the respondents appeared to the appeal under protest.

The enactments governing appeals from Vice-Admiralty Courts to the Privy Council are:

2 *Will.* 4, *c.* 51 (*An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate doubt as to their Jurisdiction*), 23*rd June* 1832.

Preamble. . . . It shall be lawful for His Majesty, with the advice of his Privy Council, from time to time to make and ordain such rules and regulations as shall be deemed expedient touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty at present or hereafter to be established in any of His Majesty's possessions abroad . . . . and also from time to time, as shall be found expedient, to alter any such rules, regulations, and fees, and to make any new regulations. . . .

Rules and Regulations touching the Practice and Proceedings in the Courts of Vice-Admiralty abroad, 27*th June* 1832.

Sect. 35. Appeals.

All appeals from decrees of the Vice-Admiralty Courts are to be asserted by a party in the suit within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in court; and a minute thereof is to be inserted in the assignation book. And the party must also give bail within fifteen days from the assertion of the appeal in the sum of 100*l.* sterling to answer the costs of such appeal.

In all cases, however, in which an appeal is asserted except respecting slaves, the judge may proceed to carry his sentence into execution, provided the party in whose favour the decree has been made give bail to abide the event of the appeal, by two sureties in the amount of the value of the property or subject in dispute, together with the further sum of 100*l.* sterling to answer costs in the event of the same being awarded by the Superior Court. The party appealing, having complied with these regulations, is then to cause the judge and registrar to be served with an inhibition from the High Court of Admiralty restraining them from further proceeding in the cause, and also with a monition to transmit the process.

This process will consist of a fair copy of the proceedings under the seal of the Vice-Admiralty Court, to be made and signed by the registrar, at the expense of the party ordering the same, which is to be transmitted to the Superior Court, pursuant to the monition.

The proceeds, if in court, or in the hands of any individual, must, on a special monition for the purpose being served, be remitted to the registrar of the High Court of Admiralty or Court of Appeal.

3 & 4 *Will.* 4 *c.* 4 (*An Act for the better Administration of Justice in His Majesty's Privy Council*) 1833.

Sect. 20. And be it further enacted that all appeals to His Majesty in Council shall be made within such time respectively within which the same may now be made, when such time shall be fixed by any law or usage, and when no such law or usage shall exist, then within such time as shall be ordered by His Majesty in Council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for His Majesty in Council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his Majesty in Council.

March 15, 1881, the motion came on for hearing.

Woodroffe in support of the motion.—This appeal purports to be made under rule 35 of the Rules and Regulations of Will. 4, 27th June 1832, and therefore under the Vice-Admiralty jurisdiction of the court; if so, the appellants are clearly out of time, and have now no right of appeal:

The Aquila, 6 Moore P. C. 102.

Even assuming that the High Court of Calcutta has Admiralty as distinguished from Vice-Admiralty (*a*) jurisdiction, such Admiralty jurisdiction only extends over causes of faction arising within the territorial limits assigned by the charter to the East India Court in 1774, constituting the Supreme

13 *Geo.* 3, *c.* 63.

Sect. 13. . . . It shall and may be lawful for His Majesty by charter or letters patent under the Great Seal of Great Britain to erect and establish a Supreme Court of Judicature at Fort William aforesaid, . . . which said Supreme Court of Judicature shall have, and the said court is hereby declared to have, full power and authority to exercise and perform all . . . Admiralty . . . jurisdiction . . . and to form and establish such rules of practice and such rules for the process of the said court, and to do all such things as shall be found necessary for the administration of justice and the due execution of all or any of the powers which by the said charter shall or may be granted and committed to the said court.

Charter, 26*th March* 1774.

Sect. 26 provides that the Supreme Court shall be a Court of Admiralty "in and for the said provinces, countries, or districts of Bengal, Behar, and Orissa, and all other territories and islands adjacent thereunto, and which now are or ought to be dependent thereupon," with power to hear, &c., all cases "between merchants, owners, and proprietors of ships and vessels employed and used within the jurisdiction aforesaid, or between others, contracted, done, had, or commenced in, upon, or by the sea, or public rivers, or ports, creeks, harbours, and places overflown within the ebbing and flowing of the sea and highwater mark within, about, and throughout the said three provinces, countries, or districts of Bengal, Behar, and Orissa, and all the said territories and islands adjacent thereto and dependent thereupon, the cognisance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies annexed and commenced causes whatsoever, and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact and the equity of the case.

39 & 40 *Geo.* 3, *c.* 79, extended the jurisdiction of the Supreme Court over the province of Benares (sect. 20), and gives power to the Court to issue a prize commission to any or all of the judges of the Supreme Court (sect. 25),

Vice-Admiralty Commission, dated 19*th July* 1822.

". . . We do by these presents make, ordain, nominate, and appoint you the Chief Justice of Bengal to be our Commissary in the Vice-Admiralty Court at Calcutta and territories thereunto belonging hereby granted unto you."

2 *Will.* 4, *c.* 51 (*An Act to regulate the Practice and Fees in Vice-Admiralty Courts abroad and to obviate doubts as to their Jurisdiction.*)

Sect. 6. And whereas in certain cases doubts may arise as to the jurisdiction of Vice-Admiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, *damage to the ship by collision*, contempt in breach of the regulations and instructions relating to his Majesty's service at sea, salvage, and droits of Admiralty; be it therefore enacted that in all cases where a ship or vessel, or the master therof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty court, notwithstanding the cause of action may have arisen out of the local limits of such court, and to carry on the same in the same manner as if the cause of action had arisen within the same limits.

The High Courts Act 1861 (24 & 25 *Vict. c.* 104).

Sect. 9. Each of the High Courts to be established under this Act shall have and exercise all such . . . Admiralty and Vice-Admiralty . . . jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the presidency for which it is established, as Her Majesty may by such letters patent as aforesaid grant and direct.

(*a*) The High Court at Calcutta obtains its jurisdiction in Admiralty under the following enactments:—

Court, and which appears to be transferred to the High Court by 24 & 25 Vict. c. 104, s. 9, and here the cause of action, the collision, arose on the high seas in the Bay of Bengal, beyond that jurisdiction, and therefore the Admiralty jurisdiction does not include the case. But even if the case were within the Admiralty jurisdiction, the appellants having acted under the decree in summoning the respondents to go before the registrar and merchants to assess damages, are now, in accordance with the practice of all Courts of Admiralty jurisdiction, or governed by the civil law, perempted from appealing :

The Aquila, 6 Moo. P. C. 102;
Lloyd and another v. *Poole*, 3 Hagg. Ecc. 477;
The Hydroos, 5 Moo. Ind. App. 137;
The Ship Clifton, 2 Knapp P.C. 375; 3 Hagg. Adm. 117.

And in such a case the proper course for the respondents to pursue is to move to quash the appeal at once, without waiting to raise the objection at the hearing:

Truman v. *Dent*, 8 Moo. P. C. 419.

The High Court could in no case have power by its rules, made under its patent, to alter those made under the Act of the Imperial Parliament regulating appeals; but, moreover, these appeals are expressly left untouched by recent Indian legislation : (Act VI. 1894, Act X. 1877; s. 616.)

Butt, Q.C. (*Benjamin*, Q.C. and *Clarkson* with him) for the appellants. If the appeal was out of time the objection should have been taken in the High Court at Calcutta, where it was asserted, and not here. The fact that no objection was taken creates a presumption that the method of appeal was correct, and is a waiver by the respondents of a merely technical objection. Besides, the time for appealing should be reckoned from the date at which the appellants could get a copy of the decree, that is, from the time at which it was drawn up, and not from the date of the decision in court. The Civil Procedure Code requires a copy of the decree to be attached in all cases to the appeal, and therefore it could not be asserted till the decree was drawn up. The appeal is within the time required by that code, and there has been no laches in asserting the appeal, therefore the court, which no doubt has power to allow the appeal to be heard, even if out of time (*The Hydroos*, 5 Moo. Ind. App. Cas. 137), will exercise that power here. The objection that the appellants have perempted their right of appeal by going before the registrar is highly technical, besides, under the circumstances of this case, where in any event there were damages to be assessed on both sides, their act was an involuntary submission to the direction of the court.

Letters Patent 14th May 1862.

Sect. 31. And we do further ordain that the said High Court of Judicature at Fort William, in Bengal, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any judge of the said court as Commissary to the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as is now vested in any commissioner or commissioners appointed by us or our predecessors, under the powers given by an Act passed in the session of Parliament held in the 39th and 40th years of the reign of his late Majesty King George III., "for establishing further regulations for the government of the British territories in India, and the better administration of justice within the same.

Woodroffe in reply.

The judgment of their Lordships was delivered by Sir BARNES PEACOCK.—This is a motion on the part of the British Indian Steam Navigation Company, the owners of the ship *Ava*, to release and dissolve the inhibition and citation issued in a certain pretended appeal of the above-named appellants, and to dismiss or quash the said appeal for want of competency, or to grant the respondents leave to file an act of protest on petition against the admission of the said pretended appeal. The suit came before the High Court, in the exercise of its original jurisdiction. It was brought by the owners of the steamship *Ava* against the *Brinhilda* for a collision which took place in the Bay of Bengal. The High Court, in its original jurisdiction, held that there was negligence on both sides, and consequently that half the damages which resulted to the owners of the ship *Ava* were to be paid by each of the parties. The damages were assessed at 50,000*l*., which would leave 25,000*l*. to be borne by the owners of the *Ava* themselves, and 25,000*l*. to be paid by the owners of the ship *Brinhilda*. The parties appealed to the High Court in the exercise of its appellate jurisdiction, and that court affirmed the decision of the first court so far as it was held that there was negligence on the part of each of the ships; but they thought it right to amend the decree by declaring that, instead of the owners of the *Brinhilda* paying the full sum of 25,000*l*., being one half the damages sustained by the owners of the *Ava*, they should be allowed to deduct half the damages which they had sustained by the injury to their ship, and that it should be referred to the registrar of the court to assess those damages. That decision was pronounced on the 23rd July 1880. The parties went before the registrar for the purpose of assessing the amount, and it appears by the report of the registrar that the damages were assessed at 3000*l*. with the consent of both parties. On the 2nd Sept. 1880 a notice of appeal was given, which was recorded as follows: "Pursuant to rule 35, of the rules and regulations made and ordained by his late Majesty King William IV. in Council, in pursuance of the 2 Will. 4, c. 51, Mr. Phillips, advocate for the impugnment, appears and declares his intention of appealing to the Privy Council against both the decrees made in this cause." The rule referred to is in these words: "All appeals from the decrees of the Vice-Admiralty Courts are to be asserted by the plaintiffs in the suit within *fifteen* days after the date of the decree, which is to be done by the proctor declaring the same in court, and a minute thereof is to be entered in the assignation book, and the party must also give bail within fifteen days from the assertion of the appeal in the sum of 100*l*. sterling to answer the costs of such appeal." (*a*) The judg-

(*a*) It may be observed that, though the rule here in question has not been revoked, it appears by the following enactments to be in contemplation to do so.

The Vice-Admiralty Courts Act 1863 (26 *Vict.* c. 24).

Sect. 23. The time for appealing from any decree or order of a Vice-Admiralty court, shall, notwithstanding any existing enactment to the contrary, be limited to six months from the date of the decree or order appealed from; and no appeal shall be allowed where the petition of appeal to Her Majesty shall not have been lodged in the registry of the High Court of Admiralty and of Appeals within that time, unless Her Majesty in Council

ment was delivered on the 23rd July 1880, and consequently the notice on the 2nd Sept. was not an assertion within fifteen days from the date of the decree. It has been urged that the decree was not drawn up in writing and signed by the court until some considerable time afterwards, and that the petitioners could not appeal without annexing a copy of the decree to their petition of appeal. But the rule of annexing a copy of the decree to the petition of appeal refers to appeals which are preferred under the Code of Civil Procedure, Act VIII., of 1859; it does not apply to appeals preferred or asserted under the 35th section of the rules of Will. 4. (*a*) The words "after the date of the decree," according to their Lordships' view of the rule, do not mean after the date when the decree is drawn up in writing, but after the date on which the decree or sentence is pronounced by the Vice-Admiralty or Admiralty Court, as the case may be. The words which are constantly used in Acts which refer to decrees in the Admiralty Court are "the pronouncing of the sentence or decree." Their Lordships therefore think that the "date of the decree" did not mean the date on which the decree was reduced into writing and signed by the court, but the date on which the High Court delivered their judgment and expressed what the decree was. If the petitioners intended to appeal, they ought, in accordance with the rule, to have asserted their appeal within fifteen days from the date of the decree, by declaring in court that they intended to appeal, and that they did not do. It is important in Admiralty proceedings that notice of appeal should be given within a short period. When a ship is sued it is usually arrested, and unless it is released upon bail it is detained by an officer of the court. It is therefore important, if a party intends to appeal from the decision of the Admiralty Court, that notice should be given within a certain limited time, and that time, with regard to Vice-Admiralty cases, is fifteen days from the date of pronouncing the decree. The collision took place in the Bay of Bengal, and therefore it may be a question whether the High Court was exercising Vice-Admiralty or Admiralty jurisdiction; but that is not material, for if the case was tried in the Admiralty jurisdiction the appeal ought to have been asserted, according to the rules of the Admiralty Court, (*a*) within fifteen days. The petitioners have stated in their petition that they asserted the appeal in accordance with the 35th rule of Will. 4. The assertion was too late, and consequently the appellants had no right to appeal. Further, they appeared before the registrar for the purpose of carrying out the order of the High Court in assessing the damages which they had sustained by the injury which had been done to the *Brinhilda*, and acted without protest. It is said that they were obliged to go before the registrar; but they might have appealed and got an inhibition, or if not, they might have appeared before the registrar under protest. The owners of the *Brinhilda* took out the summons to compel the owners of the *Ava* to appear before the registrar for the purpose of acting under the decree of the High Court and assessing the amount of damage sustained by the owners of the *Brinhilda*. That, of itself, according to the decision to which we have been referred (*The Ship Clifton*, 3 Knapp P. C. 375; 3 Hagg. Adm. 117) would be a sufficient ground for preventing the petitioners from appealing. Their Lordships therefore think that the owners of the *Brinhilda* have not put themselves into a position to appeal, as a matter of right, against the decision of the High Court. The question before their Lordships is not whether they should recommend Her Majesty to grant an appeal as a special matter of favour. That they could do only if a petition were presented to Her Majesty, and referred to the Judicial Committee to report their opinion thereon. Under these circumstances their Lordships think that the motion ought to be granted, and that the petition of appeal ought to be set aside. It is unnecessary to do more than set aside the petition of appeal; upon that being done, the relaxation of the inhibition will issue as a matter of course. Their Lordships therefore will humbly report to Her Majesty that the petition of appeal ought to be dismissed. The appellants must pay the costs of this motion and of the appeal.

Solicitors for appellants, owners of the *Brinhilda*, *Lyne* and *Holman*.

Solicitors for respondents, owners of the *Ava*, *Parker* and *Co.*

(*a*) See Williams and Bruce, Adm. Practice. p. 313.

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shall, in the report and recommendation of the Judicial Committee of the Privy Council, be pleased to allow the appeal to be prosecuted, notwithstanding that the petition of appeal has not been lodged within the time prescribed.

Sect. 24. The Acts enumerated in the schedule hereto annexed marked B. are hereby repealed to the extent therein mentioned, but the repeal thereof shall not affect the validity of any rules, orders, regulations, or tables of fees heretofore established and now in force, in pursuance of the Act 2 & 3 Will. 4 c. 51; but such rules, orders, regulations, and tables of fees shall continue in force until repealed or altered under the provisions of this Act.

The Vice-Admiralty Courts Act 1863 only applies to certain Vice-Admiralty courts enumerated in schedule A. of the Act, amongst which are none of the courts in the East Indies; but sect. 23 is expressly extended to them by the Vice-Admiralty Courts Act Amendment Act 1867 (30 & 31 Vict. c. 45).

Sect. 18. The limitation of the time allowed for appeals contained in the 23rd section of the Vice-Admiralty Courts Act 1863 shall be held to apply to all decrees or orders pronounced in any Vice-Admiralty court now established or hereafter to be established in any of Her Majesty's possessions in India.

No new order has however as yet been made under the Vice-Admiralty Courts Act 1863, or under 3 & 4 Will. 4 c. 41 (*ubi sup.*), and therefore sect. 35 of the rules of Will. 4 still govern the time for appealing.

(*a*) Act X. of 1877, s. 615. . . . Nothing in this chapter (appeals to Privy Council) applies to any matter of . . . . Admiralty or Vice-Admiralty jurisdiction. . . .

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

Wednesday, July 20, 1881.

(Before JESSEL, M.R., BRETT and COTTON, L.JJ.)

PREHN *v.* BAILEY AND OTHERS.

Limitation of liability—Salvage—General average—Wreck Removals Act 1877 (40 *&* 41 *Vict. c.* 16)—*Thames Conservancy Acts* (20 *&* 21 *Vict. c. cxlvii. s.* 86, *and* 33 *&* 34 *Vict. c. cxlix. s.* 27)—*Contribution by cargo owner—No man can profit by his own wrong.*

Where a ship carrying cargo is sunk in the Thames in consequence of a collision caused by her own negligence, and her owner limits his liability under the Merchant Shipping Act 1862, *s.* 54, *and the Thames Conservancy raise the ship and cargo under their special Acts and deliver them to the shipowner on payment of the expenses of raising, the shipowner has no lien on the cargo and no claim against the cargo owner for the cargo's proportion of the cost of raising.*

THIS was an appeal by the plaintiff from a judgment of Sir R. Phillimore delivered on the 5th April 1881 in a special case which the parties to this action had concurred in stating pursuant to Order XXXIV. of the Judicature Act 1875. The facts of the case, together with the special case and the judgment appealed against, are fully set out in the report of the case below (44 L. T. Rep. N. S. 817; 4 Asp. Mar. L. C. 428).

The following sections were referred to in the course of the argument:

The 86th section of the Thames Conservancy Act 1857 (20 & 21 Vict. c. cxlvii. s. 86):

When and so often as any vessel shall be sunk or stranded in the river, it shall be lawful for the conservators, and they are hereby required, in case the master of such vessel shall refuse or neglect to weigh and raise the same, after notice in writing requiring him so to do, and within the time to be mentioned in such notice, to cause any such vessel to be weighed and raised, or if it shall be found impracticable to weigh and raise the same (of which impracticability they shall be sole judges), to cause such vessel to be blown up or otherwise destroyed, so as to clear the river therefrom; and in case such vessel shall be weighed and raised, to cause the same, and the furniture, tackle, and apparel thereof, or of any part thereof respectively, and also all or any part of the goods, wares, merchandise, chattels, and effects which may be found on board the same, to be sold by public auction or otherwise, and by and out of the proceeds of such sale to pay the charges and expenses of weighing and raising such vessel, or the blowing up or otherwise destroying the same, and clearing the said river therefrom, and also the charges and expenses of such sale, rendering any overplus to the owner or other person who by law shall be entitled to the same; and in case the proceeds of such sale shall be insufficient to defray the charges and expenses of weighing and raising such vessel, or of the blowing up or otherwise destroying the same, and clearing the river thereof, the deficiency shall be paid to the conservators by the master or owner of such vessel on demand, and in default of payment may be recovered in the same manner as any penalty imposed by this Act is directed to be recovered.

Also the 27th section of the Thames Navigation Act 1870 (33 & 34 Vict. c. cxlix. s. 27):

With respect to vessels sunk or stranded in the Thames, the conservators in case of emergency (of which emergency they shall be sole judges) shall perform the duties, and exercise the powers imposed on them by sect. 86 of the Thames Act of 1857 without having given such notice as in that section directed.

And the 4th, 6th, and 8th sections of the Removal of Wrecks 1877 (40 & 41 Vict. c. 16):

4. Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authority to be, or be likely to become, an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove, or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal, or destruction thereof, and may sell, in such manner as they think fit, any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may out of the proceeds of such sale reimburse themselves for the expenses incurred by them under this Act, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto.

Provided as follows:

(2.) At any time before any property is sold under this Act, the owner thereof shall be entitled to have the same delivered to him on payment to the authority of the fair market value thereof, to be ascertained by agreement between the authority and the owner, or, failing such agreement, by some person to be named for the purpose by the Board of Trade, and the sum paid to the authority as the value of any property under this provision shall for the purposes of this Act be the proceeds of the sale of that property.

6. The provisions of this Act shall apply to every article or thing, or collection of things being or forming part of the tackle, equipment, cargo, stores, or ballast of a vessel in the same manner as if it were included in the term "vessel," and for the purposes of this Act any proceeds of sale arising from a vessel and from the cargo thereof, or any other property recovered therefrom, shall be regarded as a common fund.

8. The powers conferred by this Act shall be deemed to be in addition to and not in derogation of any other powers for the like object.

Millar, Q.C. and Dr. *Phillimore* for the appellants.—When the owner of the *Ettrick* had obtained a judgment under the Merchant Shipping Act limiting his liability, he then ceased to be liable for anything further in respect of the damage brought about by the wrong doing of those in charge of his vessel. Now if the *Ettrick* and her cargo had been wholly lost in consequence of this collision, the owner of the *Ettrick* would have paid 8*l.* per ton on the registered tonnage of his vessel of which the owner of the cargo on board of her would have received his due proportion and the matter would have been ended. But it was not so. The Thames Conservancy proceeded to raise the *Ettrick* and her cargo under the Wreck Removals Act 1877 (40 & 41 Vict. c. 16), under the 6th section of which Act the proceeds of sale arising from a vessel and from the cargo thereof or any other property recovered therefrom is to be regarded as a common fund, out of which the authority raising the vessel are under the 4th section to reimburse themselves. [*Myburgh* called attention to the 8th section, which is as follows: "The powers conferred by this Act shall be deemed to be in addition to and not in derogation of any other powers for the like object."] The vessel was raised under the Wrecks Removal Act. No notice was given as was necessary under the

Thames Conservancy Act 1857, s. 86. [*Myburgh.*—There is a section in the Act of 1870 (33 & 34 Vict. c. cxlix. s. 27) which dispenses with notice. Jessel, M.R.—There is nothing in the general Act to interfere with the powers vested in them under the private Acts, and they must therefore be taken to have raised it under their private Acts.] They had powers under the general Act, and under that Act they were trustees of the balance; the effect of the Act is that the charges and expenses of raising ought to be levied *pro ratâ* on ship and cargo. [Jessel, M.R.—The special case refers to the private Acts.] In any case the owner of the *Ettrick* has paid all he is liable to pay. [Jessel, M.R.—As damages?] This matter is really damages; the amount fixed by the Legislature is the measure of what the shipowner is liable for the negligence of his servants. In *The Northumbria* (L. Rep. 3 Ad. & E. 12) the principle is correctly laid down: "In these statutes (the Merchant Shipping Acts) the Legislature introduced a new principle, the object of which was to give some protection to the owner against the wrong doing of his servant the master of the vessel. They preserved the principle of *restitutio in integrum* in cases where, with his actual fault and privity, the damage had been inflicted on the sufferer; but, with this exception, they limited his liability, to a certain definite sum. In the latter case, therefore, this limited amount took the place of *restitutio in integrum.*" Under these circumstances the cargo must contribute *pro ratâ* to the cost of raising the ship and cargo, and the owner of the *Ettrick* is entitled to recover from the owner of the cargo its proportion of the expense. Suppose this sinking were the result of accident, and the conservators had sold the ship and cargo, they would just have repaid themselves the charges and expenses of raising them, and then paid over the proceeds *pro ratâ* to the owners of ship and cargo. [Cotton, L.J.—It does not seem to me that the owners of the cargo could have sued the conservators.] Under the Thames Conservancy Acts the conservators have possession of the ship and cargo, and it is their duty to hand it back to the owners of the ship; and, if the shipowners have a right to say that the cargo is liable to contribute to the expenses of raising it, it is subject to a lien:

Hingston v. *Wendt*, 3 Asp. Mar. L. C. 126; 34 L. T. Rep. 181; L. Rep. 1 Q. B. Div. 367.

[Jessel, M.R.—That was a salvage service.] No; an extraordinary service to the cargo. It was not salvage, because the services were not performed by a volunteer; nor general average, because they were not for the benefit of the whole adventure:

Notara v. *Henderson*, 1 Asp. Mar. L. C. 278; 22 L. T. Rep. N. S. 577; 26 L. T. Rep. N. S. 442; L. Rep. 5 Q. B. 347; 7 Q. B. 225.

Such would have been the position of the appellant if the collision had been the result of accident. And his position is the same now, for, by the payment of the statutory amount of 8*l.* per ton, he has become innocent again in the eyes of the law. In *Chapman* v. *Royal Netherlands Steam Navigation Company* (4 Asp. Mar. L. C. 107; L. Rep. 4 P. D. 157; 40 L. T. Rep. N. S. 433) a similar attempt was made unsuccessfully to defeat the object of the Merchant Shipping Acts. There Baggallay, L.J. says (p. 170): "If the contention of the respondents is well founded, the plaintiffs, instead of having their liability limited to 8*l.* per ton upon the registered tonnage of the ship, will also lose the amount in which the respondents have been condemned, and will be exactly in the same position as regards the amount of loss they will have to bear as they would have been in had they been held alone to blame—that is, they will have to pay the 8*l.* per ton and bear the loss of all the damage done to their own ship. . . . I think that the view contended for by the plaintiffs is more in accordance with the true construction of the Merchant Shipping Act 1862, upon which as it appears to me, the whole question turns." And Cotton, L.J. says (p. 185): "The effect of the order appealed against is to deprive the plaintiffs of the amount of half the damage occasioned to their vessel, for which the defendants were in the Admiralty Court declared to be liable, and it does so for the purpose of satisfying a portion of the amount of the damage sustained by the defendants, which, under the Acts referred to, is to be provided solely out of the fund in court." These cases show that a man who has paid 8*l.* per ton has, in the eyes of the law, given *restitutio in integrum.* *The Cargo ex Capella* (2 Mar. L. C. O. S. 552; 16 L. T. Rep. N. S. 800; L. Rep. 1 Ad. & E. 356) and the other cases cited in the court below do not apply, because we are in the position of innocent parties, and have simply taken these goods from the Thames Conservancy to preserve them from a forced sale.

Myburgh and *Stubbs*, for the respondents, were not called upon by the court.

Jessel, M.R.—This is an appeal by the plaintiff from a judgment of Sir R. Phillimore, delivered after argument on a special case agreed upon by the parties. In consequence of a collision caused by her own bad navigation, the *Ettrick* sank in the Thames, with all her cargo. Her owner obtained a judgment in a limitation action, limiting his liability to 8*l.* per ton, and paid the required sum into court. The Thames Conservancy, by virtue of the powers vested in them by statute, raised the vessel and the principal part of her cargo, including certain bales of wool belonging to the respondent, the expenses of raising the vessel and cargo not being enhanced by any expenses specially incurred for raising the wool, and upon an undertaking being given on behalf of the owner of the vessel to pay the costs of raising her, the vessel and her cargo were handed in a damaged condition, and liable to further deterioration, to the owner of the vessel. The respondent did not wish his cargo to go on in the ship, and contracted to take his cargo there, and the owner of the vessel delivered it up to him on his undertaking to pay all charges that might legally fall on it. Under these circumstances the shipowner seeks to recover 124*l.* 15*s.* 2*d.*, as the cargo owner's share of the expenses of raising the ship and cargo, and which sum the cargo owner declines to pay. In this refusal the court below has declared the cargo owner to be justified, and I agree with the decision there arrived at. In this case the cargo owner has not received the value of his cargo from the shipowner. If he had done so, other questions might arise. The shipowner, has, however, instead of making good the cargo owner's loss, proceeded under the 54th section of the Merchant Shipping Act 1862, s. 54 (25 & 26 Vict. c. 63, s. 54),

which is as follows: "The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity, that is to say (1) where any loss of life or personal injury is caused to any person being carried in such ship; (2) where any damage or loss is caused to any goods merchandise, or other things whatsoever on board any such ship; (3) where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat; (4) where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise or other things whatsoever on board any other ship or boat, be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things to an aggregate amount exceeding 15*l.* for each ton of their ship's storage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage," and has paid into court a sum amounting to 8*l.* per ton on each ton of his ship's tonnage. Now, this section which I have read does not alter the property in the wool at all, and it therefore continues to be the property of the respondent. The shipowner, however, says that the words of the section are equivalent to saying that he, the shipowner, having paid his 8*l.* per ton, is to be in the same position as if he had never been guilty of default or negligence. I cannot see that. If he had himself raised the ship and cargo after paying his 8*l.* per ton, he could not have held the cargo and claimed a lien upon it for his proportion of the cost of raising. That the ship and cargo were raised by a third person, whom the plaintiff has reimbursed, in my opinion makes no difference to the plaintiff's position. But, in the second place, it is contended that the ship and cargo are rateably liable under the words of the Acts under which the Thames Conservancy raised this vessel; but the Thames Conservancy Act 1857 (20 and 21 Vict. c. xlvii., s. 86, *vide sup.*) does not say so. The injury to navigation, to prevent which is the object aimed at in that Act, is done by the vessel, and not by the goods on board her. The vessel is therefore to be sold first, and the object of selling the furniture and cargo is to make up what is not paid by the ship. The ship is primarily liable, and the cargo only secondarily. In this case the value of the ship was sufficient to repay the services rendered by the Conservancy. The general Act (Wrecks Removal Act 1877, *vide sup.*) does not, in my opinion, alter the case, as the 8th section preserves the local Acts.

BRETT, L.J.—In this case a collision occurred caused by the fault of the shipowner, who proceeded to limit his liability under the Act for that purpose, and obtained a declaration in the usual form, and here that matter ended. After that, something else occurred which is not affected by that Act of Parliament. The Thames Conservancy proceeded to raise the vessel. Now they might have raised it without any Act of Parliament at all as salvors, but they did actually raise it under a private Act, under which they had power to sell the ship to pay the expenses incurred in raising it, but being reimbursed by the shipowner they did not exercise the power of sale, but handed back the ship and the cargo in her to the shipowner. Now the shipowner had no express authority to pay anything for the cargo owner, but he says that he is entitled to receive from the cargo owner a rateable proportion of the amount paid by him to the Conservancy, because he had a promise from the cargo owner to pay if he waved his lien and gave up the cargo to him. This the respondent denies, and affirms that his promise was only to pay if and what he found he was by law liable to pay. The question then becomes, was the respondent legally liable to pay these charges? If the plaintiff had not been in fault, I think he might have recovered this as general average, but not where the loss was caused by his own default. Can he then claim it under the provisions of the statute under which the ship was raised, and which also provides for the payment of the expenses so incurred? The shipowner contends that under that Act he is only liable *pro ratâ*, that he voluntarily paid the cargo's proportion of the expense to the Conservancy, and therefore had a lien on the cargo for it. But it is not so. Under the Act (20 & 21 Vict. c. xlvii. s. 86) the Conservancy are to repay themselves from the ship first, then from the cargo. Besides, the principle which prevents his recovering general average would prevent him from suing in the nature of general average, as in *Hingston* v. *Wendt* (*ubi sup.*) and *Notara* v. *Henderson* (*ubi sup.*). The only question remaining is, whether the statute which limits the liability of the plaintiff also purges him from his negligence and default. Why should it do so? The statute is tyrannical enough as it is. The 8*l.* per ton will not reimburse him for the value of his wool, and there is no reason why the effect of the statute should be extended. Its effect is to limit the payment of the shipowner for the damage his negligence has caused to 8*l.* per ton of his ship's tonnage. Beyond that it purges nothing.

COTTON, L.J.—The first question to be disposed of in this case is, was the contract contained in the undertaking given by the respondent to the plaintiff and set out in the special case a new contract? It appears at once that it was not a new contract, but was only to pay all charges that might legally fall on his cargo; this then must be a claim for salvage or general average. But it would be contrary to all the rules of equity to say that a person who has caused loss should recover from an innocent party. Does, however, the Merchant Shipping Act 1862, s. 54, make any difference to his position? It seems to me that it does not. The words of the section are clearly, "he shall not be answerable in damages," and go no further; neither is it our duty to extend them further. It has been contended that *Chapman* v. *Royal Netherlands Steam Navigation Company* (*ubi sup.*) is an authority for extending it further; but to my mind it is not so, and the question there seems to me to be whether the judgment in a case where both vessels are found to blame is to be considered one judgment or two. Much argument, too, has been expended on the Thames Conservancy Act, but that Act could not have been intended to alter the rights of the ship and cargo *inter se*, but says that the ship is liable to be sued by the Conservators; although it is true

that the cargo is liable to make up the deficiency should the ship be insufficient.

Solicitors for the appellants, *Ingledew* and *Ince*.
Solicitors for the respondents, *Stokes, Saunders*, and *Stokes*.

SITTINGS AT WESTMINSTER.

Reported by J. P. Aspinall, and F. W. Raikes Esqrs., Barristers-at-Law.

Thursday, Dec. 1, 1881.

(Before Brett, Cotton, and Lindley, L.JJ.

The Cito.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Derelict—Freight—Pro ratâ—Abandonment.

Where a vessel is abandoned and becomes a derelict, the owners of cargo on board are entitled to treat the contract of affreightment as abandoned, and are entitled, until the shipowner again gets possession of his ship, to have the cargo delivered to them at any port into which it may be brought by salvors, on giving bail to cover an award of salvage, without payment of any freight to the shipowner.

Quœre, as to rights of property in derelict pending adjudication.

This was an appeal from the decision of Sir Robert Phillimore, by which he had given leave for the cargo of the *Cito*, which vessel with the cargo on board had been brought into the port of Falmouth by salvors, to be released from arrest without the payment of any freight, or bail being given to answer the claim of the salvors, and on the owners of cargo undertaking to keep an account of sales of cargo.

The *Cito* was a Norwegian barque, and while in the course of a voyage from Wilmington to Rotterdam, laden with a cargo of resin, had been abandoned by her crew, in consequence of bad weather; subsequently she was fallen in with by the *Colonist*, another Norwegian barque, which put a salvage crew on board and brought her into the port of Plymouth. On her arrival the salvors arrested the ship and cargo by process in the Admiralty Court in a suit for salvage. An appearance was entered in the first instance by the owners of the *Cito*, and subsequently, but before the ship had been released, by the owners of the cargo laden on board her, who, on the 27th July 1881, moved the court to release the cargo at once on the owners of it giving bail to the salvors, but without any payment for freight to the shipowners. The application was opposed by the shipowners, but granted by the court, the cargo owner to give bail for 1150*l*., and undertaking to keep an account of the sale of the cargo. From this decision the owners of the *Cito* appealed.

Dec. 1, 1881.—The appeal came on for hearing.

Butt, Q.C. and *Stubbs* for owners of ship.—Nothing has happened to disentitle the shipowner to carry the cargo to its destination. This case is different from *The Kathleen* (2 Asp. Mar. L. C. 367; L. Rep. 4 A. & E. 269: 31 L. T. Rep. N. S. 204). There the cargo was deteriorating in value, and it was necessary that it should be discharged and sold, and therefore the shipowners could not have completed the contract of carriage either in their own or any other ship, and therefore could only have been entitled to freight *pro ratâ* on a new implied contract, and the court held that such contract could not be implied in the circumstances of that case. Moreover, *The Kathleen* (*ubi sup.*) is not an authority binding this court. We submit that, first, if a vessel is brought into a port other than that of her destination as a port of refuge, whether by her own crew or with the assistance of others, or as a derelict, the shipowner has a right to carry the cargo to its destination, if he is able to do so, either in his own ship or another; secondly, if the owner of the cargo requires his cargo to be delivered to him at the port of refuge, he can only have it, in the absence of a special contract, on the payment of full freight; thirdly, if the cargo is delivered to him by order of the court, the court will presume a new implied contract to pay freight *pro ratâ*. If the owner of cargo takes away his cargo from the owner of the ship before the latter has completed his contract with respect to it, the latter is prevented from completing the contract by the act of the former, and therefore, on well-recognised principles of law, the former is bound to pay the full amount he has contracted to pay as much as if the contract had been completed. [Brett, L.J.—If the owner of cargo repossesses himself of the cargo against the will of the shipowner, pending the completion of the contract, the whole freight is due. But is the case the same if the cargo is delivered to him out of the custody, not of the shipowner but of the court?] That can make no difference; the possession of the court is only on behalf of the shipowner. Here the shipowner has offered to give bail, that is, to become responsible for the cargo. [Cotton, L.J.—Unless the owners of the ship had possession of the cargo they could not carry it on.] The Court of Admiralty had no jurisdiction in this case at all; it is a question on a contract of affreightment between shipowner and cargo owner, and the suit is one between salvor and property salved. An abandonment of the ship, whether temporary or final, does not dissolve the contract of affreightment:

The Cargo ex Galam, Br. & L. 167.

The value of the cargo here is its original value, *plus* the freight to be paid for its carriage here, and the cargo owner has increased the value of his cargo by that amount at the expense of the ship. The act of the cargo owner in moving the court to make an order which prevents the shipowner fulfilling his contract comes within the principle laid down by the Privy Council in *The Cargo ex Galam* (*ubi sup.*). [Brett, L.J.—You say that the act of the Admiralty Court on motion by the cargo owner is the act of the cargo owner.] For the purposes of this case it is. At all events, if the original contract has from any cause fallen through, yet, seeing the cargo owner has undoubtedly derived a benefit from our act, the court will, as in the case of *The Soblomstein* (2 Mar. L. C. O. S. 436; L. Rep. 1 A. & E. 293; 15 L. T. Rep. N. S. 393), imply a new contract to pay some freight, which amounts in fact to freight *pro ratâ itineris*. An abandonment of the ship does not dissolve the contract of affreightment; we abandoned the ship, not the contract. If the abandonment of the ship was premature or wrongful we should be liable on the contract; therefore an abandonment of the ship cannot be

equivalent to an abandonment of the contract. Suppose a vessel to be abandoned, say, after a collision, and subsequently the crew fall in with her again, and, finding her position not so bad as they at first had reason to suppose, go on board again, and bring the ship into port, could it be said that they had abandoned the right to freight? Yet, so far as the original abandonment was concerned, the act and intention would be precisely the same as when they do not, but others do, fall in with the ship and bring her into port. The court will not assume an abandonment of the contract. In *The Teutonia* (1 Asp. Mar. L. C. 32, 214; L. Rep. 4 P. C. 182; 26 L. T. Rep. N. S. 48) the law is laid down by Mellish, L.J: "Their Lordships are of opinion that they ought not to hold that the contract between the parties has become impossible of performance, and is therefore to be treated as dissolved, if by any reasonable construction it can be treated as still capable in substance of being performed." There is no authority for saying freight is lost in case of derelict, in such cases actions for salvage are always brought against freight as well as against ship and cargo. *The Kathleen* (*ubi sup.*) was partly based on a supposed vesting of the property in derelict vessels in the Crown, but that is not the case; the Crown takes possession, not for itself, but for the owner should he appear, and to protect the rights of those who have benefited him. In certain cases the owner can himself institute a suit against the salvor (Merchant Shipping Act 1854, s. 468), and in that section he is called the owner of the property, though the property is wreck or derelict and in possession of the Crown by its officer the receiver of wreck. In this case both vessels—the salvor and the crew salved—are foreign, and both sailing under the same flag, that of Norway. Moreover the contract of affreightment is governed by the flag (*Lloyd* v. *Guibert*, 2 Mar. L. C. O. S. 26, 283; L. Rep. 1 Q. B. 115; 13 L. T. Rep. N. S. 602), and it is incumbent on the owners of cargo to show that the circumstances of the case are considered by the law of Norway to work an abandonment of the contract of affreightment, and that by that law they are entitled to the cargo without payment, and they have not shown it.

Myburgh and *Raikes* for the owners of the cargo.—This case is practically an appeal from the statement of the law laid down in *The Kathleen* (*ubi sup.*), but the case here is even stronger than in *The Kathleen*. There the shipowners had brought the cargo very nearly to its destination, when by no fault of theirs their ship was so injured as in their opinion to render an abandonment of her necessary. Here the vessel was abandoned on the threshold of its voyage, only three days after leaving port. What *pro ratâ* freight can be claimed for such an infinitesimal part performance of a voyage? The persons who have practically brought our cargo to England are salvors, and we shall have to pay freight to them under the head of salvage, in awarding which the increase in the value of the property by its being in England instead of America will be considered, and for that purpose we are required to keep an account of sales. There is, therefore, no question of *pro ratâ* freight; it is either the whole freight on the ground that we have wrongfully prevented the shipowner from fulfilling a contract which he was entitled to fulfil, or it is nothing on the ground that the contract was abandoned, and that almost at its commencement. Whatever rights in the cargo vested in the shipowner, such rights were only in consequence of the possession of the ship, and on the abandonment of that possession were lost. On the salvors taking possession of the ship they obtained possession of the cargo, though not of the contract of affreightment which was a personal one, and on their proceeding against ship and cargo in the Court of Admiralty, the officer of the court obtained a similar possession on behalf of the Crown. There was then no connecting link between ship and cargo except that of physical contact. The Crown were in possession of ship for its owners and its salvors, and of the cargo for its owners and its salvors, and will deliver each to its proper owner on his satisfying the claims of the salvors in respect to it. [Brett, L.J.—Suppose the shipowner appears, but the cargo owner does not, at the port of refuge, and the shipowner gives bail in respect of ship and cargo, and carries both to their destination; what do you say would be the position of the parties as to payment of freight?] Under those circumstances a new contract of carriage would have arisen, and the cargo owners would be bound to pay a reasonable amount for the carriage of the goods. But if the owner of the cargo claims it before the owner of the ship has recovered possession of it by giving bail for it or otherwise, he is entitled to have it without any payment at all. Suppose a valuable cargo to be abandoned, and the owner of cargo becoming aware of it himself salved it and brought it into port, could it be said that he was not entitled to take it out of the ship without payment of freight? That derelict property at sea vests in the Crown, and that pending adjudication private rights of property are divested, is shown by the case of *Rex* v. *Property Derelict* (1 Hagg. Adm. Rep. 383). In cases of derelict the property is gone from the owner and is in the Crown, which, however, as an act of grace, waives its right and gives back the property to the owner of it in payment of satisfaction to the person who took possession of the property when derelict, not for himself but for the crown. [Brett, L.J.—The abandonment and subsequent seizure by salvors no doubt changes the possession, but does it change the property?] It is not important here whether it does or no. The right of the shipowner to freight is an incident of his continuing in possession whilst the contract of affreightment is pending, and not necessarily of the ship being his property.

Stubbs in reply.

Brett, L.J.—I am of opinion that this appeal must be dismissed. Many interesting points have been discussed during the argument on which I do not think it necessary to give an opinion. It has been said that a ship so abandoned as to become a derelict and subsequently seized in such a way as to make the seized ship a droit of the Admiralty, causes the property in such a ship so seized to be altered. That proposition is stronger than the one which it is necessary to affirm in the present case in order to support this order and to uphold the decision in *The Kathleen* (L. Rep. 4 A. & E. 269; 31 L. T. Rep. N. S. 205), and I am not prepared to say that the property is in such case so altered; I assume for the present that it is

not. It is then said that the abandonment of a ship so as to leave it to a derelict puts an end to the contract of affreightment. I am not, however, at present prepared to hold thus. Suppose a case of wrongful abandonment, it is obvious that in such a case the contract would not be at an end, for the owner of the cargo could sue the shipowners, on the contract, for the wrongful abandonment. But it seems to me, in order to determine this case, sufficient to say that by an abandonment of a ship and cargo without any intention to retake possession, the shipowner has so far abandoned the contract as to give the other party—the cargo owner—a right to treat the contract as abandoned if he should elect to do so. In the circumstances of this case the salvors of the ship brought her into the Court of Admiralty, so that the owners of the ship cannot have possession and cannot enforce the contract against the owners of the cargo. Now before the shipowner again gets possession of the ship the owners of the cargo claim to be allowed, bail being put in to answer the claim of the salvors, to release the cargo, and take it out of the ship at Falmouth and have it delivered to them there, instead of allowing it to be carried to the original destination at Rotterdam, so that they elect to consider the contract of affrightment at an end; but the shipowner endeavours to prevent the cargo owners from doing this, and claims to have the ship and cargo re-delivered to him, that he may complete his contract of affreightment. It seems to me that the Court of Admiralty would have been wrong to deprive the owner of the cargo of the right to treat what the shipowner has done as an abandonment of the contract of affreightment; but that on the contrary, the court was bound to allow the cargo owner to exercise that right, and that is what this order does. This decision does not deal with the case of a ship which has been abandoned and brought in and dealt with without any interference on the part of the owner of the cargo; it is not necessary to determine that case now, and we do not decide it. It follows from what I have said that a cargo owner who has not done any tortious act is not in such a case as this liable to pay *pro ratâ* freight or any freight at all.

Cotton, L.J.—I am of the same opinion. I think, on the facts of the case, the order of the Admiralty Court was right. There was an abandonment of the ship, and this amounts, I think, to an abandonment, so far as the shipowner can abandon it, of the contract of carriage; so that it is not open to the shipowner to take any objection to the conduct of the owner of the cargo, who might agree if he so choose with the salvors to carry on the cargo. It is true that the shipowner could not by his own act put an end to the contract of affreightment. but his conduct gave a right to the owner of the cargo to say that the shipowner had abandoned the contract of affreightment, and to take other measures to dispose of the cargo. Acting on this view of the case, I give no opinion as to what would be the judgment of the court if the shipowner had again got possession of the ship and had made a settlement with the salvor. I am of opinion that the order before us by which the court was held that the ship must satisfy the claims of the salvor against herself without retaining the cargo was right and must be upheld.

Lindley, L.J.—I am of the same opinion. The effect of abandonment gives the owner the right to treat the contract of affreightment as terminated. The only doubt in my mind was whether this was altered by the appearance of the shipowner to give bail for ship and cargo, but that doubt has been dispelled.

Appeal dismissed with costs.

Solicitors for appellants, *Thos. Cooper* and *Co.*
Solicitors for respondents, *Pritchard* and *Sons.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Nov. 3 *and* 11, 1881.

(Before Sir R. Phillimore.)

The Gaetano and Maria.

Bottomry—Foreign law—General Maritime law.

A contract of bottomry is governed by the general maritime law as administered in the place where the bond is payable.

It is no answer to cargo owners sued on a bottomry bond, and setting up a defence that the master of the ship had not taken proper steps to apprise them of his necessity, that such communication was not necessary by the law of the country to which the ship belonged.

The Hamburg (*Br. & Lush.* 253) *followed.*

This was a demurrer to a portion of the defence in a bottomry action.

The statement of claim set up a claim on a bottomry bond given by the master and part owner of the Italian vessel *Gaetano and Maria*, at Fayal, in the Azores, into which port he had put in distress, whilst on a voyage from New York to London, laden with a cargo consigned to the latter place. The bond purported to be on ship, cargo, and freight.

No appearance was entered for the owners of the ship and freight, but the owners of the cargo appeared and alleged (*inter alia*) that the bond was invalid as against the cargo in consequence of the master not having communicated with the owners of it, he having opportunity to do so.

To this defence, the plaintiff on the 18th July 1881 delivered an amended reply as follows:

4. And by way of further reply to the several allegations in the said paragraph (6), the plaintiffs say that by the law of Italy, to which country the *Gaetano and Maria* belonged at the time that the bottomry bond in question was executed and at the time when it became due, the bottomry contract had to be entered into and the said bottomry bond had to be executed, as they in fact were in the presence and with the intervention and sanction of the Italian consul or consular agent at the port of Fayal, and that upon these being so entered into and executed, they became and were valid and effectual to bind both ship and cargo without any previous communication being made by the master to the owners of the ship or to the owners of the cargo.

5. In the alternative the plaintiffs say, in answer to the allegations in the same paragraph, that by the law of Italy, to which country the *Gaetano and Maria* belonged at the time aforesaid, a bottomry contract can be lawfully made and a valid bottomry bond can be executed without any previous communication with the owners of

ship or the owners of cargo, and that all the formalities and conditions required by the Italian law in order to make a good and valid bottomry bond were complied with and satisfied before the said bottomry bond was executed.

To this reply the defendants, on 21st July 1881, delivered a rejoinder and also demurred. The rejoinder was simply a joinder of issue, and the demurrer was as follows:

2. The defendants also demur to paragraphs 4 and 5 respectively of the reply, and say that the same are and each of them is bad in law upon the ground that the matters therein respectively alleged afford no answer to the allegations in paragraph 6 of the said defence, and on other grounds sufficient in law to support the demurrer.

Nov. 3.—The demurrer came on for argument.

Butt, Q.C. and *Myburgh* for the defendants in support of the demurrer.—This question is not governed by the law of Italy, but by general maritime law (*The Hamburgh*, Br. & Lush), 253; 1 Mar. Law Cas. O. S. 327) as administered in the place where the bond is payable (*Ibid.*). That law, as administered in England, is that before a master of a ship can hypothecate the cargo, he must, where it is possible so to do, communicate with the owners of the cargo (*Ibid.*). Therefore it is no answer to our defence, that we were not in fact communicated with, that by the law of Italy such communication was unnecessary. The principle of *The Hamburgh* (*ubi sup.*) has been recently upheld by the Privy Council in the case of *Kleinwort and Co.* v. *The Cassa Marittima of Genoa* (3 Asp. Mar. Law Cas. 358; L. Rep. 2 App Cas. 156; 36 L. T. Rep. N. S. 118); and though the judgment in *Lloyd* v. *Guibert* (2 Mar. Law Cas. O. S. 26, 283; L. Rep. 1 Q. B. 115) will probably be quoted as an authority on the other side, it is in fact strongly in favour of our contention, as Willes, J. in his judgment expressly distinguishes cases such as this, and also distinguishes between a case of hypothecation and one of sale of the cargo arising from necessity. It is almost essential, moreover, in such a peculiar maritime contract as that of bottomry, that it should be governed by the maritime *lex fori*, for, if not, by which of the several municipal laws should it be governed? The cargo, as in this case, was shipped by a citizen of the United States, to be consigned to an Englishman in England, and the captain, in his capacity of agent of the owner of the cargo, may be considered as of the same nationality as that owner, the flag of the ship was that of Italy, the place at which the bond was made was Portuguese territory, and it might well be that the lender of the money might be a Spaniard. Why should not the law of the lender's nation govern the contract as well as that of the borrower? The only law this court, sitting as a court of international jurisdiction, will administer in maritime matters is the general maritime law:

The Leon, 4 Asp. Mar. Law Cas. 404; L. Rep. 6 P. Div. 148; 44 L. T. Rep. N.S. 613.

Charles Hall, Q.C. and Dr. *W. G. F. Phillimore* for the plaintiffs.—This court is governed by the law laid down in the Exchequer Chamber in the case of *Lloyd* v. *Guibert* (*ubi sup.*); any observations in that case with regard to bottomry are merely *obiter dicta*. The decision in that case is, that in maritime contracts entered into between persons of different nationalities, in the absence of agreement to the contrary, the parties must be taken to have contracted according to the law of the flag of the ship with reference to which the contract is made. This is also in accordance with the law in America:

Pope v. *Nickerson*, 3 Story (Amer.) Rep. 165.

Myburgh in reply,

Cur. adv. vult.

Nov. 11.—Sir ROBERT PHILLIMORE.—The argument in this case arose upon demurrer, and the facts material to the demurrer, and taken for the purposes of the argument as true, are as follows: The *Gaetano and the Maria*, an Italian ship laden with cargo and bound for London, being in distress, put in at Fayal in the Azores; whilst there her master finding it necessary to raise money for the expenses of the ship, executed a bottomry bond for 2330*l.* 2*s.* 7*d.* purporting to bind ship, freight, and cargo, to one Antonio Caeltro, who thereupon advanced to him the above sum. The money was made payable together with the maritime premium thereon, upon the safe arrival of the ship at her port of discharge. The bond was duly executed in the presence and with the sanction of the Italian consular agent at Fayal. Before executing the bond, the master did not communicate with the defendants, who were then and still are the owners of the cargo, although it was reasonably practicable for him to do so. Antonio Caeltro subsequently indorsed the bond to the plaintiffs, who are the present holders of it. The *Gaetano and Maria* shortly afterwards proceeded on her voyage, and in May last arrived safely with her cargo at the port of London, and this action against her was commenced by the plaintiffs. It is now contended by the plaintiffs that, as the ship is an Italian ship, and as the bottomry contract was duly entered into in the presence and with the sanction of the Italian consular agent, the case must be governed by the law of the ship's flag, that is, by the law of Italy, under which the master would have authority to bind the cargo owners by his bottomry bond, though executed without previous communication with them, whether such communication were practicable or not. The contention of the defendants is, that their liability must be determined by the general maritime law as administered in England, and that under that law the bottomry bond in the circumstances of the present case would not be valid against them. I am of opinion that the point raised is decided in favour of the defendants by the judgment of Dr. Lushington in *The Hamburg* (1 Mar. Law Cas. O. S. 327; Brown. & Lush. Adm. 259, 261, 272). In that case the question was the validity as against cargo owners of a bottomry bond entered into by the master of a German ship, in circumstances very similar to those of the present case, and it was laid down by Dr. Lushington, who relies on Lord Stowell's judgment in *The Gratitudine* (3 C. Robinson, 240), and on the case of *The Buonaparte* (8 Moore P.C. 459), that the general maritime law as administered in England was to be applied, and not the *lex loci contractus*, nor the law of the ship's flag. This decision was affirmed on appeal by the Privy Council. The judgment of the Exchequer Chamber in *Lloyd* v. *Guibert* (2 Mar. Law Cas. O. S. 26, 283; L. Rep. 1 Q. B. 115) was cited by the plaintiffs as impugning the authority of this decision, but Willes, J., who delivered that judgment, expressly recognises and distinguishes the decision in *The Hamburg*. Moreover the question in *Lloyd* v.

Guibert was, by what law a contract of affreightment, and not the right of a master to hypothecate cargo, should be governed. The plaintiffs also relied upon the case of *Pope* v. *Nickerson* (3 Story's Reports 465), decided in the Circuit Court of the United States in 1844. There are some observations of Story, J. in this case which may appear to favour the plaintiffs' contention, but I am clearly of opinion that I am bound by the decisions of the Privy Council and of this court to which I have referred. The proposition of law is clear that communication by the master with the cargo owners, if reasonably practicable, is necessary in order to constitute an agency for the purpose and enable him to hypothecate the cargo. The *Hamburg* recognises it as settled law, and the question is put beyond doubt by the more recent case of *Kleinwort, Cohen, and Co.* v. *The Cassa Marittima of Genoa* (3 Asp. Mar. Law Cas. 358; L. Rep. 2 App. 156; 36 L. T. Rep. N. S. 118), in which the previous decision on this subject were referred to. I give judgment on the demurrer for the defendants.

Solicitors for plaintiffs, *Lowless* and *Co.*
Solicitors for the defendants, *Cooper* and *Co.*

Thursday, March 9, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE KILLEENA.

Salvage—Derelict—Volunteers—Ineffectual efforts—Abandonment.

Where volunteers navigate a derelict for a time, and on falling in with another vessel abandon her, they are not entitled to salvage award.

THIS was a consolidated salvage action brought by the owners, masters, and crews of the barque *Beatrice*, of 521 tons register, belonging to the port of Galveston, U.S., the North German Lloyd screw steamship *Leipzic*, of 1609 tons register, belonging to the port of Bremen, and the Norwegian barque *Nora*, of 783 tons register, against the barque *Killeena*, her cargo and freight, and her owners intervening.

The *Killeena*, a barque of 795 tons register, belonging to the port of Glasgow, and built of iron, left New York on 20th Aug. 1880, bound for Liverpool, laden with a cargo of 1160 tons of Indian corn, and 389 bales of cotton, and manned by a crew of eighteen hands all told.

On the 6th Oct. she encountered a heavy gale of wind, and took so heavy a list to port that the master caused the mainmast and subsequently the foremast to be cut away in order, if possible, to right the ship. The mizentopmast was also carried away. But although she righted somewhat when relieved of her masts, she still continued to have a heavy list to port, and finding that she was unmanageable and could not be navigated into port without steam assistance, on the 9th Oct., her master and crew abandoned her in latitude 48° 10′ N. and longitude 15° 54′ W. The hull of the *Killeena* was not damaged below the deck, and she was making no water. On the 12th Oct. the Norwegian barque *Nora*, which was proceeding from Quebec to Barrow, with a cargo of deals, and a crew of sixteen hands, all told, fell in with the *Killeena*, and put five men on board of her, who proceeded to rig up a jurymast, and used their best endeavours to get sail on her. The *Nora*, after keeping company with the *Killeena* for some hours, proceeded on her voyage. The five men on board the *Killeena* continued to navigate her for three days, until on 15th Oct. the barque *Beatrice* sighted her with her ensign flying at her gaff with the Union Jack downwards, and bore down upon her, and the *Nora's* men, then being exhausted by their exertions, requested to be, and were, transferred to the *Beatrice*, which vessel put another salvage crew on board of the *Killeena* and took her into tow. The *Killeena* was then in latitude 49° 0′ N. and longitude 12° 13′ W. The *Beatrice* then, and the salvage crew put on board by her, together with the steamship *Leipzic*, which afterwards fell in with the *Killeena*, performed valuable salvage services to her, the only dispute for the court to decide in their case being as to the amount to be awarded. In the case of the *Nora* the question arose as to whether she or the men placed by her on board the *Killeena* were entitled to be rewarded at all for their services. The owners of the *Nora* pleaded in addition that their vessel was in a damaged condition, and was seriously imperilled by parting with the five men placed on board the *Killeena*, that much extra labour was thrown upon the remainder of the crew of the *Nora*, and before the completion of her voyage she had to take assistance which otherwise she would not have needed.

J. P. Aspinall for the *Nora*.—The owners of the *Nora* and her master and crew are entitled to salvage reward for their services. As to the owners they were absolutely out of pocket by the stores supplied to the *Killeena*, by the time of the *Nora's* voyage being lengthened, and by the cost of the assistance she was obliged to take, and further, the vessel being in a damaged condition and short-handed, ran considerable risk. As to the master and that portion of the crew which remained on board the *Nora*, they underwent much extra labour and some extra risk to enable the others to perform services to the *Nora*; and if the *Nora* was at all benefited by their labours (and her change of position between the time the men went on board and the time they were taken off shows that she was benefited, and, in addition to that, a jurymast had been rigged up, which was afterwards utilised to bring her into port), no subsequent act on the part of the salvage crew could take away from them their right to be rewarded. As to the salvage crew, they actually benefited the *Killeena* by rigging up a mast and sailing her some distance, and when they were taken off exhausted, they enabled the *Beatrice* to spare a salvage crew without danger to herself in case of bad weather, and so continued to render service to the *Killeena*.

E. C. Clarkson for the *Beatrice*.

Webster, Q.C. (with him Dr. *Phillimore*) for the *Leipzic*.

Cohen, Q.C. (with him *Myburgh*) for the *Killeena*.—The *Nora* is not entitled to salvage award. They attempted a task which was beyond their courage, and when the *Beatrice* sighted them they begged to be taken off; and, as far as they are concerned, the *Killeena* would never have been rescued at all, but would have been totally lost. *The Jonge Bastiaan* (5 C. Rob. 322) governs this case. In that case the court awarded salvage award to prior salvors solely on the ground that they had not abandoned the vessel in distress, and laid the law

down clearly that had they done so they would not have been entitled to any reward.

J. P. Aspinall (in reply) for the *Nora*.

Sir R. PHILLIMORE.—This is a case of salvage service rendered to a vessel which was abandoned by her master and crew. The *Killeena* was a barque of 795 tons, and left New York on the 26th Aug. last year, bound to Liverpool, with a cargo of Indian corn. On the 6th Oct. she encountered a heavy gale, and took so heavy a list to port that her master caused the mainmast and and foremast to be cut away, and, finding that she became unmanageable and could not be navigated, her master and those on board left her, and on the 9th Oct. she was abandoned. She kept about in the Atlantic Ocean until the 12th, when she was sighted by a Norwegian ship called the *Nora*, which put a crew of five hands on board. On the 15th Oct. those men who went on board from the *Nora* were frightened, and determined to abandon the vessel, and they hoisted the Union Jack, and that attracted the attention of the *Beatrice*. There is here a most important question — whether the *Nora* is entitled to anything for her services. Now, to refer to the principles of law, they are laid down in the case of *The Undaunted* (Lush. 90): "Salvors who volunteer go out at their own risk for the chance of earning reward, and, if they labour unsuccessfully, they are entitled to nothing. The effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel." Now, there is no doubt that some decisions have laid down this doctrine, that where a set of salvors have done some acts which tend to an ultimate salvage of a vessel, they are entitled to some remuneration, but there is a circumstance in this case most material to consider. The four men and the boy who were put on board from the *Nora*, deliberately, according to the evidence, when the *Beatrice* had answered the signal, abandoned and deserted the vessel. It appears to me that the *Killeena* was a derelict vessel, and her crew deliberately determined to leave her. Four men were found with better heart and courage to take their places and do what was necessary for her preservation. It seems to me that the words of Lord Stowell, in *The Jonge Bastiaan* (5 C. Rob. 324), are applicable to this case. That was a case of salvage; and he says: "It appears that the vessel was stuck fast upon a rock with her bottom beaten in, and her rudder lost, when the first salvors went to her assistance, in a very heavy sea, and succeeded in warping her off. She sunk afterwards, it is true; but it is not on that account to be said that the first salvors had lost her again, or that they had abandoned their interest in her. They did not stay by the vessel; but it cannot be supposed that, having risked so much for her recovery, they meant to desert her, while others were employed in their sight in weighing her up and in saving the cargo." Now, that was the reverse of this case. Here they did not stay by the vessel, and they had not the slightest intention of assisting her. It appears to me that it would be contrary to the principles upon which salvage remuneration is awarded to allow the *Nora's* people to appear as salvors in this case, because they were, according to the evidence, turning their backs and running away from the danger to which the vessel was exposed. The men on board the *Beatrice* had as much reason to be alarmed; but they persevered, and their courage deserves to be rewarded. I am clearly of opinion that the *Nora* is not to be considered as a salvor in this case. There are two other vessels—the *Beatrice* and the *Leipzic*—whose services are to be considered. The *Beatrice* towed the vessel from the 10th to 26th, and then stood by and lost sight of her upon the 27th. The *Leipzic*, on the 9th Nov., spoke the *Killeena*, and offered her services, which were accepted, and after a towage of two days and six hours, she was brought safely into harbour, and thereby very valuable assistance was rendered. The first thing the court has to consider is, what is the sum or the total value out of which the services of the salvors are to be rewarded? It is 12,663*l.*, and out of that I shall award 4,200*l.* The *Beatrice* ran great risk in order to save the vessel, and deviated from her course, being thus delayed in the performance of her voyage. I shall apportion to the *Leipzic* 1200*l.*, and the remaining 3000*l.* to the *Beatrice*—300*l.* to the master, to the four men placed on board 200*l.*, to the rest of the crew 1200*l.*, and to the owners 1300*l.*, the plaintiff Cunningham, of the *Beatrice*, to have a double share.

Solicitors for the plaintiffs (the owners of the *Beatrice*) *Stokes, Saunders*, and *Stokes*.

Solicitors for the plaintiffs (the owners of the *Leipzic*), *Clarkson, Greenwell*, and *Wyles*.

Solicitors for the plaintiffs (the owners of the *Nora*), *Prichard* and *Sons*.

Solicitors for the defendants (the owners of the *Killeena*), *Thomas Cooper* and *Co*.

May 19 *and* 20, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS).

THE CHILIAN.

Collision—Regulations for Preventing Collisions at Sea—Art XII.—*Mechanical foghorn*—36 *&* 37 *Vict. c.* 85, *s.* 17—*Necessary departure—Accident to mechanical foghorn.*

Where the mechanical foghorn of a sailing ship breaks down, and a mouth horn is made use of in its place, the departure from Art. XII., of the Regulations is necessary, and the vessel is not to blame.

THIS was an action brought by Peter Isberg and others, the owners of the late vessel *Carl Konow*, and the owners of the freight due for transportation of the cargo lately laden on board her, and her master and crew proceeding for their personal effects against the steamship *Chilian* and her freight for the recovery of damages caused by a collision which took place between the two vessels, shortly before 5.30 p.m. on the 10th April 1881 in the Irish Channel, about fifteen miles east of the Tuskar Rock. The *Carl Konow* was a Norwegian barque of 491 tons register, and at the time of the collision was on a voyage from Philadelphia, which port she left on the 24th March 1881, to Newry in Ireland, with a cargo of wheat, manned by a crew of twelve hands, all told. The *Chilian* is a screw steamship, owned by the West India and Pacific Steam Shipping Company, belonging to the port of Liverpool, of

1306 tons register, and with engines of 250-horse power nominal, and at the time of the collision was on a voyage from Baltimore to Liverpool with a cargo of general merchandise, manned by a crew of forty-five hands, all told.

The case put forward on behalf of the *Carl Konow* was that, shortly before 5.30 p.m. on the 10th April 1881 she was in the course of her voyage in St. George's Channel, from ten to fifteen miles to the eastward of the Tuskar Rock, the weather being foggy, with a light breeze from the E.N.E. and the tide ebb, and that she was at that time under top sails, topgallant sails, foresail, jib, and foretopmast staysail, heading about S.E., close hauled on the port tack, making from two to two and a half knots an hour, keeping a good look-out and duly sounding the regulation sound signals for fog, and that under these circumstances those on board her observed the *Chilian* about a quarter of a mile off a little before the beam on her starboard side heading for the *Carl Konow*, and that the *Carl Konow* was kept on her course under the expectation that the *Chilian* would keep out of her way, and her foghorn blown loudly, but that the *Chilian*, apparently without altering her course, came on, and with her stem struck the starboard side of the *Carl Konow* just abaft the mainmast, doing her so much damage that she shortly sank with her cargo and the personal effects on board her, and the *Carl Konow* alleged that the *Chilian* was not keeping a good look-out, was being navigated at an improper rate of speed and failed to slacken her speed and stop and reverse when approaching the *Carl Konow*.

The *Chilian*, in her statement of defence, agreed so far as was material with the *Carl Konow* as to the state of the weather, and pleaded that just before the collision she was heading about N.E. by E., with her engines going dead slow, and making about five and a half knots an hour, keeping a good look-out, and sounding her whistle at short intervals; that, under these circumstances, those on board her heard the faint sound of a foghorn on the port bow and apparently close to, and her helm was ported and her engines stopped and reversed full speed, and shortly afterwards a schooner was seen on her port side going clear in an opposite direction; and whilst the schooner was so passing, the *Carl Konow* was seen about a ship's length ahead crossing the bows of the *Chilian* on the port tack, and the *Chilian's* engines were kept reversing and her helm was put hard a-starboard; but, notwithstanding, the *Chilian* with her stem struck the *Carl Konow* on her starboard side between the main and mizen rigging, and the *Chilian* alleged that those on board the *Carl Konow* improperly neglected to comply with the provisions of Article XII. of the Regulations for Preventing Collisions at Sea.

Art. XII. is as follows:

Article XII. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient foghorn to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar foghorn and bell. In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows, that is to say:

(*b*) A sailing ship under way shall make with her foghorn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

The *Carl Konow*, by her reply, joined issue, and further pleaded:

(2) The plaintiffs say that the *Carl Konow*, on leaving Philadelphia, was provided with an efficient foghorn to be sounded by mechanical means, and also with a mouth foghorn. A few days before the collision with the *Chilian* the piston of the mechanical foghorn was found to be working a little loose. The mouth foghorn, a powerful brass American horn, was accordingly from that time used on board the *Carl Konow*, when necessary, instead of the mechanical foghorn, and it was being used before and at the time of the collision. From the time of leaving Philadelphia until the collision the *Carl Konow* had touched at no port, and her master had had no opportunity of procuring any other foghorn.

The further facts of the case appear sufficiently in the judgment.

Clarkson, Q.C. (with him *Dr. Phillimore* and *Stubbs*) for the plaintiffs.—The facts of this case take it out of the operation of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), the 17th section of which is: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulations has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." In this case it was necessary for the *Carl Konow* to depart from the regulation; in fact, it was impossible for her to do otherwise. A mechanical foghorn was on board when the *Carl Konow* started, and subsequently got out of order. The master of the *Carl Konow* afterwards, up to the time of the collision, did everything in his power to conform to the provisions of Article XII. of the Regulations. This is therefore not a case of wilful departure from the rules, which will cause the court to declare the *Carl Konow* to blame. Neither was it an inevitable accident. The evidence shows that the weather was not so thick but that, if the *Chilian* had been navigated at a moderate speed, and a good look-out had been kept on board of her, and, if she had been smartly handled, the collision might have been avoided.

Nelson appeared for the owners of the cargo laden on board the *Carl Konow*.

Butt, Q.C. (with him *Myburgh*) for the defendants.—The *Carl Konow* was to blame for this collision.—The court cannot take into consideration such facts as the plaintiffs rely on in this case. If once the excuse is admitted it will be a rare thing for a sailing ship to have her mechanical foghorn in working order. It is much less trouble to use the old mouth-horn, and sailing vessels will not fail to make full use of any opportunity afforded them by a lax interpretation of the rule. Besides, if the court allows the excuse to be good, it really comes to a question as to which of two innocent parties is to be held to blame, for if the steamer heard a faint sound of a foghorn she was entitled to suppose it was at some distance, as it would have been had a proper mechanical horn been used. Really, however, the *Chilian* did all she could possibly have done in this case. She was proceeding carefully at a low rate of speed, and while avoiding one sailing vessel got so close to another in the thick fog as to make it impossible to avoid a collision:

† *Lovebird*, 4 Asp. Mar. Law Cas. 427; L. Rep. 6 Div. 80; 44 L. T. Rep. N. S. 650.

Clarkson, Q.C. in reply.

Sir R. PHILLIMORE.—This is a case of collision in which I have thought it necessary to have a long conference with the Elder Brethren of the Trinity House. The vessels that came into collision were the *Carl Konow*, a sailing barque, and the *Chilian*, a screw steamer. It seems that the time of the collision was somewhere about 5.30 p.m., on the 16th April in this year, and the place of the collision was ten or fifteen miles to the eastward of the Tuskar Rock; the exact distance has not been ascertained. The direction of the wind was E.N.E., and the weather (which is a most important circumstance in this case) is said by the *Carl Konow* to have been foggy, and by the *Chilian* to have been a thick fog. The parts of the vessels which came into contact were the stem of the *Chilian* and the starboard side of the *Carl Konow* abaft the mainmast and between the main and mizen rigging. The *Carl Konow* was a Norwegian barque, of 491 tons register, and left Philadelphia on the 24th March last, with a crew of twelve hands, and in the course of her voyage, when she had come to what she describes as fifteen miles off the Tuskar Rock, the weather came on foggy. She was under topsails, topgallantsail, foresail, jib, and foretopmast staysail, heading about S.E.; and she says in her case that she saw the *Chilian*, on her starboard side, a quarter of a mile off, and she was kept on her course expecting the *Chilian* would keep out of her way, but the *Chilian* ran into her. The *Chilian* was a screw steamer of 1306 tons register, and was bound from Baltimore to Liverpool. She says she was heading about N.E. by E. with her engines going dead slow. The *Carl Konow* was close-hauled on the port tack; and the *Chilian* says she heard a faint sound of a foghorn on the port bow, and her helm was ported, and her engines stopped and reversed, and shortly afterwards a schooner was seen on her port side, and going clear in an opposite direction; and while the schooner was so passing the *Carl Konow* was seen about a ship's length off, nearly ahead, and crossing her bows; that her engines were reversed, and her helm put hard a-starboard; but, notwithstanding, a collision took place. The *Carl Konow* ascribes the collision to improper navigation on the part of the *Chilian*, and to her neglect of the 17th and 18th Rules for Preventing Collisions at Sea. The 17th rule is, "If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship;" and the 18th, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary." The defence of the steamer is mainly that, on account of the density of the fog, the accident was inevitable, and she has also contended that the *Carl Konow* improperly neglected to comply with Article XII. of the Regulations for Preventing Collisions at Sea. There is no doubt that it was the duty of the steamer to keep out of the way of the barque; and the question is, whether the defences which she sets up are sufficient to excuse her for having caused the damage in this case. The first question we have had to consider is the law with respect to the foghorn. The account given by the captain is that the ship was furnished with a mechanical foghorn at Rotterdam, and she had three other horns on board. He went from Rotterdam to Philadelphia, and left there on the 24th March. On the 15th April he discovered that this mechanical foghorn was not a proper and efficient one. He says: "The first time I tried the mechanical foghorn I found that it was in want of repair." That was the day before the collision, which took place upon the 16th. Now the words of the statute (36 & 37 Vict. c. 85, s. 17) are: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary. Now the barque does comply with the regulation so far as the purchasing of a foghorn is concerned. Article XII. says: "A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient foghorn to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar foghorn and bell." Now she had the foghorn on board, which her captain had purchased at Rotterdam, where he had selected from amongst others the best he could get. He made a trial of it, and sailed with it to Philadelphia, and then, unfortunately, he discovered some accident had befallen it, and he then had recourse to the mouth-horn. Now it has been said that here is a disobedience of the 12th Article, and that therefore the case falls under the statute to which I have referred. Under these circumstances it becomes necessary to consider whether the circumstances of the case made a departure from the regulation necessary. The damage to the horn was not discovered until the 15th, and the collision took place upon the 16th. On the whole, I am of opinion that the circumstances of the case did render a departure from the rule necessary in this sense, that some accident had befallen the instrument that was in itself a right and proper instrument, and had been placed on board the ship after a due trial, and some accident had befallen it on the road, which is not accounted for. The captain made use of a mouth-horn in its place, and I think it would be a very severe construction of the Act in these circumstances to hold that the barque was in fault, and I think that the defence on that ground cannot be sustained. There remains to consider the other defence, which I should say is the main question, namely, whether it is an inevitable accident. Now that there was a fog is pretty certain. The question is as to the degree of the thickness. Was it so thick as to render vessels unable to be seen at a greater distance than 300 or 400 feet from each other? We think it was not. Then the question is whether the steamer ought not to have stopped at an earlier period. The captain came on deck on hearing the telegraph bell ring, and then the engines were going ahead. The steamer continued until she was within 200 feet of the barque, and one schooner had passed so close that she could be seen. We think that the steamer must have heard the foghorn, according to the evidence. We think that in these circum-

stances the captain ought not to have continued his speed of not less than five knots, which was greater than was necessary for a vessel in these circumstances, and I must therefore pronounce the *Chilian* alone to blame.

Solicitors for the plaintiffs, the owners of the *Carl Konow*, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the defendants, the owners of the *Chilian*, *Pritchard* and *Sons*.

April 9 and 11, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE MAID OF KENT.

Collision—Consequential damage—Original jurisdiction—Practice—Reference to registrar and merchants.

It is not the invariable practice of the Admiralty Division in cases of damage to refer questions of consequential damage to the registrar and merchants.

The court will in each case consider whether the question of consequential damage is one which ought to be decided by the court itself, with the assistance of the Elder Brethren of the Trinity House, or one which ought to be referred to the registrar and merchants.

The court will be influenced in coming to its decision by economical considerations, and by the presence of questions requiring for their decision the nautical knowledge of the Elder Brethren.

THIS was an action brought by Richard Calvert Haws and others, the owners of the barque *Kate Covert*, against the owners of the paddle steamship *Maid of Kent*, to recover damages sustained by them in a collision which occurred between the *Kate Covert* and the *Maid of Kent* shortly before 6 p.m. on the 7th Feb. 1881, not far from the mouth of Dover harbour.

The plaintiffs' statement of claim alleged that at the above-mentioned time the barque *Kate Covert* was lying at anchor in Dover bay by her port and starboard anchors with her proper riding light duly exhibited and burning brightly, and keeping a good look-out, the wind at such time blowing a gale from the south and the tide being a little after high water, and that at such time the defendants' steamship the *Maid of Kent*, being at the time under steam, ran against and with her mainmast fouled the jibboom of the *Kate Covert* and caused the *Kate Covert* to drag her anchors and to go upon the Mole Rocks, and thereby damage was done to the *Kate Covert* and she was compelled to take salvage assistance, and great losses and expenses had to be and were incurred by the plaintiffs, and that the collision was occasioned by the negligence and mismanagement of those on board the *Maid of Kent*.

In answer to this the defendants, in their statement of defence, pleaded that, on the afternoon of the day in question, their paddle steamship *Maid of Kent*, a vessel of 171 tons register, belonging to the port of London, employed in the mail service between Dover and Calais, and manned by a crew of eighteen hands, was in Dover harbour, and that about 5.30 p.m. the *Maid of Kent*, having to run as the night mail boat that night, and having to leave the harbour while the tide served, left the harbour, the weather at that time being thick with rain, and there being a gale blowing from the S.S.W. with a heavy sea from the south, and the tide being nearly slack, as it was shortly after high water, and that the *Kate Covert* was anchored at that time about 150 or 200 yards from the mouth of the harbour bearing about S.E., there being also other vessels anchored near the mouth of the harbour; and that, as the weather was so bad as to make it imprudent for the *Maid of Kent* to lie alongside the Admiralty Pier till her time came for actually receiving passengers and mails, her master prepared to moor her to the innermost mooring buoy outside the harbour, and in the course of manœuvring for the purpose of carrying this out, a good look-out being kept on board the *Maid of Kent*, and she being very carefully navigated, it became necessary for the *Maid of Kent* to steer out to sea, and her course was so shaped as to pass well clear of the *Kate Covert*, and that she had got right ahead of her in safety when a very heavy sea struck her on the starboard side and carried her, notwithstanding all the efforts of those on board her, on to the jibboom of the *Kate Covert*, which damaged the *Maid of Kent's* foremast funnel, and was itself damaged. The statement of defence then proceeded:

5. In and by reason of this collision the *Kate Covert* sustained no other damage save the loss of her jibboom and some other slight damage to her upper works. It is not true that the *Maid of Kent*, by colliding with her, caused the *Kate Covert* to drag her anchors or to go upon the Mole Rocks, or to receive the damage thereby alleged to have been sustained, or to take the salvage assistance mentioned in the third paragraph of the statement of claim. The defendants do not admit that the *Kate Covert* dragged her anchors at any time after the collision, or that she went on to the Mole Rocks. If she did it was not owing to the collision with the *Maid of Kent*.

7. The defendants say that the collision was an inevitable accident, and was not caused or contributed to by any negligence of the defendants or those on board the *Maid of Kent*. They further say that in any event they would be liable only for the aforesaid damage to the jibboom and upperwork.

On this statement of defence the plaintiffs joined issue.

At the trial of the action, which came on on the 9th April, the defendants' counsel proceeded, in cross-examination of the master of the *Kate Covert*, to put the question: "Would not the *Kate Covert* have gone aground on the Mole Rocks if there had been no collision?" To this question the plaintiffs objected on the ground that it could only be material on the question of consequential damage, which, according to the practice of the court, had to be referred to the registrar and merchants, and that the question was therefore irrelevant to the issue before the court.

Butt, Q.C. (with him *Clarkson*, Q.C.) in support of the objection.—In this case there arises a question of consequential damage, and it has always been the practice of this court to refer such questions to the registrar and merchants. The plaintiffs have merely to prove that they sustained loss by the default of the defendants, and they are then, by the practice of the court, entitled to a reference. If it had been the practice for the court to decide these questions at all, that course would

certainly have been adopted in such cases as *The Thuringian* (1 Asp. Mar. L. C. 263), and *The Flying Fish* (Br. & L. 436), but there is no mention of such a course there. In this case the plaintiffs have relied on that established practice, and are not prepared with evidence in support of their case of consequential damage. There is sufficient reason for the practice. If in all cases it was necessary for plaintiffs to be prepared to go into such questions at the trial, many unnecessary witnesses would have to be brought up in case they should be required, and the expense of damage actions would be greatly increased. It can make no difference to the practice of the court that the question of consequential damage appears on the pleadings.

Webster, Q.C. (with him Dr. *Phillimore*), for the defendants, against the objection.—The plaintiffs are right to the extent that it is the general practice of the court to refer questions of consequential damage to the registrar and merchants, but this is only the general, and not the universal, rule. Instances of cases in which the court itself has entertained such questions are to be found. In *The Mellona* (3 W. Rob. 7), and *The Linda* (Swab. 306), questions similar to those involved in the present case as to the management of injured vessels after collision arose, and the court, with the assistance of Trinity Masters, decided them without reference. There is no difference between those cases and the present. In all of them alike questions of nautical skill and management have to be decided, and the court, having nautical experts specially to assist it in deciding such questions, is the proper, and only proper, tribunal to decide them. It is useless for the plaintiffs to plead surprise, for the whole question is raised on the pleadings, and they ought to have been prepared to meet it.

Butt, Q.C. in reply.

Cur. adv. vult.

April 11.—Sir R. PHILLIMORE.—In this case of the *Kate Covert* against the *Maid of Kent* a question has arisen as to the practice of the court in cases of consequential damage, and the question was argued on Saturday last, when a good many cases were referred to upon the point, and the court reserved its judgment, which it will now deliver. The question which the court really has to determine is, whether it is competent for the court in every case of this kind to decide the question of consequential damage, or whether it is not rather the practice to refer it to the registrar and merchants. The general competency of the court to decide upon questions of this description is not denied, but the point raised—though not expressly raised upon the pleadings—was, whether in all cases and all circumstances it is the practice of the court to send a matter of consequential damage to be tried by the registrar and merchants. This point has not been expressly decided, and it may very well be that in some cases such a question should be transferred to the registrar and merchants, and that in other cases it should not be. In some cases, for instance, considerations of economy or the presence of questions requiring for their decision a knowledge of nautical affairs might make it very desirable that the matters involved in them should be decided by the judge of the court, with the assistance of the Elder Brethren of the Trinity House. Now the cases cited by the plaintiffs I need not go into, because they do not prove more than that under the special circumstances of those particular cases the questions of consequential damage arising in them were considered such as might fitly and properly be referred to the registrar and merchants. But the cases referred to by the defendants fully establish the proposition, that the court has full power to deal with questions of this description with the assistance of the Elder Brethren of the Trinity House. The case of *The Mellona* (3 W. Rob. 7, 13, was cited from William Robinson's Reports, and *The Linda* (Swa. 306) from Swabey's Reports, and many more cases were cited, but it is not necessary to refer to them for the purposes of the present case. In the case of *The Aline* (5 Monthly Law Mag. 302) the plaintiffs, whose vessel had sustained loss by collision on a voyage to St. Petersburg, at the hearing claimed certain consequential damages caused, as they alleged, by their vessel being detained for repairs in this country beyond the Baltic season, and Dr. Lushington said he would require it to be satisfactorily proved that every possible exertion had been made to get the cargo to St. Petersburg, and come back again before the close of the season, and not having sufficient evidence before him to decide whether this had been done, referred the question of consequential damage generally to the registrar and merchants. That was all that was decided in that case. Again, in the earlier case of *The Eolides* (3 Hagg. 367) Sir John Nicholl appears to have taken evidence at the hearing respecting damages done to the cargo on board the plaintiffs' vessel, and stated to have been in consequence of the collision, and to have rejected the claim on the ground that the plaintiffs appeared to have waited two tides without having done anything during that period to stop a leak. In both these cases I have just mentioned the court itself dealt with the question whether there was on the facts any claim for consequential damage which could be sustained. In the present case, then, it is competent for the court to deal with and decide the question of consequential damage. It remains to be considered whether in this case it is proper for the court, with the assistance of the Elder Brethren of the Trinity House, to entertain that question, or whether it ought rather to refer it to the registrar and merchants. In the present case the statement of claim contains the allegation that by reason of the collision damage was done to the *Kate Covert*, and she was compelled to take salvage assistance, and great losses and expenses had to be and were incurred by the plaintiff. There the plaintiffs clearly plead consequential damage. This is met by the following averment, in the fifth paragraph of the statement of defence, that "in and by reason of the collision the *Maid of Kent* sustained no other damage save the loss of her jibboom, end some other damage to her upper works"; and the paragraph then goes on to say more specifically that "it is not true that the *Maid of Kent* by colliding with her caused the *Kate Covert* to drag her anchors, or to go upon the Mole Rocks, or to receive the damage thereby alleged to have been sustained, or to take the salvage assistance mentioned in the statement of claim;" and in the last paragraph of the statement of defence the defendants say that "the collision was an inevitable accident, and was not caused or con-

tributed to by any negligence of the defendants, or of those on board the *Maid of Kent*, and they further say "that, in any event, they would be liable only for the aforesaid damage to the jibboom and upper works;" that is to say, that they are not liable for consequential damage. I am of opinion that it is proper in this case that the court itself should entertain this question of consequential damage and decide upon it, assisted as it will be by the advice of the Elder Brethren of the Trinity House. Indeed it was not denied that the court, assisted by the Elder Brethren of the Trinity House, would in this case be a better tribunal to decide the question of consequential damage than the registrar and merchants, as the Elder Brethren would bring to bear on it that nautical knowledge which they undoubtedly possess, but which may or may not be possessed by the registrar and merchants. I am of opinion that the court itself can and ought to go into the question of consequential damage in this case at the present stage of the proceedings, and that the practice of the court will not be interfered with by this being done, and I shall therefore rule accordingly.

The further hearing of the case was then proceeded with, and before the defendants' case had commenced it was agreed by both sides that judgment should be entered for the plaintiffs, with damage 60*l.* and costs.

Solicitors for the plaintiffs, the owners of the *Kate Covert*, *W. W. Wynne* and *Son*.

Solicitors for the defendants, the owners of the *Maid of Kent*, *Clarkson*, *Greenwell* and *Wyles*.

Friday, July 29, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE REIHER.

Collision—Regulations for Preventing Collisions at Sea, Art. XI.—Overtaking vessels—Light astern—Apprehension of danger.

A vessel is not bound by Art. XI. of the Regulations to show from her stern a white light or a flare-up light to a vessel overtaking her, unless there is ground for the apprehension of danger from the overtaking vessel.

THIS was an action brought by the owners of the fishing dandy *John Ivory*, of Lowestoft, against the North German Lloyd, the owners of the steamship or vessel *Reiher*, of Bremerhaven, for damages resulting from a collision which occurred between the two vessels about 5.30 a.m. on the 30th Nov. 1880 in the North Sea. The plaintiffs averred that their vessel, a fishing dandy of twenty-eight tons, was, shortly before the time of the collision, in the North Sea, about twenty-five miles E.N.E. of Lowestoft, manned by a crew of eleven hands, and with about five thousand herrings on board, the weather being then clear and starlight, the tide flood, and there being a breeze from the W.S.W. The *John Ivory* was lying to on the starboard tack under whole mainsail storm jib and drift mizen, heading about S.S.W., and making little headway, her regulation side lights being duly exhibited and burning brightly, and a good look-out being kept. Under these circumstances those on board of her perceived the white light and shortly afterwards the green light of the *Reiher* at a considerable distance astern on the starboard quarter, and shortly afterwards the green disappeared and the *Reiher* opened her red light, and was then in a position to pass all clear on the starboard side of the *John Ivory*; but when not far off she suddenly altered her course again and opened her green light, shutting in her red, and though a flare-up was shown to her she came on at a considerable rate of speed, and with her stern struck the starboard quarter of the *John Ivory* and did her great damage, and caused her master to be drowned.

The defendants pleaded in defence that, shortly before the time of the collision, the wind being about W.S.W., blowing a fresh breeze, and the weather fine, but very dark, with passing clouds, and the sea rough, the *Reiher*, a screw steamship of 920 tons register, was, during the prosecution of a voyage from Breuerhaven to London, in the North Sea, off Yarmouth, being laden with a general cargo, and manned by a crew of twenty-two hands and passengers, steering about W. by S. half S., and proceeding at the rate of about six knots per hour, with the proper regulation masthead and side lights duly exhibited and burning brightly, and keeping a good look-out, and that at such time a dark object was seen on the starboard bow, and the helm of the *Reiher* was starboarded a little, and then steadied, and shortly afterwards a vessel with no light visible, which proved to be the *John Ivory*, was seen a little on the starboard bow, at the distance of half a ship's length, and almost immediately afterwards a flare-up light was seen to be shown on board of her: and that the *Reiher* then immediately stopped and reversed, and her helm was put hard-a-starboard, but the *Reiher*, with her port bow, touched the starboard quarter of the *John Ivory*, and did some slight damage to her upper work; and that (*inter alia*) those on board the *John Ivory* did not show a white light or a flare-up light from her stern in due time before the said collision in accordance with Art. XI. of the Regulations for Preventing Collisions at Sea.

There was some conflict in the evidence as to the state of the weather, plaintiffs averring that it was fine and clear and starlight, and the defendants stating in their preliminary act that it was dark but clear, and in their statement of defence that it was fine, but very dark, with passing clouds.

The plaintiffs' witnesses further gave evidence to the effect that the green light of the *Reiher* when first seen about ten minutes before the collision, was on the port quarter of the *John Ivory*, and about one mile distant, and that in about five minutes her lights changed and she opened her red light, being then about half a mile off, and in about three minutes more she shut in her red and showed her green light again; that a flare-up was immediately shown, the steamship still being at some distance, but that nevertheless the collision took place.

On the other side it was alleged by those on board the *Reiher* that the course of the *Reiher* was altered a little, her helm being starboarded because the look-out man said he thought he saw a dark object on the water, and that some little time afterwards the flare-up light of the smack was seen ahead just on the starboard bow, and the collision immediately took place. One of the defendants' witnesses, who was on the bridge during the whole of the time in question, stated that he did not believe that the dark object seen by the look-

out man was the *John Ivory*. The further facts of the case appear in the judgment.

Dr. *Phillimore* (with him Dr. *Deane*, Q.C.) for the plaintiffs.—In this case the *John Ivory* did everything which it was necessary for her to do under Art. XI. of the Regulations for Preventing Collisions at Sea. Art. XI. is as follows: "A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light." This rule must be reasonably interpreted. It cannot be contended that it is the duty of a vessel to show a white light or a flare-up light to every vessel which is passing across her stern, or passing in any direction out of sight of her side lights. If a vessel is passing astern of another on a course at right angles to her course, and suddenly changes her course so as to become an overtaking vessel, the duty of showing a light astern does not devolve on the vessel being overtaken until after the change of course involves danger of collision. In this case, as long as the *Reiher* kept her red light open, there was no danger of collision; the *Reiher* was passing safely across the *John Ivory's* stern at some distance, and there was consequently no obligation at that time on the *John Ivory* to show a light. Suddenly, however, the *Reiher*, either in consequence of seeing something dark on the water, as her own witnesses say, or for some other reason, saw fit to change her course; this opened out her green light to the *John Ivory*, and then, and not till then, arose the duty of showing a stern light. This she did as soon as possible, but it was too late then to avert the collision. If a good look-out had been kept on board the *Reiher*, the *Reiher* would have been able to see the *John Ivory* on such a night as the evidence shows this to have been, and those on board the latter vessel had a right to assume that they were seen until the *Reiher* steered directly in the direction of the vessel. The *Reiher* is therefore solely to blame for this collision. She disobeyed the rule which made it her duty to keep out of the way, while the *John Ivory* did everything that was required by the rules, and cannot therefore be said to have contributed to the collision.

Clarkson, Q.C. (with him *J. P. Aspinall*).—There is nothing in the collision rules to release the *John Ivory* from the obligation placed upon her by the 11th article. The *Reiher* was in every sense of the word an overtaking vessel. The course of the *John Ivory* was S.S.W., and she was going very slowly through the water, while the *Reiher* was going at the rate of six knots. According to the evidence of those on board the *John Ivory* the green light of the *Reiher* was seen about ten minutes before the collision about one mile distant, and about one point on the port quarter of the *John Ivory*. Five minutes later the *Reiher* was half a mile distant—as she would be at the rate she was going—and the *John Ivory* had got exactly on to her course, where both her lights were visible, and, crossing that course, opened out the red light of the *Reiher*, which was coming steadily on her course, being well behind the *John Ivory's* side lights. This being the case, it is obvious, and should have been so to those on board the *John Ivory*, that if both vessels pursued their respective courses for the next five minutes they would come into dangerous proximity to one another; in fact they were so nearly approaching the same spot that the slightest change of course on the part of the *Reiher* might bring them into collision. It cannot be said that this is a case in which the *Reiher* ought to have been kept in ignorance of the position of the *John Ivory*, nor that the 11th rule does not apply. The *John Ivory* was clearly bound by that rule to show a light astern, and the collision was caused by her failing so to do. If this rule is to be held to apply only to cases in which the courses of vessels are actually converging, it will only apply to a very small proportion of the cases it was intended to cover. It is submitted that, according to the true construction of this rule, a vessel is bound to show a light to any vessel astern, which by any manœuvre on her part might cause danger of collision, and not only in cases where there is actual reason to apprehend a collision unless one of the vessels changes her course.

Phillimore in reply.

Sir R. PHILLIMORE.—This is a case of collision which happened on the 30th Nov. last, off the coast about twenty-five to thirty miles E. N.E. of Lowestoft. The direction of the wind was W.S.W., and the state of the weather, which is not unimportant in this case, was stated in the preliminary act of the plaintiffs to be fine and clear. The result of the evidence is that it was fine and clear, but starlight. The vessels that came into collision were the *John Ivory*, a fishing smack of twenty-eight tons burthen, and the other vessel was the *Reiher*, a screw steamer of 920 tons register. The *John Ivory*, the fishing vessel, was lying to on the starboard tack, under whole mainsail storm jib and drift mizen, heading about S.S.W. The *Reiher* was coming with a cargo from Bremerhaven to London. The parts of the vessels which came into collision were the stem of the *Reiher* with the starboard quarter of the *John Ivory*. Now, the articles of the sailing rules that apply to this case are the 11th and the 20th. The 11th says that a ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light, and the 20th rule says that, every ship, whether a sailing ship or a steamship, overtaking any other shall keep out of the way of the overtaken ship. The articles appear to apply to this case. The *Reiher* was an overtaking ship. It was therefore the duty of the steamer to keep out of the way of the dandy fishing smack, and it was the duty of the dandy to have shown a light over her stern if there was ground for the apprehension of damage from the overtaking vessel. The first question we have had to consider is, was a flare-up exhibited in sufficient time on board the dandy to warn the steamer of her position? It appears to us that the steamer ported her helm, and therefore, inasmuch as her red light was shown, there was no necessity for the dandy to have shown a flare-up light at the time, because she had a right to assume that the steamer had seen her. With regard to the conduct of the steamer, it is to be observed that the night was not so dark that the dandy could not have been seen at the time of the collision, and if she had either decided on porting or had decided on starboarding, and kept on one or the other courses, she might have gone clear; but she first ported and then starboarded; and had she adhered to her first porting, in our judgment, all would have been

right. Therefore, I pronounce the *Reiher* alone to blame.

Solicitors for the plaintiffs, *Keane* and *Rogers*, for *Seago* and *Son*, Lowestoft.

Solicitors for defendants, *Clarkson*, *Greenwell*, and *Wyles*.

QUEEN'S BENCH DIVISION.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Nov. 21 *and Dec.* 9, 1881.

(Before FIELD and CAVE, JJ.)

CORY AND OTHERS *v.* BURR.

Marine insurance — Barratry — Smuggling — Seizure by Revenue officers—Warranty free from seizure.

Where a policy of marine insurance for a named time enumerates, amongst the perils insured against, "men-of-war, enemies, pirates, rovers, thieves, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners," there being also a warranty "free from capture and seizure and the consequences of any attempts thereat," and the officers of the ship insured by the policy, are arrested by Spanish revenue officers for smuggling tobacco on board, and proceedings are taken to procure sentence of condemnation and confiscation of the ship at a Spanish port, an underwriter of the policy is not liable for expenses incurred in resisting the proceedings of the Spanish revenue officers.

THIS was an action brought by the plaintiffs to recover from the defendant under a policy of marine insurance subscribed by the defendant a proportion of the amount of a general average contribution and of particular charges and expenses incurred by the plaintiffs in respect of the subject-matter of insurance, and, pursuant to order, the following case was stated for the opinion of the court:

1. The plaintiffs, at the several times hereinafter mentioned, were the owners of the steamship *Rosslyn*, and the defendant is an underwriter at Lloyd's. On or about the 30th May 1878 the plaintiffs effected a policy of marine insurance for 3500*l.*, which the defendant subscribed for the sum of 100*l.* on the said steamship the *Rosslyn*, the ship valued at 12,000*l.* and machinery valued at 6000*l.* for the space of twelve calendar months at and from the 30th May 1878 to the 29th May 1879, both days inclusive.

2. A copy of the policy accompanied the case, and was to be taken as part thereof, the material parts of which were as follows:

Touching the adventures and perils which we, the assurers, are contented to bear and to take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c. or any part thereof.

After the attestation clause and before the signature there were several clauses, amongst them the following:

Warranted free from capture and seizure and the consequences of any attempts thereat.

3. At the time of effecting the policy and thence until and at the several times thereinafter mentioned, the plaintiffs were interested in the subject-matters of insurance to the full amounts insured thereon, and the policy was made by the authority and for the use and benefit of the plaintiffs.

4. On the 23rd May 1879 the vessel, being then covered by the policy, was at the port of Gibraltar in ballast, and was ordered by the plaintiffs' agents at Gibraltar to proceed at once and direct to the port of Bilbao in Spain, for the purpose of there loading a cargo.

5. On the night of the 23rd May 1879 the master took on board eight tons of tobacco, which were brought on board by two British subjects, and which the master knew were intended to be smuggled into Spain by the said British subjects, and the said master, in order to assist the said British subjects in smuggling the said tobacco into Spain, undertook in consideration of 30*l.* paid to him by them to deliver the said tobacco on board another vessel at sea.

6. The master in entering into this agreement and on shipping the tobacco as aforesaid, and in causing the said vessel to proceed to sea with the said tobacco on board to be delivered as aforesaid, acted against the interest and contrary to the express instructions of his owners, and with the intention of benefiting himself, and exposed his ship, as he well knew, to the risk of being seized by Spanish revenue officers.

7. The said ship left Gibraltar at 5.30 a.m. of the 24th May 1879 with the said tobacco on board, and at 11 p.m. of that day, being then off the coast of Spain, the master caused the engines to be stopped for a time, and the said ship afterwards proceeded dead slow, looking for the vessel on board of which the said tobacco was to be delivered in pursuance of the undertaking mentioned in the fifth paragraph.

8. If it is a question of fact whether the conduct of the master in acting as aforesaid was barratrous, the arbitrator who stated the case found that it was.

9. While the said ship was so proceeding as in the seventh paragraph mentioned, two craft came alongside with Spanish revenue officers on board, who seized the ship and took her into Cadiz.

10. On the arrival of the vessel at Cadiz, the master and crew were placed under arrest on a charge of smuggling, and proceedings were taken to procure sentence of condemnation and confiscation of the ship. The plaintiffs incurred heavy expenses in resisting the said proceedings against the said ship.

11. In order to procure the restoration of the said ship, the plaintiffs were compelled to pay a large sum of money, and but for this payment the ship would have been confiscated and wholly lost to the plaintiffs. There was no other mode of rescuing the ship. The defendant's proportion of the said payments and expenses incurred by the plaintiffs amount to 8*l.* 18*s.* 11*d.*

The question for the opinion of the court was, whether the sum of 8*l.* 18*s*, 11*d.* was payable by defendant to the plaintiffs?

If the court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs with costs. If the court should be of opinion in the negative, then judgment was to be entered for the defendant with costs.

Nov. 21.—*Myburgh* (with him *Tyser*) argued for the plaintiffs.

Cohen, Q.C. (with him *Barnes*) for the defendant.

The following authorities and cases were cited and discussed:

Arnould's Marine Insurance, 3rd edit. p. 724;
Phillips on Insurance, p. 704, s. 1163;
Vallejo v. *Wheeler*, 1 Cowp. 143;
Goldschmidt v. *Whitmore*, 3 Taunt. 508;
Kleinworth v. *Shepard*, 28 L. J. 147, Q. B.;
American Insurance Company v. *Dunham*, 12 Wandell's New York Reps. 463; and on appeal, 15 Ib. 9;
Heyman v. *Parish*, 2 Camp. 149;
Arcangelo v. *Thompson*, Ib. 620;
Havelock v. *Hancill*, 3 T. R. 277;
Powell v. *Hyde*, 5 E. & B. 607;
Blyth v. *Shepherd*, 9 M. & W. 763.

Cur. adv. vult.

Dec. 9.—FIELD, J.—This is an action brought to recover from the defendant his proportion of a loss in respect of the ship *Rosslyn*, insured by the defendant and other underwriters on a time policy. The policy enumerated the ordinary perils insured against, and also contained a warranty against "capture and seizure." The facts were stated in a special case, and raised the question which was argued before us whether the loss was to be treated as a loss by barratry of the master, in which case it was within the assurance effected by the policy and so recoverable, or whether it was a loss by capture and seizure, and so within the warranty as an excepted peril. The facts were as follows: On the night of the 23rd May 1879 the master of the *Rosslyn*, in consideration of 30*l.*, took on board at Gibraltar eight tons of tobacco, which he was to deliver on board a vessel for the purpose, as he knew, of being smuggled into Spain. It was admitted that this was "barratry" of the master within the meaning of the policy, that by it he exposed his ship, as he well knew, to the risk of being seized by Spanish revenue officers. The ship having left Gibraltar with the tobacco on board was so seized and taken into Cadiz, where the master and crew were placed under arrest on a charge of smuggling, and proceedings were taken to procure sentence of condemnation and confiscation of the ship. To prevent this result the plaintiffs incurred heavy expenses, and were compelled to pay a large sum of money to get back their ship, and it was to recover the defendant's proportion of these payments and expenses, amounting to 8*l.* 18*s.* 11*d.*, that this action was brought. Now, the ordinary maxim applicable to losses by perils assured against when in the chain of causes the loss may be referred to more than one of those perils, is to assign it to its proximate and not its remote cause, and in a case, therefore, where a ship insured under a policy limited to capture and seizure, and not extending to perils of the sea was driven on a hostile coast by those perils, and so became a prize to a captor, the loss was held to be within the policy, no separate loss having occurred before the happening of that event: (*Green* v. *Elmslie*, Peake's N.P. 278.) But the case of loss by barratry does not fall within this general rule, and to recover for a loss so caused it is not necessary that the barratrous act should be, and indeed it hardly ever is, the proximate cause of loss, and therefore a loss traceable remotely to, may be recovered as a loss by, barratry. Thus, in the case of a ship being dashed to pieces by the sea and lost in consequence of drifting caused by a barratrous act, it was held that the loss might be recovered for, either as a loss by perils of the sea or by barratry: (*Heyman* v. *Parish*.) So, also, a loss by capture which was made by reason of a barratrous agreement for that purpose entered into by the master with the captor, was held recoverable as a loss either by capture or barratry, at the option of the assured: (*Arcangelo* v. *Thompson*.) But in the cases thus decided there was not, as in the present case, any warranty against the proximate cause of loss—*i.e.*, the capture and seizure—and they do not, therefore, go far enough to establish the plaintiffs' right in this case. Neither does it appear to me that the cases of *Vallejo* v. *Wheeler* and *American Insurance Company* v. *Dunham*, cited on the part of the plaintiffs, establish their contention, the grounds of those decisions not extending beyond the wording and effect of the policies in those cases, which are not similar to the one which we have to decide upon. In the present case it was admitted by Mr. Cohen in argument that the loss might possibly have been recovered for as barratrous, if there had been no warranty in the policy, but the question in this case is whether, upon the true construction of the policy, the loss was covered by a peril assured against or by one excepted, and in deciding that question we are bound, according to the ordinary rules of construction, to give effect to the whole policy, and if any construction sought to be put upon it would have the effect of rendering any of the language used null or ineffective, that construction must be condemned. Now, it has been held that where there is a warranty such as this, and the ship being by perils of the sea placed in such a position as to be exposed to capture, and is captured, the loss is to be assigned to the proximate cause, the capture, and not to the remote cause, the perils of the sea, and so is within the exception: (*Livie* v. *Janson*, 12 East, 648; *Green* v. *Elmslie*.) In *Livie* v. *Janson* there was a warranty "free from American condemnation." The master sailed out of port in breach of an American embargo, and having sustained partial sea damage was seized and condemned by the American Government for the breach, and this was held a total loss by the excepted peril; Lord Ellenborough saying that the substantive loss was imputable to such latter peril only, and not to the preliminary sea damage. The consideration of these authorities, and the application of the well-known principle that a contract of assurance is one of indemnity and indemnity only, leads me to the conclusion that the loss in the present case is imputable to the excepted peril. It was correctly alleged by Mr. Cohen in the argument that capture and seizure are not in terms enumerated perils, but are and may be included in, or caused directly or remotely by, a great many of the perils actually enumerated; *e.g.*, perils of the seas may be the remote cause of it, as in the case of *Green* v. *Elmslie*; or more frequently perils by men-of-war, or enemies, or pirates. In these or similar cases to hold that a capture caused by, or the direct result of any of, these perils is not within the exception, would, it seems to me, be to deprive the latter of its whole or at least a good part of its effect and value. As Mr. Cohen pointed out, the warranty is not an extension, but a limitation of the contract of assurance. Capture and seizure

therefore, although not specifically included in the catalogue of perils insured against, must be found in some of them, and may be found in many, and amongst others (as the case shows) they may be the consequence of barrratry which led to the act by which in truth the loss happened. Until the seizure by the Spanish authorities, although a barratrous act had been committed, there had been no loss, and had the captain not been overhauled there probably never would have been any. It was the seizure that brought the loss into existence. The true mode of construction is, I think, to read the clause in which the perils are enumerated and the barratry together, and then it will stand thus: "Assurer liable for loss by barratry except such barratry as ends in or causes capture and seizure." This construction gives effect to all the words used. There is capture and seizure as found in the warranty, and there may be acts of barratry which do not result in seizure, and are therefore properly assured against without exception. On the contrary, Mr. Myburgh asks us to read it thus: "Free unless caused by barratry," but if so, why not also read in all the other perils capable of producing seizure, and so render the exception nearly or absolutely nugatory? I think therefore that, reading the whole policy, the true contract is, that if there is a loss directly caused by capture and seizure, as was the case here, the loss is not the less imputable to the excepted peril because it might remotely have been due to the barratrous act. My judgment is therefore for the defendant, with costs.

Cave, J.—I also am of opinion that the defendants are entitled to succeed. The master was clearly guilty of barratry, which led to the seizure of the vessel, and there was therefore a loss by barratry; but a loss which *primâ facie* was within the warranty. It was, however, contended, on behalf of the plaintiffs, that there having been a loss by barratry, they were entitled to recover, although the proximate cause of the loss arose from seizure, and in support of this contention *Vallejo* v. *Wheeler* was cited. In that case the vessel was assured by a voyage policy, and the master having barratrously deviated, it was held that the insurer was liable for a loss by perils insured against, whether such loss happened during the fraudulent deviation or afterwards. The ground on which it was held that the insurer was liable for loss by a peril happening after the fraudulent deviation was that, as there was a deviation, the owner, if not secured against the barratry of the master, would have lost his insurance by the fraud of the master. Now, if in this case it could have been shown that the owner could not have recovered upon a policy against loss by seizure by reason of the barratrous conduct of the master, the principle of *Vallejo* v. *Wheeler* would have applied. But it is clear from the cases of *Arcangelo* v. *Thompson*, *Heyman* v. *Parish*, and *Blyth* v. *Shepherd*, that the law is not so, and that under the circumstances of this case, the insurer could have recovered under a policy against loss by seizure. The case of *The American Insurance Company* v. *Dunham* was also cited on behalf of the plaintiffs. In that case it was held that, upon a policy against (amongst other perils) barratry of the master, the assured was entitled to recover damages sustained in consequence of the seizure and detention of the vessel and cargo by reason of prohibited goods having been found on board belonging to the master, shipped by him for the purpose of being smuggled, notwithstanding a clause in the policy that the insurer should be free from charge in consequence of seizure or detention for or on account of any illicit or prohibited trade. The ground of that decision, which was founded on *Havelock* v. *Hancill*, was that the warranty extended only to the acts of the assured and of those acting with his knowledge and consent. It is clear that that ground cannot apply here, and if, because perils from barratry are insured against, it is to be held that the warranty against seizure does not extend to a seizure which is barratrous, or which is the natural result of barratry, it might equally be contended that, because perils from enemies are insured against, the warranty against capture does not extend to capture by an enemy. In *Kleinworth* v. *Shepard* there is an *obitur dictum* of Lord Campbell which tends to support the view I take. In that case there was the same warranty as here, and Lord Campbell in his judgment, while discussing what is a seizure within the warranty, says: "If the crew intending to turn pirates were to murder the captain and run away with the ship, would not this be a loss by seizure?" and it is evident from the context that in his opinion it would have been. If therefore a seizure which is in itself the barratrous act is within the exception, why is not a seizure which is not the barratrous act, but only the result and consequence of it?

Judgment for defendant.

Solicitor for plaintiffs, *H. C. Coote* for *H. A. Adamson*, North Shields.

Solicitors for defendant, *Waltons, Bubb*, and *Walton*.

Wednesday, Feb. 22, 1882.

(Before Mathew and Cave, JJ.)

Hopper and another v. Wear Marine Insurance Company.

Marine insurance — Beginning of adventure — From the loading on board—Loss of lighters alongside.

Where shipowners by a policy insurance caused "themselves to be insured, lost or not lost, at and from Libau to Bordeaux, upon freight (valued at interest), of and in the vessel Hawthorn, beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau, and to continue and endure during the said vessel's abode there, and until the said vessel shall have arrived at Bordeaux, and the said goods shall be safely delivered from the said ship," and during the loading at Libau a portion of the cargo, which was in lighters alongside and about to be transferred to the vessel, was by reason of the perils of the sea wholly lost and the shipowners prevented from earning the freight insured, it was held, upon demurrer, that the shipowners could not recover.

This was a demurrer to a statement of claim which was as follows:

1. The plaintiffs are shipowners at Sunderland, in the county of Durham, and are the owners of a certain steamship called the *Hawthorn*, which, at the time of the making of the policy of insurance hereinafter mentioned, was chartered to carry a cargo from Libau to Bordeaux.

2. The plaintiffs, by their agents, Messrs. T. and H. Crosby, by a certain policy of insurance made on the 13th

Dec. 1879, and intended to operate from that date, but by mistake dated the 13th Dec. 1880, did make assurance and did cause themselves to be insured, lost or not lost, at and from Libau to Bordeaux upon freight (valued at interest) of and in the vessel *Hawthorn*, beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau, and to continue and endure during the said vessel's abode there, and until the said vessel should have arrived at Bordeaux, and the said goods should be safely delivered from the said ship. And it was provided by the said policy that it should be lawful for the said ship to proceed and sail to and touch and stay at any ports and places whatsoever in the course of her said voyage for all necessary purposes, without prejudice to the said assurance. Touching the adventures and perils which the defendant company was contented to bear and did take upon itself in such said voyage, they were of the seas and other perils usually inserted in policies of assurance, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods or freight, or any part thereof. And it was by the said policy declared and agreed that the interest of the assured under the said assurance should be and was on freight, and it was agreed that all average claims should be settled according to the laws of England. Provided, nevertheless, that the capital stock and funds of the defendants should alone be liable to answer and make good all claims under or by virtue of the said policy. By the said assurance the defendant company bound itself to the plaintiffs for the true performance of the premises, confessing itself paid the consideration due unto it for the said assurance as specified in the said policy, and the defendant company subscribed the said policy for 600*l.*, and became insurers thereon to the plaintiffs for that amount on freight.

3. The said steamship *Hawthorn* duly proceeded to Libau, and commenced at Libau loading a cargo of oats as per charter-party, to be carried from Libau to Bordeaux pursuant to the said charter-party. After the said loading had commenced a portion of the said cargo, which had been delivered to the plaintiffs to be carried on the said insured voyage, was in lighters which were alongside the said vessel, and was about to be transferred from the said lighters to the said vessel, when, by reason of the perils of the sea, the said lighters and the said portion of the cargo laden on board of them were wholly lost, and the plaintiffs were unable to obtain other cargo except at a lower rate of freight than that stipulated for by the said charter-party, and were prevented from earning the freight they otherwise would have earned on the said insured voyage, and the freight which the plaintiffs would otherwise have earned in respect of the goods so lost as aforesaid; and a loss was incurred by the plaintiffs within the meaning of the said policy.

4. The said freight was insured with other underwriters, and the proportion of the said loss which is recoverable from the defendant company amounts to 77*l.* 8*s.* 7*d.*

5. All things have been done and happened, and all conditions have been performed, and all times have elapsed to entitle the plaintiffs to be paid out of capital, stock, and funds of the defendant company the sum of 77*l.* 8*s.* 7*d.*, yet the defendants have neglected and refused to pay the same, and the same remains and is due and unpaid.

The plaintiffs claim:
1. The said sum of 77*l.* 8*s.* 7*d.*
2. Such other sum as they may be entitled to recover.

This statement of claim was demurred to on the ground, amongst others, that the loss described did not come within the perils insured against.

Manisty (with *J. Edge*) argued for the defendants.—The commencement of the defendants' risk is defined in the policy by the words "beginning the adventure upon the said goods or freight from the loading thereof on board the said ship at Libau." The freight could not be insured, therefore, until the goods for which the freight was charged were actually on board the ship. There is no clause in this policy, which is to be found in some others, covering perils to craft used for loading the ship. In the case of *Beckett* v. *West of England Marine Insurance Company* (1 Asp. Mar. Law Cas. 185; 25 L. T. Rep. N. S. 739), the plaintiff, the shipowner, effected an insurance on freight at and from Lagos, and the policy contained a clause whereby the defendants, the insurance company, agreed that the insurance should "commence upon freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above." In that case the ship was lost on her way out, and before she had shipped any of her homeward cargo, and it was held that, although, as in this case, the subject of insurance was chartered freight, yet the plaintiff could not recover. [Stopped by the Court.]

Gainsford Bruce for the plaintiffs.—This was an insurance upon freight "at and from Libau" for goods from the loading thereof on board the ship. These words must surely refer to the chartered freight which was incurred from the commencement of the loading. The risk must have attached as soon as something was done towards earning the freight. Here some part of the cargo was actually on board when the other part was lost, and it cannot be contended that there was no insurance on the chartered freight until the whole cargo was on board. It may perhaps be that by this policy no risk attached to the goods insured until they were on board, but the freight chartered for these goods must necessarily become a liability to the defendants as soon as the loading of the goods commenced. [MATHEW, J.—The same words are used in the policy with respect to goods and freight. Why should they not be interpreted in the same way in both cases?] The freight becomes due upon delivery of the goods. [MATHEW, J.—If this be chartered freight, I fail to see how there can have been any loss.] That would depend upon the charter-party, and it cannot be considered on this demurrer. In the case of *Montgomery* v. *Eggington* (3 T. Rep. 362) the ship was driven from her moorings and lost when about a fourth of her cargo was put aboard, and it was held that the shipowner was entitled to recover the whole freight upon a valued policy on freight. In *Jones and another* v. *Neptune Marine Insurance Company* (1 Asp. Mar. Law Cas. 416; L. Rep. 7 Q. B. 702; 27 L. T. Rep. N. S. 308), where the words "from the loading" were held to mean from the completion of the loading, it was observed that the policy did not contain the words "at and from" in respect of the place of loading. And even upon an insurance upon goods, in *Mellish* v. *Allnutt* (2 M. & S. 106) Lord Ellenborough is reported to have said at p. 110, "To construe the subsequent words *from the loading thereof aboard the said ship* to mean only the same thing as being loaded, would be giving them no effect."

MATHEW, J.—I think Mr. Bruce can make no answer to this demurrer. The words of the policy on this point seem to be clear. It is not disputed that the effect in regard to the goods is to omit from the adventure all goods not actually on board the ship; and I see no reason to apply a different rule to the freight. If any loss of chartered freight has occurred, the defendants cannot be liable for it in respect of those goods which never got on board the plaintiffs' ship. The words

"from the loading thereof" exclude the goods not actually loaded, and also the freight for them.

CAVE, J.—I am of the same opinion.

Judgment for the defendants.

Solicitors for the plaintiffs *Belfrage* and *Co.*, for *W. Halcro*, Sunderland.

Solicitors for the defendants, *Botterell* and *Roche*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, March 24, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE BUCKHURST.

Collision—Regulations for preventing Collisions at Sea, Art. 6—*Lights—Ship adrift—Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85) *sect.* 17 —*Inevitable accident—Necessary departure from regulations—Possible contribution to collision.*

Where a sailing vessel broke adrift from her anchors in very bad weather, and about one hour and a half afterwards, during a large part of which time she had been bumping over sands, thereby injuring herself so as to be unmanageable, drove into another vessel at anchor, having in the meantime neither put up her side lights nor three red lights:

Held, that the collision was an inevitable accident, and that under the circumstances of the case she was not to blame for not carrying her side lights or the three red lights prescribed by Art. 5 *of the Regulations for Preventing Collisions at Sea, the circumstances being such as to render a departure from the rule necessary and their absence not possibly contributory to the collision.*

The action was dismissed without costs.

THIS was an action *in rem*, instituted by the owners of the brig *Creole* against the ship *Buckhurst* and her freight, and against her owners intervening, to recover damages sustained by the *Creole* in a collision which occurred between that vessel and the *Buckhurst* between eight and nine p.m., on the 18th Jan. 1881, in the Penarth Roads.

The plaintiffs alleged in their statement of claim that shortly after eight p.m. on the 18th Jan. 1881 the *Creole*, a brig of 275 tons register, manned by a crew of eight hands all told, in ballast, was brought up with two anchors in Penarth Roads with a proper riding light duly exhibited, the weather at that time being dark, with a gale blowing from the E.N.E., a heavy sea running, and the tide running about half a knot, it being nearly high water; and that at such time the *Buckhurst*, which was under sail but carrying no lights, ran against, and with her bowsprit and stem struck the *Creole* on the starboard side in the way of the foremast and seriously damaged her; and the plaintiffs alleged that the collision was caused by the negligence of those on board the *Buckhurst* in improperly neglecting to keep out of the way of the *Creole*, and to comply with the provisions of Art. 6 (lights for sailing ships) of the Regulations for Preventing Collisions at Sea.

In answer to this the owners of the *Buckhurst* alleged in their statement of defence that the *Buckhurst*, a ship of 1877 tons register, manned by a crew of thirty-five hands all told, bound on a voyage from Cardiff to Bombay with a cargo of coals, left the Penarth Docks on the morning of the 10th Jan. 1881, in tow of a tug and in charge of a duly licensed pilot, and that in consequence of the weather becoming unsettled her master thought it prudent to come to an anchor in the outer roads, which he did, and remained at anchor until the morning of the 18th Jan., when she was riding to her port anchor with ninety fathoms of cable out, and to her starboard anchor with sixty fathoms out, with her riding light duly exhibited and burning brightly, and an anchor watch set and kept, the wind at such time blowing a gale from the E.N.E., varying, and with hurricane force, accompanied by thick blinding snow, and the tide being about high water; and that about 6.30 p.m., during a heavy squall, the port cable parted, and shortly afterwards the starboard cable also parted. Efforts were made at once to wear ship and to get out to sea, and at about seven p.m., the weather having become worse and there being a very heavy sea running, the *Buckhurst* struck heavily on Cardiff Sands, and whilst working over the sands received injuries which caused her to make a great deal of water and damaged her rudder, thereby rendering her helpless and unmanageable, and in this helpless condition the *Buckhurst* was drifting towards Penarth Beach, the hurricane and blinding snow still continuing, when about eight p.m. the *Creole* was observed at anchor at a distance of about 100 yards, a little on the port bow of the *Buckhurst*, and the helm of the *Buckhurst* was then put to starboard as far as its damaged condition would permit. The mizen staysail was hauled down, and main and cross-jack yards squared and geared in to try and pay the ship off, but notwithstanding the *Buckhurst* came into collision with the *Creole*, her jibboom and headgear crossing the deck of the *Creole* and carrying away her masts. After clearing the *Creole*, the *Buckhurst* drove ashore on Penarth Beach with eight feet of water in her hold, and there remained for some time, filling with water each tide. The owners of the *Buckhurst* therefore pleaded that so far as the *Buckhurst* was concerned the collision was the result of inevitable accident.

On this statement of defence the plaintiffs joined issue, and further replied that if the *Buckhurst* was in a helpless and unmanageable condition as alleged, those on board of her neglected to comply with Art. 5 of the Regulations for Preventing Collisions at Sea.

The defendants' evidence materially substantiated the allegations contained in their statement of defence, and the further material facts proved appear in the judgment.

Butt, Q.C. (with him *Nelson*) for the plaintiffs.—The defendants in this case are in a dilemma. The *Buckhurst* must have been either manageable or unmanageable. If she were manageable when those on board of her found that her cables had parted and that she was no longer at anchor, they ought to have taken down the riding lights and put up the proper regulation lights for a vessel under way. According to their own account it was more than an hour after the *Buckhurst* broke adrift before they sighted the *Creole*, and there was therefore ample time for them to have put up

the regulation lights. If on the contrary she was unmanageable, she ought to have put up three red lights according to the provisions of Art. 5 of the regulations, which was intended to meet such a case as this. It cannot be said that the absence of these lights could by no possibility have contributed to the collision, for if those on board the *Creole* had seen them they would have been able to take some steps to keep out of the way of the *Buckhurst* and allow her to pass clear of them.

E. C. Clarkson and *Myburgh* for the defendants.—This collision must be held to have been the result of inevitable accident. The evidence is conclusive that the fearful state of the weather was the sole cause of the collision, and the court will not attach any weight to what is merely a technical objection, and hold that the omission of those on board the *Buckhurst* to put up these lights could by any possibility have contributed to the collision.

Butt, Q.C. in reply.

Sir R. PHILLIMORE.—This is a case of collision in the Penarth Roads, which happened between eight and nine o'clock on the 18th Jan. last. The vessels that came into contact were the brig *Creole*, a small vessel of 275 tons register, lying at anchor in these roads, and the *Buckhurst*, a vessel of 1877 tons register, manned with a crew of thirty-five hands and laden with a cargo of coals, which was also at anchor in these roads, with her riding light exhibited and burning brightly. According to the evidence, at about six o'clock in the evening the port cable parted, and afterwards the starboard cable, and she struck heavily on the Cardiff Sands, and whilst working over the sands received some injuries which made her unmanageable. There is no question at all in the opinion of the Elder Brethren that no blame attaches to the *Creole*. The state of the weather was of the worst possible description, and they think that the accident was inevitable. But it is contended that the *Buckhurst* did not carry her side lights, and that, therefore, though the accident might otherwise have been inevitable, she is to blame for the collision, notwithstanding the state of the weather and the other circumstances of the case. Now, the rule is laid down and cannot be altered, that where by any possibility a non-compliance with any of the Regulations for Preventing Collisions at Sea might have contributed to the collision, the vessel which has not complied with the regulation is to blame. Now, the *Buckhurst* was on the sands till about twenty minutes before the time of the collision; and I have asked the Elder Brethren whether it was her duty during that time to put up her side lights, and they are of opinion that it was not, and that it would have misled other vessels if she had done so. The 17th section of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85) provides that the ship by which the regulations have been infringed shall be deemed to be in fault, unless the circumstances of the case show a departure from the regulations to have been necessary; and as it is the opinion of the Elder Brethren that so far as concerns the time referred to when this vessel was on the sands she ought not to have put up her side lights, and that if she had done so either then or after she got off the sands, she might have misled the other vessel, it appears to me that the circumstances of the case made a departure from the regulations necessary. Moreover, in our opinion, the non-carrying of the side lights could not by any possibility have contributed to the collision. As to the charge of not carrying three red lights when she got afloat, considering the position of the two vessels and the state of the weather, we do not think that the absence of these lights could by any possibility have contributed to the collision. The Elder Brethren are of opinion that the collision could not have been avoided in the dreadful state of the weather. Therefore I dismiss the suit.

Nelson for the plaintiffs.—This action ought to be dismissed without costs. In cases of inevitable accident the general rule is to make no order as to costs:

The Itinerant, 2 W. Rob. 244.

It is true that the court has a discretionary power, but in this case it cannot be contended in the face of the absence of the regulation lights on board the *Buckhurst* that the plaintiffs had no sufficient ground for bringing this action.

E. C. Clarkson for the defendants.—It is true that the general rule is to make no order as to costs, but cases abound in which plaintiffs have been condemned in the absence of good reason for bringing their action:

The Thornley, 2 W. Rob. 244;
The London, Br. & L. 82.

In this case the weather being, as the evidence shows, as bad as possible, the plaintiffs knew quite well that the collision was inevitable, and were unduly rash in bringing this action without sufficient ground. Moreover, it is the ordinary practice of all the divisions of the High Court, when a plaintiff fails to prove that which he undertakes to prove, to dismiss his action with costs. In this case the plaintiffs came here to prove that the collision occurred by the default of the *Buckhurst* and have failed to do so. In *The Swansea* (4 Asp. Mar. Law Cas. 115; 4 P. D. 115) the Court of Appeal deprecate the existence of one rule as to costs in one branch of the High Court of Justice and another rule in another branch. This court ought to follow the universal rule and condemn the unsuccessful plaintiff in costs.

Nelson, in reply, was stopped by the Court.

Sir R. PHILLIMORE.—Having regard to the special circumstances of the case, and that the only light exhibited on board the *Buckhurst* was her anchor light, I do not think it can be said that the action ought not to have been brought. I think this is a case in which there ought to be no costs.

Solicitors for the plaintiffs, *Lowless*, *Nelson*, and *Co.*

Solicitors for the defendants, *Parker* and *Co.*

Feb. 14 *and* 21, 1882.

(Before Sir R. PHILLIMORE.)

THE GUY MANNERING.

Damage — Collision — Suez Canal — Compulsory pilotage—Regulations—Concession.

The employment of a pilot in the Suez Canal, though compulsory, is not of such a nature as to exempt the owners of a ship from liability for damage done to another ship by the negligence of such pilot.

By the Regulations of the Suez Canal a pilot is to

advise the master of the ship, but the master remains responsible for the navigation of the ship.

The Regulations for the Navigation of the Suez Canal, establishing such a relationship between master and pilot, are not ultra vires, so far as appears from the extract from the Act of Concession set out in the case.

THIS was a special case stated for the opinion of the court whether, under the circumstances therein set out, the defendants were exempt by reason of the compulsory employment of a pilot from liability for the consequences of a collision which took place in the Suez Canal.

The special case was as follows.

SPECIAL CASE.

1. This is an action for damages by collision, brought by the plaintiffs as owners of the British screw steamship *Wistow Hall*, of 1729 tons register, against the British screw steamship *Guy Mannering*, of 2317 tons register, whose owners have appeared and are the defendants.

2. The collision occurred on the afternoon of the 4th Dec. 1880 in the Suez Canal. The *Wistow Hall* and the *Guy Mannering* were both proceeding in the same direction, namely, towards Suez, the *Wistow Hall* being the headmost vessel. The *Wistow Hall* had to stop her way in order to allow some vessels coming from Suez to pass, and it was the duty of the *Guy Mannering* to stop her way also, so as not to run into the *Wistow Hall*; but the proper measures were not taken in time on board the *Guy Mannering*, and before her way was stopped she forged ahead into the *Wistow Hall*, so that her stem cut into the stern of the *Wistow Hall*, and did the damage complained of.

3. The facts are that upon the occasion in question the engines of the *Guy Mannering* were stopped, but she still went on ahead with the way she had had previously; that the master of the *Guy Mannering* saw that his vessel was approaching too close to the *Wistow Hall*, and informed the pilot of it, and suggested to him that the engines should be moved astern. The pilot, however, refused to give the order to the engines, whereupon the master, having more than once suggested to the pilot to give the order, gave it himself, but too late, and, though it was obeyed, the collision ensued. The plaintiffs admit that the collision was solely caused by the pilot's negligence.

4. The defendants admit that this collision was caused by the bad navigation of the *Guy Mannering*, and that her master and crew were their servants but they claim to be exempt from liability for it on the ground that they were compelled by the law in force in the Suez Canal, to which all vessels passing through the said canal are subject, to give up charge of the navigation of their ship to one of the pilots employed by the Suez Canal Company, whom they had taken on board, and on the ground that the collision was entirely occasioned by his bad navigation.

5. The provision for the employment of pilots in the Suez Canal is contained in Article 4 of the "Regulations for the Navigation of the Suez Maritime Canal," which article is as follows; "Every vessel measuring more than one hundred (100) tons gross must take on board a company's pilot for the whole length of the canal, who will indicate all particulars concerning the passage through. The captain is held responsible for all groundings and accidents of whatsoever kind resulting from the management and manœuvring of his ship. Pilots place at the disposal of captains of vessels their experience and practical knowledge of the canal, but, as they cannot be specially acquainted with the defects or peculiarities of each steamer, and her machinery in stopping, steering, &c., the responsibility as regards the management of the ship devolves solely upon the captain."

6. The plaintiffs admit that these regulations are lawfully in force, and that the pilot taken on board the *Guy Mannering* was a company's pilot, and was on board her by virtue of these regulations.

7. Copies of the statement of claim and statement of defence, and of the regulations for the navigation of the Suez Maritime Canal, are annexed to and are to be taken as part of this special case.

8. The question for the opinion of the court is, whether the defendants are liable or are exempt from liability for the aforesaid bad navigation of the ship.

9. If the defendants are liable, judgment is to be entered for plaintiffs with costs, and with the usual order for reference of the damages to the registrar and merchants.

10. If the defendants are exempt from liability, judgment is to be entered for them with or without costs, or with such portion of the costs as to the court may seem just.

STATEMENT OF CLAIM.

1. The plaintiffs are the owners of the screw steamship *Wistow Hall* of 1729 tons register, which at the time of the matters hereinafter stated was bound on a voyage from Liverpool to Bombay *viâ* Suez, with a crew of seventy hands, all told, and a cargo of general merchandise.

2. On the afternoon of the 4th Dec. 1880 the *Wistow Hall* was in the Suez Canal. There was no wind. The weather was fine and clear. There was no tide perceptible. The *Wistow Hall* was the third in a line of vessels going to Suez.

3. The *Guy Mannering* was next behind her, about three-quarters of a mile off. About 3.20 p.m. the *Wistow Hall* was coming out of the narrower part of the canal into Lake Timsah, when it was seen that the canal signals were up ordering the whole line of vessels to wait in the lake in order to allow some vessels coming from Suez to get out of the canal into the lake. The vessels in front of the *Wistow Hall* and the *Wistow Hall* accordingly stopped. The whistles were sounded, and it was the duty of those on board the *Guy Mannering* to see what the vessels in front were doing and to stop also. But the *Guy Mannering* did not stop, or did not stop in time, and notwithstanding that the engines of the *Wistow Hall* were put on full speed ahead when it was seen that the *Guy Mannering* continued to approach, the *Guy Mannering* came on so fast that she struck the *Wistow Hall*, and her stem cut into the stern of the *Wistow Hall* and did her great damage.

4. A good look-out was not kept by those on board the *Guy Mannering*.

5. Those on board the *Guy Mannering* negligently and improperly omitted to stop her in due time, and to keep her out of the way of the *Wistow Hall*.

6. Those on board the *Guy Mannering* broke Article 20 of the Regulations for Preventing Collisions at Sea.

7. Those on board the *Guy Mannering* improperly neglected to comply with Article 18 of the Regulations for Preventing Collisions at Sea.

8. The collision was caused by some or all of the matters and things stated in the 4th, 5th, 6th, and 7th paragraphs hereof, or otherwise by the negligence of the defendants, or of those on board the *Guy Mannering*.

9. The collision was not caused or contributed to by the plaintiffs, or by any of those on board the *Wistow Hall*.

The plaintiffs claim as follows:

1. Judgment against the defendants and their bail for the damage occasioned to the plaintiffs by the collision, and for the costs of this action.
2. Such further and other relief as the nature of the case may require.

STATEMENT OF DEFENCE.

1. Shortly before 3.30 p.m. on the 4th Dec. 1880 the steamship *Guy Mannering*, of 2817 tons register, of which the defendants are the owners, whilst on a voyage from London to Kurrachee, laden with a general cargo, fully manned, and with a duly licensed pilot on board, was in the Suez Canal. The wind at the time was light and variable, and the weather was clear. A good look-out was being kept.

2. The *Guy Mannering* was being steered straight through the canal, going at an easy speed under the direction of the said pilot, the *Wistow Hall* being right ahead as she had been for some time, distant about half to three quarters of a mile from the *Guy Mannering*. Under these circumstances the *Wistow Hall* was seen suddenly to stop right in the fairway of the canal, the pilot's attention was drawn to her, the whistle was sounded, and the engines reversed full speed astern, but notwithstanding this the stem of the *Guy Mannering* came into collision with the stern of the *Wistow Hall*, and did her some damage.

3. Save as above admitted, the defendants deny the allegations in the statement of claim.

4. The collision was not caused or contributed to by the defendants, or by any of those on board the *Guy Mannering*.

5. By the laws in force at the time and place of the collision the *Guy Mannering* was compulsorily in charge of a duly appointed pilot, whom the defendants did not select, and had no power of selecting.

6. If the collision was not the result of inevitable accident, it was exclusively caused or contributed to by the negligence and default of the said pilot on board the *Guy Mannering*, all of whose orders were duly obeyed and complied with.

The following articles contained in the copy of the "Regulations for the Navigation of the Maritime Suez Canal," attached to the special case, were also commented upon in the course of the argument and judgment.

These regulations are to come into force on and after the 1st July 1878. Previous regulations are hereby annulled.

Extract from the Act of Concession, dated 5th Jan. 1856.

Art. 14. We hereby solemnly declare for ourselves, and for our successors, under reserve of ratification by H.I.M. the Sultan, the Great Maritime Canal from Suez to Pelusium and ports belonging to it henceforth and for ever open, as neutral passages to any merchant vessel crossing from sea to sea without any distinction, exclusion, or preference whatever from persons or nationalities against the payment of dues, and execution of regulations established by the said universal company granted for the working of the said canal and its dependencies.

Art. 17. To indemnify the company for the expenses of construction, maintenance, and working, devolving upon them by these presents, we authorise the company henceforth, and during the whole term of their lease as determined by clauses 1 and 3 of the preceding article (*a*), to establish and levy for the passage through the canals and ports thereunto appertaining navigation, pilotage, tonnage, tracking, or berthing dues, according to the tariffs which they shall be at liberty to modify at all times upon the following express conditions: (1) That these dues be collected without exception or favour from all ships, under like conditions. (2) That the tariffs be published three months before they come into force, in the capitals and principal commercial ports of all nations whom they may concern. (3) That for the special navigation due the maximum tolls shall not exceed ten francs per ton of capacity on vessels and per head of passengers.

(*a*) Art. 16. "the preceding article," does not appear in the copy of the regulations attached to the special case.—[REP.]

Art. 1. Before entering the canal captains of ships shall bind themselves, on receiving a copy of the present regulations, to abide by and conform themselves in all points to all required arrangements made in view of the execution of these regulations.

Art. 4. (Set out above in the text of the special case.)

Art. 5. Whenever ships intending to proceed through the canal shall have dropped anchor either at Port Said or Suez, the captain must enter his ship at the Transit Office, and pay all dues for passage, as also for pilotage, towage, and berthing when such be the case; a receipt for the same shall be delivered to him, which will serve as justification whenever required. The following written information to be handed in by the captain: Name and nationality of the ship; name of the captain; names of the owners and charterers . . . . draft of water . . . .

Art. 7. All ships entering the canal are to be prepared by bracing their yards forward, running in their flying jib and jibbooms, and swinging their boats on board. In addition to their two bow anchors they must carry at the stern, ready for letting go at the request of the pilot a strong kedge, with a stout hawser bent on sufficient to hold the ship.

Art. 8. . . . . (6) When two vessels proceeding in an opposite direction are in sight of each other, they must both decrease their speed, and hug the starboard shore, or stop if so required by the pilot.

Art. 9. When circumstances arise that oblige a ship to stop during her passage through the canal, and when a siding is not at hand, which must always be reached if possible, the captain must make fast ahead and stern to the weather bank, showing the proper signal by day, and two lights by night, forward and aft, as already mentioned. In the event of a grounding, the agents of the company alone shall have the right to direct all operations by which a vessel is to be floated off again, to unload and tow the vessel as may be necessary, by means of the plant and stock which the company has at hand, at the expense of the vessel, unless it be regularly proved that there was an insufficient depth of water in the canal, or that erroneous directions by the pilot had caused the grounding.

Art. 10. The following prohibitions are hereby notified: (1) . . . . (2) The anchoring of a ship in the canal, except through unavoidable circumstances, and then only with the consent of the pilot.

Art. 13. The pilotage charges for traversing the canal are levied according to draft of water, and are . . . . pilotage charges for entering the port of Port Said, and leaving the same are fixed as follows: . . . . The payment of the pilotage charged for entering the port of Port Said and leaving the same is compulsory on every ship measuring one hundred (100) tons gross and upwards.

Feb. 14.—The case now came on for argument.

Dr. *W. G. F. Phillimore* for plaintiffs.—The question here is, whether owners are exempted from liability for the acts of a pilot who is on board their ship by compulsion of law, but by the same law is not in charge of the navigation of it. Here it is obvious that the management of the ship is not within the control of the pilot; it is expressly reserved by the regulations to the control of the master. Both principle and authority require the pilot to be in charge to exempt the owners. In sect. 376 of the Merchant Shipping Act 1854 the provision is that the penalty for not taking a pilot is to be levied on a master who pilots his ship "after a qualified pilot has offered to take charge of such ship;" and in sect. 378 of the same Act the master is directed to "give the charge" of piloting his ship to the first qualified pilot who offers his services. *The Halley* (3 Mar. Law Cas. O. S. 131; 18 L. T. Rep. N. S. 879; L. Rep. 2 P.C. 193), which will probably be relied on

by the defendants, is really an authority in favour of the plaintiffs, as the basis of the decision of the Judicial Committee was that the pilot was compulsorily "in charge." That was the form of pleading, and for the purposes of that argument it had to be taken as proved. Selwyn, L.J., in delivering the judgment of the court, says: "Their Lordships agree with the learned judge in his statement of the common law of England with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel while under the control of a pilot whom the owner is compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses the servant, and gives him orders which he is bound to obey; and that the acts of the servant, so far as the interests of third parties are concerned, must always be considered as the acts of the owner. This exemption of the owner from liability where the ship is under the control of what has been termed a "compulsory pilot" has also been declared by express statutory enactments." Here the pilot has no control whatever. Other articles of these regulations show that in certain circumstances his consent is necessary before the master can do some things, that is a necessary provision for the preservation of the canal itself; but in no case can the pilot order anything to be done. His duty is merely to advise the master. He is, in fact, not a pilot at all within the definition of the Merchant Shipping Act, for he has not the "conduct" of the ship at all (Merchant Shipping Act 1854, s. 2). To avail themselves of the exemption from liability the defendants must show, not only that the person was on board by compulsion of law, for that would apply to a gendarme or a custom-house officer on board for police or revenue purposes, but that he was imposed on the owners to take charge of the navigation of the ship, and that they were bound to obey his orders, and that in consequence of obedience to those orders the injury was caused; if they were not bound to obey his orders, but to act for themselves, his neglect to give orders is no excuse for them.

Butt, Q.C, and *Nelson* for the defendants.—These pilotage tolls are levied by permission of Government, and it is *ultra vires* on the part of a private company, such as the Suez Canal is owned by, to take advantage of the tolls and not to render the service; it is an attempt to get rid of their liability for the acts of their servants which cannot be supported, and is contrary to law in this country. If they levy pilotage dues they must render pilotage service, and what pilotage service is is well known and is moreover defined by sect. 2 of the Merchant Shipping Act 1854. But even if the rules are not *ultra vires*, the defendants are none the less exempt from liability, for whatever the pilot's rights and duties were there can be no doubt that in fact he was acting in charge of the vessel's navigation, and it is admitted that his employment, whatever the nature of it was, was compulsory by law; he was fulfilling the functions of a pilot *de facto*, if not *de jure*, and was conducting a vessel in a district in which his employment was compulsory (*Lucy* v. *Ingram*, 6 M. & W. 302; *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (3 Mar. Law Cas. O. S. 168, 237; 20 L. T. Rep. N. S. 581; L. Rep. 4 Ex. 238), and it is admitted that the collision and injury caused by it was solely occasioned by his default.

Phillimore in reply.—*The General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* was a decision on sect. 388 of the Merchant Shipping Act 1854, but the section is in Part III. of the Act, and by sect. 330 its operation is limited to the United Kingdom. *Lucy* v. *Ingram* was a decision under the former Pilotage Act (6 Geo. 4, c. 125), which Act was repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120), and is also open to the objection that it cannot apply in the territorial waters of another country; the rights of the parties are governed here by the common law alone as affecting the relationship of master and servant. As to the regulations in respect of the functions of a pilot being *ultra vires*, if that were so there would be no legal compulsion on the defendants to take a pilot at all, and therefore the defence of compulsory pilotage would fall to the ground altogether. But in arguing the case the validity of the regulations must be taken to be admitted. Paragraph 6 of the case (*ubi sup.*) is an admission by the plaintiffs against themselves, and the defendants cannot now rebut it.

Cur. adv. vult.

Feb 21.—Sir R. PHILLIMORE.—The question for the opinion of the court is, whether the defendants are liable or are exempt from liability for the aforesaid bad navigation. The defendants maintain that, inasmuch as the pilot was taken on board by compulsion of law, the master was not responsible for the bad navigation of the ship which caused the collision. It must be remembered that this exemption from liability is founded upon the principle that the pilot is taken by compulsion of law, and that to him is committed the sole charge of the ship. These at least are the propositions of British law, which were relied upon by the defendants; but in the present case it is expressly declared in the 4th article of the Suez Canal Regulations that the duty of the pilot is to act as the adviser of the captain in matters requiring local and practical knowledge of the canal, but that the responsibility as regards the management of the ship devolves solely upon the captain. This regulation appears to me to alter the usual relations of the master and pilot, and to take away the reason of the law upon which the exception rests. It has been urged on behalf of the defendants that this regulation is *ultra vires*, and therefore bad, and much has been said upon article 17 of the Act of Concession of the 5th Jan. 1856, which authorises the company to establish and levy pilotage and other dues, and it was urged that these pilotage dues must mean dues to be levied in respect of persons who should exercise all the usual functions of a pilot according to British law, and should take the entire charge of the navigation of the ship. I am unable to assent to these propositions; I am of opinion that I must assume that these canal regulations were made by competent authority, and were not *ultra vires*; and moreover, if they were *ultra vires*, the pilot taken on board would not have been taken on board, in accordance with them, by compulsion of law. I have only the 14th and 17th articles of the Act of Concession of 1856 before me. From them I cannot infer

any legal disability on the part of the company to frame the regulations in question. Upon the whole, I am of opinion that the defendants are liable for the bad navigation of the ship and the damages consequent thereon.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Lowless* and *Co*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Nov. 17, 1881, *and Jan.* 21, 1882.

(Present: The Right Hons. Sir BARNES PEACOCK, Sir MONTAGUE SMITH, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

CHASTEAUNEUF *v.* CAPEYRON AND ANOTHER.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 55-60—*Transfer of property in ship—Sale by licitation—Registration.*

The transfer of a British ship is not governed by the rules applicable to movables in general, but by the express provisions of the Merchant Shipping Acts.

A sale of a ship under an order of the Supreme Court of Mauritius (by licitation, in accordance with the practice there) is not a transmission of the ship "by any lawful means other than by a transfer according to the provisions of this Act," within the meaning of the Merchant Shipping Act 1854, *sect.* 58, *and the Registrar of Shipping is not bound, in a case where the register shows the ship to be mortgaged, upon the production of a declaration and a statement under that section, without a bill of sale or release for the mortgage, to register the purchasers as owners without incumbrance or at all.*

This was an appeal from an order made by the Supreme Court of the Mauritius, Ellis and Leclezio, J.J., dated the 17th April 1879, by which it was ordered that the appellant should register the respondents as owners of a certain British barque called the *Barentin*, and expunge from his books certain entries which appeared on the register against the said ship.

The appellant was collector of customs, and as such registrar of shipping at Port Louis, in the Mauritius. The respondents were merchants at Port Louis, and were naturalised British subjects.

On the 7th March 1877 there was registered, at Port Louis, in the books of the appellant as such registrar of shipping, the British barque *Barentin*, and Aimé Docinthe was at that time sole registered owner thereof.

On the 28th June 1877 a mortgage of the said barque to Henri Capeyron, Emile Coeffic, and John Ferguson, jointly to secure $8000, with interest at 9 per cent., was duly registered by the appellant.

Subsequently one Eliacin François died, and among his papers was discovered a secret document or instrument known to the law of the Mauritius as a *contre lettre*, which was in the words and figures following:

Reçu de M. E. François la somme de six mille deux cent huit roupies pour payer la barque *Barentin*, payable avec interêts at 12 per cent.; je reconnais que M. E. François possède la oitié du *Barentin* bien que son nom ne figure pas sur le registre.

Port Louis, 17 Janvier 1877.

(Signé) A. DOCINTHE.

Under the law of the Mauritius, apart from the Merchant Shipping Act 1854, this document would have had the effect of making the said Eliacin François joint owner with the said Aimé Docinthe of the *Barentin*.

One of the heirs of the said Eliacin François thereupon commenced a suit in the Supreme Court against the said Aimé Docinthe and the other heirs of the said Eliacin François for a sale by licitation of the said barque, and on the 6th Nov. 1878 such sale was ordered by the court.

A sale by licitation is, according to the law and practice of the Supreme Court of the Mauritius, the *vente d'une chose possédé en commune par plusieurs*, whenever the thing in question is incapable of division, and is ordered by the court as a matter of course without any inquiry as to the title of the parties applying if the persons claiming ownership desire it, and it is binding only on the parties to the suit, and is not a procedure *in rem*. This was the course pursued in this case, and the register of shipping was not consulted.

The sale was proceeded with in accordance with the Code du Commerce (197 *et. seq.*), and on the 27th Feb. 1879 the sale took place under the said order before the master of the Supreme Court in accordance with the rules of the court, and in the result the said barque was sold for the sum of Rs. 3520 and expenses to the respondents jointly. This sum was paid into court.

Thereafter Jules Delange, on behalf of himself and his co-respondent herein, applied to the appellant to register their names as owners of the barque under the Merchant Shipping Act 1854, and to erase the entry relating to the mortgage from the register. At the time of this application Jules Delange produced to the appellant a copy of the memorandum of sale containing the charges, clauses, and conditions thereof, and requested the appellant to grant the respondents a free title, that is, without any mortgage, the purchase money having been deposited in court. The appellant refused to register the respondents as owners of the said barque, on the ground that a bill of sale and declaration of ownership and the mortgage deed with a receipt for the mortgage money endorsed thereon were not produced, and that there had been no sufficient compliance with the provisions of sects. 55—75, of the Merchant Shipping Act 1854.

The respondents, after this refusal, applied upon affidavit to the Supreme Court, which, on the 13th March 1879, after hearing counsel for the respondents, granted a rule calling on the appellant and the above-mentioned mortgagees "to show cause why the collector of customs should not register in his books the British barque the *Barentin*, under the names of Capeyron and Delange, of Port Louis, merchants, who have, according to a judgment of adjudication of the master of this court, purchased the same on a sale by licitation thereof on the 27th Feb. last, prosecuted at the request of the heirs of François against Aimé Docinthe; and, further, why the inscriptions which appear in his books against the said ship should not be erased from the books,

inasmuch as the said Capeyron and Delange have, in compliance with the conditions of sale, and with the master's order, deposited in the master's office the full amount of their purchase price."

The time for showing cause was enlarged, and ultimately, on the 25th March 1879, the appellant appeared before the Supreme Court, by counsel appointed by the Procureur-General, and showed cause against the said rule being made absolute, and it was ordered that the said cause should be referred, and it was then referred to the Ministère Public for his conclusions, and he, on the 10th April 1879, informed the court that he was satisfied to leave the matter to the decision of the judges of the Supreme Court.

On the 17th April 1879 it was ordered by the Supreme Court that the appellant should register in his books the said barque under the name of Messrs. Capeyron and Delange, upon the production of the memorandum of conditions under which the said sale by licitation took place before the Master of the Supreme Court, together with the award of that officer, and upon the said Messrs. Capeyron and Delange making and signing the declaration and statement required by sect. 58 of the Merchant Shipping Act 1854, and by form marked H in the schedule thereto. And it was further ordered that the appellant should erase from his books the inscriptions which appeared therein against the said ship, the creditors having accepted to exercise their rights upon the sale price deposited with the Master of the Supreme Court.

The appellant thereupon wrote to the colonial secretary for instructions from the Governor of the Mauritius in the matter, and pending His Excellency's answer did not make the registration and erasures as required.

On the 29th April 1879, before the instructions had reached the appellant, upon the application of the respondents, the appellant was ordered by the Supreme Court to appear before the said court to show cause why his person should not be attached for disobedience to the said rule of court of the 17th April, with costs against him.

On the 30th April 1879 the appellant accordingly appeared by counsel, and it was ordered that he should be allowed forty-eight hours, in order to comply with the said rule, and the case was further adjourned for further proceedings to the 2nd May 1879.

The appellant, under the above circumstances and although he had not yet received instructions from the Governor of the Mauritius, obeyed the order of the court.

On the 2nd May 1879 the appellant again appeared by counsel before the said Supreme Court, and it was ordered that the said rule of the 29th April should be discharged, and that the respondent should recover against the appellant the costs incurred up to the execution by him of the judgment of the court.

There has been no local legislation affecting the registry of owners of ships, and the registration thereof is wholly governed by the Merchant Shipping Act 1854, and the Acts incorporated therewith.

This appeal was then brought from the order of the 17th April 1879, and the orders based thereon.

The *Attorney-General* (Sir *H. James*, Q.C.) and *A. L. Smith* appeared for the appellant.

The respondents did not appear, and the appeal was consequently heard *ex parte*.

In addition to the cases referred to in the judgment, the case of the *Union Bank of London* v. *Lenanton* (3 Asp. Mar. Law Cas. 600; 3 C. P. Div. 243; 38 L. T. N. S. 698) was cited in the course of the argument.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Jan. 21, 1882.—Their LORDSHIPS gave judgment as follows: This is an appeal from a rule made by the Supreme Court of Mauritius, whereby it was ordered that the collector of customs at Port Louis in Mauritius do register in his books the British barque *Barentin* under the name of Messrs. Capeyron and Delange, of Port Louis, and whereby it was further ordered that the said collector of customs do erase from his books the inscriptions which appear therein against the said ship, the creditors having accepted to exercise their rights upon the sale price deposited with the master of the court. That rule was obtained upon the application of Messrs. Capeyron and Delange, the respondents, who claimed as purchasers of the barque at a sale by licitation. The appellant was the collector of customs at Port Louis, and in that capacity was registrar of British ships at that port. The barque was a British ship, and was registered at Port Louis in the name of Aimé Docinthe, a British subject, as the sole proprietor thereof, and in the names of Henry Capeyron, Emile Coeffic, and John Ferguson, as joint mortgagees, for $8000, with interest at 9 per cent. The sale by licitation was ordered by the Supreme Court in a suit in which Marie Léonie Lilia François, as one of the heiresses of the late Jean Eliacin François, deceased, was plaintiff, and Aimé Docinthe, the registered owner of the barque, and the guardian and sub-guardian respectively of certain minors, heirs of the said Jean Eliacin François, were defendants. In the order for the sale made in that suit it was directed to take place before the master of the court according to law, and in the conditions under which the sale was directed by the court to take place, the sale was described as a judicial sale as regards the heirs François, and by licitation as regards Aimé Docinthe, of the barque *Barentin*, therein described as belonging for one-half to the estate and succession of the late Jean Eliacin François, and the other half to Aimé Docinthe. Neither the judgment of the Supreme Court by which the sale was ordered nor the grounds upon which it was based are before their Lordships. The registrar was ordered to register the barque under the names of the respondents upon the production of the memorandum of conditions under which the sale by licitation took place before the master, together with the award of that officer, and upon the making and signing by the respondents of the declaration and statements required by sect. 58 of the Merchant Shipping Act 1854, and by form marked H in the schedule thereto. It would be unnecessary, even if their Lordships had the means for so doing, to inquire into the validity of the order for sale; that order was binding upon the parties to the suit, and the substantial question to be determined in this appeal is, whether the registrar of British ships was bound to register as owners of the barque the purchasers under the award of the master made

upon the sale by licitation. Their Lordships have had the benefit of the arguments of the learned Attorney-General and Mr. Smith on behalf of the appellant, but the respondents did not appear. Their Lordships have carefully considered the case, and have arrived at the conclusion that the registrar was right in refusing to register the respondents as owners of the barque, and to erase from his books the inscriptions contained in the register against the barque in the names of the mortgagees. The determination of the question so far as it relates to the obligation on the part of the registrar to register the respondents as owners, depends principally upon the proper construction of the 55th and 58th sections of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). The 55th section enacts that a registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify it to the satisfaction of the registrar, and shall be according to the form marked E in the schedule to the Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, one or more witnesses. By sect. 57 it is enacted that every bill of sale for the transfer of any registered ship, or any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration required by sect. 56 to be made by a transferee, and that the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale. By the 58th section it is enacted that if the property in any ship, or in any share therein, becomes transmitted in consequence of the death or bankruptcy or insolvency of any registered owner, or in consequence of the marriage of any female registered owner, or by any lawful means other than by a transfer according to the provisions of the Act, such transmission shall be authenticated by a declaration of the person to whom such property has been transmitted, made in the form marked H in the schedule to the Act, and containing the statements thereinbefore required to be contained in the declaration of a transferee, or as near thereto as circumstances permit and in addition a statement describing the manner in which and the party to whom such property has been transmitted. The form marked H contains forms applicable to the cases of bankruptcy, insolvency, death, and marriage respectively, but no form applicable to any other means of transmission. In each of these cases, the marriage, the bankruptcy or insolvency, or the death of the registered owner has to be declared, and by sect. 59 the declaration has to be accompanied with the proof required by that section of the transmission by such means of the property in the ship or in the share thereof from the registered owner to the person entitled by such transmission; and then by sect. 60 it is enacted that the registrar, upon the receipt of such declaration so accompanied as aforesaid, shall enter the name or names of the person or persons entitled under such transmission in the register book as the owner or owners of the ship or share therein in respect of which such transmission has taken place, and such persons, if more than one, shall, however numerous, be considered as one person only as regards the rule thereinbefore contained relating to the number of persons entitled to be registered as owners. The latter portion of the section refers to the enactment in sect. 37 that, subject to the provisions with respect to joint owners or owners by transmission, not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship. So strictly were the provisions of the earlier statutes relating to the transfer of British ships interpreted, that it was held by Lord Eldon that the doctrine of implied trust in a court of equity could not be extended to the case of a British registered ship where the title accrued by an act of the parties other than a transfer made in accordance with the provisions of the Merchant Shipping Acts, see *Ex parte Yallop*, 15 Ves. 60, and *Curtis* v. *Perry*, 6 Ves 749. His Lordship, however, drew a clear distinction between such a case and a trust implied by law not arising out of an act in which the parties claiming the beneficial interest had joined. In the case of *Curtis* v. *Perry*, 6 Ves., his Lordship, at p. 746, said, "I desire it to be distinctly understood that I give no opinion upon the effect of these two Acts of Parliament in cases of trusts implied by law and not arising out of an act in which the contracting parties join." And again, in *Ex parte Yallop*, 15 Ves., at p. 70, "The case of *Curtis* v. *Perry*, though it does not rule this case, furnishes a strong intimation of my opinion that the distinction between trusts by operation of law unconnected with acts of the persons claiming interests, and trusts, in a sense perhaps by operation of law, but arising out of acts of the parties not regulated by the Act of Parliament, is founded on principle." The decision in *Ex parte Yallop* was followed in the case of *The Liverpool Borough Bank* v. *Turner*, decided by Lord Hatherley, then Wood, V.C. in 1 J. & H. 159; and 29 L. J. 827, Ch., upheld on appeal by Lord Campbell, L.C. (1 Mar. Law Cas. O. S. 21; 3 L. T. Rep. N. S. 84 and 494). In that case the Vice-Chancellor pointed out a distinction between the Merchant Shipping Act 1854, and the former statutes, viz, that in the former statutes the Legislature declared that an unregistered contract should have no effect at law or in equity, and that those words were left out in the Act of 1854, and this after they had been the subject of express decision. But, notwithstanding that distinction, it was held that an unregistered contract to assign an interest in a ship, when required as a security for past and future advances, was inoperative even in equity. In his judgment in that case Wood, V.C. referred to sect. 58 with reference to the contention that the Legislature, in the Act of 1854, intended to depart from its general policy of requiring all transfers to be effected by the specified methods: he said, "The phrase which strikes me as the strongest in favour of such a contention is that which is found in the 58th sect. which speaks of the transmission of the property in a ship by death, bankruptcy, marriage, or by any lawful means other than by a transfer according to the provisions of this Act. That is certainly a very strong expression, but the phrase must be looked at in connection with the context, because the transmission is directed to be authenticated

by a declaration in the form marked H in the schedule which contains forms of statement that the owner is a natural born subject, and also certain forms applicable to the transmission by death, marriage, bankruptcy, and insolvency." Then, after referring to sects. 59 and 60, his Honour proceeded: "It is clear that these provisions cannot possibly apply to a contract for the sale of a ship, and whatever may have been pointed at by the words 'transmission by any lawful means other than by a transfer according to the provisions of the Act,' it could not have been intended that any person should be at liberty to go to the registrar with a contract for sale in his possession and insist upon having it registered." The above decisions are referred to not for the purpose of showing that a beneficial interest cannot now be created by implication or by a contract neither registered nor made according to the provisions of the Merchant Shipping Act 1854, but for the dicta of and the principles laid down by the learned judges in constructing the earlier statutes. The law has been altered by the 25 & 26 Vict. c. 3, s. 63, passed since those cases were decided. By that section it is enacted that the expression "beneficial interest," whenever used in the second part of the principal Act (*i.e.*, the Act of 1854), includes interests arising under contract and other equitable interests, and the intention of the said Act is that without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as equities may be enforced against them in respect of any other personal property. It may be assumed for the purpose of argument, that, as regards ordinary movables, the award of the master to a purchaser on a sale by licitation vests the property in him without any deed or other conveyance, and that according to the law of Mauritius, there is no distinction between legal and equitable estates. But the transfer of a British ship is not governed by the rules applicable to movables in general, but by the express provisions of the Merchant Shipping Acts, which make a clear distinction between the legal estate and mere beneficial interests in a British ship. It must be borne in mind that, by sect. 43 of the Merchant Shipping Act 1854, it is enacted that no notice of a trust, express, implied or constructive, shall be entered in the register book or receivable by the registrar. It may be admitted that the sale by licitation without a conveyance by bill of sale created a beneficial interest in the purchasers; but the question is not whether the sale by licitation created a trust for or a beneficial interest in the purchasers, but whether it created such an interest in them as rendered it compulsory upon the registrar to register them as owners. That still depends upon the proper construction of the 58th section of the Act of 1854. Their Lordships are of opinion that the words "or by any lawful means other than by a transfer according to the provisions of this Act." in that section must be restricted and construed as comprehending only transmissions of the same nature as those previously enumerated in the section. If this were not so, they would include any assignment by a registered owner not made according to the provisions of sect. 55 of the Act of 1854, and would in effect nullify the provisions of that section. It must be observed that there is a clear distinction made in sects. 55 and 58 between a "transfer" and a "transmission;" the same distinction is also made in sects. 73 and 74, and the form L in the schedule as regards the transfer and transmission of mortgages. In their Lordships' opinion, a transmission, in order to be of the same nature as a transmission by bankruptcy, insolvency, death, or marriage, must be a transmission by operation of law, unconnected with any direct act of the party to whom the property is transmitted, and that a transmission to a purchaser at a sale by licitation is not such a transmission, inasmuch as it is connected with, and is the direct consequence of, an act of the person who applies for the order, and another act of the person who purchases, and to whom the property is transmitted. This view of the case is supported by sect. 103, clause 3, when read in conjunction with sect. 55; for if a transfer by a judicial sale to a purchaser not qualified to be the owner of a British ship were a transmission, there would be no reason for placing him in a different position from a purchaser under sect. 55. In the present case the purchasing and paying the purchase money for the ship by the purchasers was the act upon which the master's award was based, and admitting that the adjudication and award of the master passed a beneficial interest to the purchasers without any further conveyance, the interest was not such as to entitle them to be registered as owners. Further, it may be remarked that so long as Docinthe was registered as sole owner, the interest of the heirs François could not have been such as would have entitled a purchaser of it under a judicial sale to be registered as the owner of it. In the case of *The Sisters*, heard before the High Court of Admiralty in 1804 (5 Rob. Adm. Rep. 155), Lord Stowell observed, "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the Court of Admiralty would, in its ordinary practice, always require, and what the Legislature of this country has now made absolutely necessary, with regard to British subjects, by the regulations of the statute law." This, no doubt was before the introduction of the transmission section, but the remark is applicable to all cases in which ships are transferred by purchase and sale, by whomsoever the sale is effected. It may be stated, in corroboration of the view of the case taken by their lordships, that upon a sale of a ship in execution of a judgment the sheriff passes the property by bill of sale and their Lordships understand that, although upon the sale of a ship by order of the High Court of Admiralty in a judgment *in rem*, the vessel becomes the property of the purchaser, it is the practice for the pur-

chaser to procure a bill of sale from the marshal or commissioner, in order to entitle him to be registered in accordance with the Merchant Shipping Act 1854. The above view of their Lordships renders it almost unnecessary to say a word as to the order to erase the names of the mortgagees from the register, except that it is clearly invalid; but it may be pointed out that the mortgagees were no parties to the proceedings for sale by licitation; that that proceeding was not a judgment *in rem*; that the mortgagees were not called upon by the rule *nisi* to show cause against it; and that the only consent on the part of the mortgagees to forego their rights against the ship, and to exercise their rights upon the sale price, was upon the hearing of the rule *nisi*. Such a consent was not an act which would have justified the Registrar in making an entry on the register under sect. 68 of the Act of 1854, that the mortgage had been discharged; still less did it render it obligatory upon him, or even authorise him, to erase the mortgages from the register, Such a proceeding, even if the mortgages had been discharged in the manner pointed out by the Act, would have been wholly unwarranted. There is no provision in the Acts which authorises the registrar to erase entries of mortgages upon their being discharged, and it would be in violation of the principle of the Registration Acts to erase any entries which appear on the face of the register. For the above reasons their Lordships will humbly advise Her Majesty to rescind the order above mentioned, and to order that the rule to show cause of the 13th March 1879 be discharged, with costs. The respondents must pay the costs of this appeal.

Solicitor for the appellant, the *Solicitor to the Treasury*.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by J. P. Aspinall, F. W. Raikes, and A. H. Bittleston, Esqrs., Barristers-at-Law.

Monday, March 6, 1882.

(Before Brett, Cotton, and Holker, L.JJ., assisted by Nautical Assessors.)

THE ODESSA.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damage—Collision—Thames Conservancy Rules—Vessels meeting.

Whether "two steam-vessels proceeding in opposite directions, the one up and the other down the river Thames, are approaching one another so as to involve risk of collision," within rule 22 of the Thames Conservancy Rules, is in all cases a question of fact for the court, and is not subject to the same interpretation as that given by Art. 15 of the Regulations for Preventing Collisions at Sea for vessels meeting end on or nearly end on.

When two steam-vessels are proceeding in the Thames in such directions that their respective courses if continued will bring them so near each other as to cause a risk of collision, rule 22 of the Thames Conservancy Rules is imperative and both vessels must so manœuvre as to pass port side to port side.

Semble, when two steam-vessels are proceeding one up and the other down the river, and have their green lights only in sight each to each, and bearing one point on each other's starboard bows at a distance of a quarter of a mile, they are approaching so as to involve risk of collision, and are both bound to port their helms to pass port side to port side.

Semble, if each had the other's green light three points on the starboard bow they would not be approaching so as to involve risk of collision.

Observations on the difference of the rules for the navigation of a river and those for preventing collisions at sea.

This was an appeal from a decision of Sir R. Phillimore, by which on the 7th April 1881 he had found the steamship *Murton* alone to blame for a collision which took place in Gravesend Reach of the river Thames on the 22nd Nov. 1880 between that vessel and the steamship *Odessa*.

The plaintiffs, the owners of the *Murton*, by their statement of claim alleged that the *Murton*, whilst coming down Gravesend Reach about 5 p.m. on the 22nd Nov., the wind being a light breeze from S.W., the weather hazy, and the tide first quarter ebb, was heading about E.S.E., and going about three knots through the water, and that the masthead and green light of a steamship, which proved to be the *Odessa*, and a white light on board her, used as a signal for the Custom-house boat, were seen at a distance of about a quarter of a mile, and bearing about one point on the starboard bow of the *Murton*, and that thereupon the helm of the *Murton* was starboarded a little, and the *Murton* proceeded so as to pass the *Odessa* starboard side to starboard side: but the *Odessa* as she came nearer shut in her green light and opened her red light, and caused immediate danger of collision. The helm of the *Murton* was put hard a-starboard, and her engines set on full speed ahead; but the *Odessa* with her stem struck the starboard quarter of the *Murton* and did her considerable damage.

The defendants traversed several of these allegations in the defence and counter-claimed for the damage they had sustained in the collision. At the hearing it appeared from the evidence of the plaintiffs' witnesses that the steam whistle of the *Murton* was not blown.

The rules referred to in the arguments and judgments were:

Rules and Bye-laws for the Regulation of the Navigation of the River Thames. Order in Council, 18th *March* 1880.

Bye-laws and Rules for the Regulation of the Navigation of the River between Yantlet Creek and Teddington Lock.

Rules concerning Lights.

4. The lights mentioned in the following rules and no others, shall be carried in all weathers from sunset to sunrise.

5. A steam-vessel when under way shall carry (*a*) On or before the foremast . . . . a bright white light . . . (*b*) On the starboard side a green light. . . . . (*c*) On the port side a red light. . . . . (*d*) The said green and red lights shall be fitted in such a manner as to prevent these lights from being seen across the bows.

Rules as to Speed and Mode of Navigation.

14. Every steam-vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, and shall stop and reverse if necessary.

Bye-Laws and Rules regulating the Navigation of the River between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek.

17. When two steam-vessels are in sight of one another and are approaching with risk of collision, the following steam signals shall be intimations of the course they intend to take: (*a*) One short blast of the steam whistle of about three seconds duration to mean, "I am directing my course to starboard, and intend to pass you port side to port side," the use of this signal shall be optional; (*b*) Two short blasts of the steam whistle, each of about three seconds duration to mean "I am directing my course to port and intend to pass you starboard side to starboard side. This latter signal shall not be used in the case provided by rule 22, when that rule can be obeyed; but it shall be compulsory to use this signal when a departure from that rule is necessary to avoid immediate danger.

Steering and Sailing Rules.

22. When two steam-vessels proceeding in opposite directions, the one up and the other down the river, are approaching one another so as to involve risk of collision, they shall pass one another port side to port side.

24. Steam-vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

Regulations for Preventing Collisions at Sea. Order in Council, 9th Jan. 1863.

Art. 13. If two ships under steam are meeting end on or nearly end on so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Order in Council, 30th July 1868.

The said two articles 11 and 13 respectively only apply to cases where ships are meeting end on or nearly end on in such a manner as to involve risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases in which the said two articles apply are where each of the two ships is end on or nearly end on to the other; in other words, to cases in which by day each ship sees the masts of the other in a line or nearly in a line with her own; and by night to cases in which each ship is in such a position as to see both the side lights of the other.

The said two articles do not apply by day to cases in which a ship sees another ahead crossing her own course, or by night to cases where the red light of one ship is opposed to the red light of the other; or where the green light of one ship is opposed to the green light of the other; or where a red light without a green light, or a green light without a red light, is seen ahead; or where both green and red lights are seen anywhere but ahead.

Regulations for Preventing Collisions at Sea. Order in Council, 14th Aug. 1879.

Art. 15 is the same as art. 13 of the regulations of 9th Jan. 1863, with the addition of the explanatory regulation of 30th July 1868, both of which are given above, with the exception that instead of in the earlier rule, "the helms of both shall be put to port," the expression used is "each shall alter her course to starboard."

Butt, Q.C. and *Clarkson*, Q.C. for the plaintiffs, owners of the *Murton*, after the close of their evidence, and on an intimation from the Court that the case had not been clearly made out.—It is customary, even if not compulsory, in the Thames for vessels to keep to the starboard side of the mid-channel, that is, for those coming up to keep to the north shore, and those going down to the south shore; in that case they will pass port side to port side. We are coming down to the south of mid-channel, and see a vessel coming up still more to the south. She is showing a special light not authorised by the regulations, but which we know indicates that she is signalling for a Custom-house officer, and they are stationed on the south shore. We see that vessel's green light on our starboard bow, and, if she had continued on her course, there could have been no collision; and therefore rule 22 does not apply. We starboarded our helm to give her more room, but there being no risk of collision, it was not necessary to give the sound signal prescribed by rule 17 (*b*); the collision was solely caused by the wrongful act of the *Odessa* in porting when the vessels were in a position of safety. If vessels with green lights open on the starboard bow, that is in a position of safety, green to green, are to port across each other's bows, to comply with rule 22, it will not prevent but cause collisions.

Webster, Q.C. and *Bucknill*, for defendants, owners of *Odessa*, elected not to call witnesses.—This is clearly a case of meeting ships within rule 22. It is immaterial whether they were on the south side or north side of the river; if they were approaching so as to cause risk of collision, each was bound to port. We did port; they starboarded. The fact that they thought it necessary to do something shows they thought there was some risk. Besides they gave no proper sound signal, as required by Art. 17 (*b*) of the Thames Conservancy Rules, to show that they intended to act otherwise than under rule 22.

Sir R. Phillimore.—I pronounce that this is a case in which the 22nd rule is applicable. Here are two steam-vessels proceeding in opposite directions, the one up and the other down the river, and approaching so as to involve risk of collision. They should have passed one another port side to port side, instead of which in this case the helm of the *Murton* was put a-starboard, and the intention on her part was to pass starboard side to starboard side. The whistle ought to have been used, but it was not used. On the whole, I am of opinion, and the Elder Brethren agree with me, that this is a case in which rule 22 is applicable. I think, therefore, that it is unnecessary to consider whether there was also a breach of rule 17. I find the *Murton* to be to blame for the collision, and I pronounce for the owners of the *Odessa* both in the action and on the counter-claim.

From this judgment the plaintiffs appealed.

March 6, 1882.—The appeal came on for hearing.

Butt, Q.C. and *Myburgh*, Q.C. for appellants.—The decision of the court below was clearly wrong. The case is clearly one of green light to green light, and therefore one in which there is no risk of collision if both keep their course. This rule of the Conservancy must be subject to the same construction as the similar rule for preventing collisions at sea; its language is only different to adapt it to the turns of a river; but here the collision was in a straight reach, and therefore it is subject to precisely the same construction as at sea. In consequence of a decision of Dr. Lushington that vessels were meeting when a green light of one was open on the starboard bow of the other (*The Cleopatra*, Swabey, 135), the original rule (13) of the regulations made in 1862, that when vessels were meeting "end on or nearly end on" each was to port, was explained by Order in Council of the 30th July 1868 to apply only when meeting "in such a manner as to involve risk of collision," which is the same expression as is used in the rule of the Conservancy, and that is further explained

by the same Order in Council to mean that it only applies . . . . by night to a case in which each ship is in a position to see both side lights of the other ship, which was not the case here. The same Order in Council further says expressly that the article does not apply, that is, that there is no risk of collision when by night "the green light of one ship is opposed to the green light of the other," which is precisely this case. There was therefore no obligation on the *Murton* to port her helm so as to pass the *Odessa* port side to port side, and to do so would be most dangerous. The fact that the starboard side rule for narrow channels contained in the New Regulations for Preventing Collisions at Sea is not expressly incorporated in the Conservancy rules shows that it is not intended that vessels should always pass port side to port side. There being no obligation to do so, and no risk of collision in not doing so, there was no harm in the *Murton, ex majore cautelâ*, starboarding a little, but that starboarding not being done to avoid a collision, or caused by danger of a collision, or in the words of the rule itself (17 *b*), "to avoid immediate danger," there was no obligation to use the sound signal. That there was no obligation to port with a green light open is further shown by the decision in *The Ericsson* (Swabey, 35), which, though a decision upon the repealed section (296) of the Merchant Shipping Act 1854, is applicable to this case of vessels meeting. That rule 22 in the Conservancy Rules is not always applicable to the cases of vessels meeting, one going up and the other down the river, is shown by the recent case of *The Libra* (4 Asp. Mar. L. C. 439; L. Rep. 1 P. Div. 139; 45 L. T. Rep. N. S. 161).

Webster, Q.C. and *Bucknill*, for the respondents, were not called on.

Brett, L.J.—It seems to me that in this case we must affirm the decision of the learned judge of the court below. I take that judgment to be, that the position of the vessels, even as given by the witnesses for the *Murton*, was in the opinion of the assessors below such, not that there must have been a collision if they proceeded in the courses they were then upon, but that there would have been risk of collision in this sense—that, if the vessels had kept on, they would have passed so closely to each other that any small obstruction in the river, or slight variation in their course, would have caused a collision. In other words, they were in such a position that, if they had continued their courses, there would have been reasonable risk of a collision. Now, it is said that the vessels were going on nearly parallel courses, and that they were a quarter of a mile off when they saw each other's green light. That is true. But how did each vessel see the green light of the other? Those on board the *Murton* saw the green light of the *Odessa*, a point on their starboard bow. That might be, although the vessels were not on exactly parallel courses; but if one vessel was only slightly pointing to the other the two vessels might have crossed one another's course. It is only on the supposition that both vessels would keep on parallel courses that they would pass each other without collision. Mr. Butt says that so long as green light was to green light there would be no danger of a collision; and he says, if we hold to the contrary, that will be making a hard and fast rule. On the contrary, I think that, if we adopted his theory, we should be making a hard and fast rule. Whether there is risk of collision must be a question of fact and skill, to be decided by the learned judge, with the assistance of assessors, on the evidence brought forward. If the vessels had been three or four points off, showing green light to green light, I would say that there was no risk of collision; but when you come to two points, I do not know exactly what the risk would be. But when you come to one point, it seems to me, as far as I can understand the matter—and I have heard it very often discussed, and evidence given on the point—that it is very difficult to show that there is not risk of collision. With three points there is hardly any risk, but even then it must depend on the circumstances of the case. Well, in the court below the judge, with the assistance of assessors, has come to the conclusion, as I gather from the judgment in the case, that there was risk of collision, and he adds: I am of opinion, and the Elder Brethren agree with me, that this is a case in which the 22nd rule of the Navigation Rules of the River Thames applies." I understand that they agreed upon this—that in fact, the vessels were in such a position that there was the risk of a collision. Our attention has been called to the sea rule, which would have applied in this case elsewhere than in the river Thames, and that the words "end on" which appeared in these rules are omitted from the 22nd rule of the Rules for Thames Navigation: but there is a good reason why the words "end on" are omitted from the Thames rules. The sea rules and those rules are naturally different. I think I know why this, the 22nd Thames rule, is different from the sea rule. The difference is owing to the considerations arising from the narrow width of the river Thames. It is very difficult for two vessels, one going up the river and the other going down, not to be nearly "end on." Therefore those words are not necessary, and vessels are supposed to keep so wide apart at sea that the sea rule would not apply to navigation in the river Thames. The whole question is one of fact; and the whole point to be decided in this case is, whether the vessels were in such a position when they sighted each other that there was a risk of collision. The moment that that question of fact is decided, in all circumstances the rule becomes absolute that the vessels must port their helms. In the present case the *Murton* starboarded her helm, and the other vessel, the *Odessa*, ported. That being so, I am of opinion that the decision of the court below must be affirmed.

Cotton, L.J.—I am of the same opinion. Mr Butt said that this 22nd rule had no application unless the vessels were "end on," as explained by the Order in Council of 1868. In my opinion it would be wrong to say that this rule had no application in this case. The facts of each particular case must be decided as they arise, whether in the river under the Thames Navigation Rules or at sea under the sea rules. When two vessels are proceeding in opposite directions so as to involve risk of collision, the 22nd rule of the Thames Rules must apply; but, whether the rule applies, all depends upon the question of fact. If there is a risk of collision, the rule applies; but it is a question of fact to be decided in each case. The bearing of each vessel, and her distance, must be carefully considered; and on these facts it must

be decided whether or not there was risk of collision. This is a question upon which the assessors can assist us, and I have asked them as to the risk of collision in the present case; and they have answered that there was risk of collision from the first. They hold that, if the two vessels had gone on in the course in which they were proceeding, the slightest accident might have brought about a collision. The *Murton* has not obeyed the rule to be adopted under such circumstances, and therefore she is to blame for the collision. The judgment of the court below must therefore be affirmed.

Holker, L.J.—I think this case falls under rule 22 of the Rules for Regulating Navigation on the River Thames, and I think it highly probable that the words "end on" were deliberately excluded from this rule. I concur in the judgment.

Brett, L.J.—I may add that I agree with what Mr. Butt has said on the question of a risk of collision at sea, and if the words "end on" were inserted in this rule, it would be subject to the same interpretation as the rule at sea; but whether there is a risk of collision on either a river or at sea, is a question which must be decided on the evidence. Each case is to be determined in the same way according to the facts brought to light as to the relative position of the vessels.

Appeal dismissed with costs.

Solicitors for the appellants, owners of the *Murton*, *Lowless* and *Co.*

Solicitors for the respondents, owners of the *Odessa*, *Pritchard* and *Sons.*

July 1, 2, *and Aug.* 5, 1881.

(Before Bramwell, Brett, and Cotton, L.JJ.)

Robertson *v.* The Amazon Tug and Lighterage Company.

Contract between master and shipowner—Specific ship—Implied warranty as to efficiency.

The plaintiff agreed to take a named steam-tug, towing six sailing barges, from Hull to the Brazils, paying and providing for the crew, and furnishing all necessary instruments. The defendants agreed to pay for these services 1020*l. After she had started the boilers and engines of the steam-tug in question turned out to be considerably out of repair, and in consequence the voyage occupied sixty days more than it would otherwise have done. The fact of the engines being out of repair was not known to either party at the time of the contract.*

Held (Bramwell, L.J. dissentiente), that there was no implied warranty by the defendants that the tug should be reasonably efficient for the purposes of the voyage,

Judgment of Lord Coleridge, C.J. reversed.

The plaintiff, a master mariner, brought this action against the defendant company for an alleged breach by them of a contract, the terms of which are expressed in the following document:

I, Robert Robertson, hereby agree to take steam-tug, towing six sailing barges, from Hull, and one small steamer from the Downs, the latter-named to assist when required, to Para, Brazils, providing and paying crew of officers, sailors, stokers, and trimmers (forty-one men all told), also provisions for all on board for seventy days, and finding nautical instruments and charts for the navigation of the above said steam-tug, steamer, and six barges, the company paying pilotage from Hull to sea; all surplus stores to be left on board to be taken over by, and to be the property of, the company. I hereby undertake to do all the above, and hold the company harmless in regard to the return of the above crew from Para, expenses for which shall be borne by me wholly from the date of the arrival of the vessels in Para, for the sum of 1020*l.* sterling, 100*l.* of which shall be payable to me on signing contract, and a further sum of 600*l.* sterling before leaving Hull, for which I shall give guarantee satisfactory to the company, the balance of 320*l.* sterling to be paid by the company's agent in Para, on their being satisfied that no claims exist against the company in regard to me, Captain Robertson, or my crew.

(Signed) Robert Robertson.

London, July 12, 1876.

The steam-tug supplied by the defendants under this contract was the *Villa Bella*, which had been named to the plaintiff at the time of the contract, and during the voyage it turned out that her boilers and engines were very much out of repair. In consequence the voyage took considerably longer than was contemplated by the plaintiff, and he brought this action to recover the loss that he had thereby incurred.

The action was tried by Lord Coleridge, C.J. without a jury, who gave judgment, upon further consideration, for the plaintiff, the amount of damages to be referred.

From this judgment the defendants now appealed.

Sir *Hardinge Giffard*, Q.C. and *Kenelm Digby* for the defendants.

Butt, Q.C. and *Edward Pollock* for the plaintiff.

Cur. adv. vult.

Aug. 5.—Bramwell, L.J.—I am of opinion that the judgment should be affirmed. We disposed on the hearing of that part of the case which relates to the *Galopin*, holding that in respect of it the plaintiff had a cause of action, if he could prove any damages resulting from the breach of contract in relation to that tug caused by its desertion from the enterprise. It remains to consider the question as to the larger tug. Now the plaintiff's complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough; nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed, because his engagement was with respect to specific things, and he took them for better or worse. It is admitted that this was so, and rightly admitted. For in the same way as it might be shown that, on the sale of a horse or carriage, a particular horse or carriage was meant, so might it be shown in this case that a specific and definite vessel and specific and definite barges were meant. The plaintiff's complaint was that he had agreed upon a lump sum to take this vessel, towing several lighters, to the Brazils, that it was important to him that the vessel and apparatus should be efficient, as the faster he went the more he gained, and the slower he went the less he gained or the more he lost. He proved as a fact that the boilers were out of order, that they were sufficient in themselves, but needed repairs, and that in consequence it took him much longer to perform his undertaking than it otherwise would have done. The defects, the want of repair, were obvious—obvious to anyone who had looked at or tried the boilers. The question is, if this gives a cause of

action. I am of opinion that it does. The contract of the defendants was to deliver to the plaintiff the tug and barges, with and in relation to which he was to perform a certain work, or bring about a certain result, for the profitable doing of which the efficiency of the tug was all important. The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing for another which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he undertakes for the condition being such that it can do what its means enables it to do. Thus, if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on, and that it should not have been excessively worked or used the day before. I am asked where I find this rule in our law; I frankly own I cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is, I think, in accordance with the analogous authorities. I am afraid that the nearest is the dictum of Lord Abinger in *Smith* v. *Marrable* (11 M. & W. 5). "No authorities were wanted," "the case is one which common sense alone enables us to decide." The subject is treated in Story on Bailments, sec. 383. And certainly according to what is said there, if this had been a case of letting to hire the defendants would be liable. But as Story says, speaking of the letter's obligations (sect. 392); "It is difficult to say (unreasonable as they are in a general sense) what is the exact extent to which they are recognised in the common law. In some respects the common law certainly differs." This is so. What Story mentions, however, does not effect the principle I contend for. I have referred to some of Story's authorities; I may also refer to Merlin, Répertoire, Bail, sect. 6. *Smith* v. *Marrable* (11 M. & W. 5); and *Wilson* v. *Finch Hatton* (36 L. T. Rep. N. S. 473; L. Rep. 2 Ex. Div. 336), are favourable to the plaintiff's contention. In the former case is Lord Abinger's reference to "common sense." But, as to these two cases, I am afraid "common sense" has differed much in different people, and it is certainly remarkable that in the latter case the Lord Chief Baron refers to the plaintiff as "a lady who generally resides in the country coming to town for the season, sending her carriage, horses, and servants," &c., and proceeds, "therefore it is abundantly clear that it was in contemplation of both parties that the house should be ready for her occupation." Even if both parties "contemplated" that, I do not know it follows that they "agreed." The cases of *Readhead* v. *Midland Railway Company* (16 L. T. Rep. N. S. 485; L. Rep. 2 Q. B. 412) and *Hyman* v. *Nye* (44 L. T. Rep. N. S. 919; L. Rep. 6 Q. B. Div. 685) do not help. They and similar cases show that where there is an undertaking to supply an article not specific, the article must be "as fit for the purpose for which it is hired as care and skill can make it." The article here was specific, but I think the same reasoning which leads to that conclusion shows that when the article is specific, it must be supplied in a state as fit for the purpose for which it is supplied, as care and skill can make it. It was asked in the course of the argument, whether the defendants would have complied with their agreement, had there been no rudder to the ship—if, as was suggested, a ship is not a ship without a rudder, or if some of its copper was off if it was a coppered ship, or if there was a large hole in the deck or no covering to the hatchways? I think it impossible to say that there was not a duty on the defendants to have the tug free from such defects, and consequently impossible to say that there would not be in such a case a breach of their implied agreement. So I think there is now, and that the judgment must be affirmed.

Brett, L.J.—I am sorry that in this case I cannot agree with the judgment of Bramwell, L.J. The case was tried before Lord Coleridge without a jury, and Lord Coleridge was of opinion that, under the circumstances, there was an implied warranty that the larger tug was reasonably fit for the purposes for which it was to be used. The contract between the plaintiff and defendants was in writing, and the only parol evidence which was admissible to my mind for the purpose of construing the contract was evidence to show what was the subject-matter of the contract. That evidence showed that the defendants were the owners of the large tug the *Villa Bella* and of the smaller vessel the *Galopin*, and that they were desirous that these tugs should proceed to the Brazils with certain barges. The larger vessel, the *Villa Bella*, was named to the plaintiff at the time of the contract, and, although I do not think it is material, the plaintiff had an opportunity of seeing it. That at once makes the contract a contract with regard to that specific vessel. Now the plaintiff, being a skilled mariner and master, undertook by this contract to take the command of the expedition to the Brazils, and to conduct the large tug, the *Villa Bella*, and the barges across the sea. He was to be supplied, of course, with the means of working the large tug and also the smaller vessel, but he undertook amongst other things to provision the crews, and further he undertook to conduct this expedition for a fixed sum. It therefore was most material to him to calculate what would be the time in which he should in all probability perform the voyage. The larger tug, the *Villa Bella*, at the time when the contract was made, had been kept during the winter in a state which is not infrequent, that is to say, sunk in the water, which may not be so bad for the vessel itself, but it certainly is very deleterious to the engines. She was, in fact, a vessel with engines considerably damaged, but she was the vessel which the plaintiff undertook to conduct across the Atlantic. I agree with my Lord that there is an analogy, and a somewhat close one, between this case and the case of a person hiring some chattel for the purpose of using it. I think it would be true to say, as in the case he puts of the horse, that where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the latter that he will, in the meantime, keep the thing, as I should say, in repair, that is, he will not, by want of reasonable care after the contract is made, allow it to become worse than it was at the time the contract was made. But with great deference to him, I think that the facts of this case do not raise the point upon which his judgment rests. The *Villa Bella* was a vessel with damaged engines at the time the contract was made, it was that vessel with these engines, such as they were, that the plaintiff undertook to conduct across

the Atlantic. Now I think there would be an implied contract on the part of the defendants that they would not, by want of reasonable care, allow that vessel with its damaged engines to get more out of repair at the time the voyage was to commence than it was at the time that the contract was made. I think they were bound by an implied contract to take all reasonable care to keep the vessel as good and as efficient for the work it was to do as it was at the time the contract was made. But it would be to say that they were bound to make it better than it was at the time of the contract, if it is to be said that they were bound to hand it over to the plaintiff in a state reasonably fit for the purpose of the work it was to do. Now, as I understand my Lord, he would not imply such a contract as that, but if he would, I must say that, with all deference, I cannot agree to it. When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made, and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made. Therefore, it seems to me that the judgment of my Lord really does, I believe, come to what was the opinion of Lord Coleridge, although in words he negatives it. It seems to me that he holds that the defendants were bound to supply this large tug in a condition reasonably fit for the purpose for which the contract was made, and the breach upon which he relies really is that it was not so fit, whereas it seems to me that there was no such implied contract. I wish to put my view as plainly as I can. If there had been evidence in this case that, after the contract was made, the machinery, from want of reasonable care by the defendants, had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract, for which the defendant would have been liable. But I find no such evidence. The only misfortune about the tug was that the machinery at the time the contract was made was in such a condition that the vessel was not reasonably fit for the purpose of taking barges across the Atlantic. Therefore, the misfortune which happened was the result of a risk which was run by the plaintiff, and of which he cannot complain, and consequently he has no cause of action as regards the *Villa Bella*. The plaintiff is thus reduced in order to maintain his action, to show that he suffered damage by the desertion of the *Galopin*. He is entitled to nominal damages in respect of such desertion, and, if he can prove that he suffered any substantial damage by reason of it, then the nominal damages will be increased accordingly.

Cotton, L.J.—This is an action for breaches of a contract, and the breaches related to two matters. One of them related to the smaller vessel, the *Galopin*, and that we disposed of at the time the case was argued, and we did so on the ground that on the fair construction of the written contract there was a contract on the part of the defendants that the smaller steamer, which was not named, the *Galopin*, should assist when required by the plaintiffs, and that she deserted the expedition, and that there was a breach as to that part of the contract. Our judgment was reserved as to that part of the plaintiff's claim which sought to recover damages for loss sustained by the inefficiency of the *Villa Bella*. This inefficiency was attributed to the fact that the boilers of the *Villa Bella* were not sufficiently powerful for the engines, and principally to the fact that the boilers were in a bad condition, in consequence of what had happened to the tug before she became the property of the defendants. The defendants were not aware of these defects, and the plaintiff cannot recover on the ground of false representation. He must recover, if at all, on the ground of breach of warranty. The contract does not contain in express terms any warranty, and there is some uncertainty as to the form of the warranty on which the plaintiff relies. It must be either, as urged in argument, and held by Lord Coleridge, that the *Villa Bella* was a vessel reasonably fit for the service to be performed, or, as I understand Bramwell, L.J. to hold, the *Villa Bella* and her engines were in a reasonable state of repair, and otherwise in a condition fit for the service, so far as that vessel and her engines could be so. The plaintiff tendered evidence to show that there was such a contract between the parties. But parol evidence is not admissible to construe the contract; and, even if in such action it would be open to the plaintiff to reform the contract, the evidence would not establish what is essential for such a case, viz., that both parties agreed to a contract not expressed in the written document. But evidence is admissible to show what the facts were with reference to which the parties contracted, and thus to enable the court to apply the contract. The evidence showed that at the time of the contract the defendants were proposing to send out the *Villa Bella*, and that this was known to the plaintiff. The contract must therefore be dealt with as one made with reference to an ascertained steam vessel. Though the contract contains no warranty in terms, the question remains whether there are in it expressions from which, as a matter of construction, any such warranty as that relied on by the plaintiff can be inferred. In my opinion, this is not the case. The question remains, does the contract put the plaintiff and defendants into any relation from the existence of which the law, in the absence of any actual contract, implies such a warranty as is relied on by the plaintiff? In my opinion, it does not. The plaintiff was to be master of the *Villa Bella*, but the law does not, as against the owner, imply in favour of a captain or master any warranty of the seaworthiness or efficiency of the vessel: (*Couch* v. *Steel*, 3 E. & B. 402.) Here, however, the plaintiff is more than master. It has been suggested that plaintiff is in the same position as the hirer of an ascertained chattel, and the defendants in the same position as the person who lets the chattel for hire. There is at least a doubt what warranty the law implies from the relation of hirer and letter to hire of an ascertained chattel. But, however this may be, in my opinion the relation of the parties here is different. The plaintiff here contracts with the defendants for a sum to be paid by them to take a vessel and barges to South America, with liberty to use the vessel as a tug. I say with liberty, for it can hardly be said that it would have been a breach

of contract on his part not to use the motive power of the tug, but to tow both the *Villa Bella* and the barges to their destination. If the vessel were not at the time of the contract ascertained and known to both parties, probably the contract would imply such a warranty as is relied on by the plaintiff. But a contract made with reference to a known vessel, in my opinion, stands in a very different position. In such a case, in the absence of actual stipulation, the contractor must, in my opinion, be considered as having agreed to take the risk of the greater or less efficiency of the chattel about which he contracts. He has to determine what price he will ask for the service or work which he contracts to render or to do. He may examine the chattel and satisfy himself of its condition and efficiency. If he does not, and suffers from his neglect to take this precaution, he cannot, in my opinion, make the owner liable. He must, in my opinion, be taken to have fixed the price so as to cover the risk arising from the condition of the instrument which he might have examined if he had thought fit so to do. It may well be that, where parties enter into such a contract as that which exists in the present case, there is an implied contract that the owner of the chattel will not after the agreement, and while the chattel remains in his possession, use or treat it in any way which will render it unfit for the service which has to be performed, and that he will take such care of it as is reasonable, having regard to the purpose for which it is under the contract to be used. But, in the present case, the inefficiency of the *Villa Bella* arose not from any improper use of the vessel by the defendants, or any neglect on their part to take care of it after this contract, but from defects which, though unknown to the plaintiff and defendants, existed at the date of the contract. The cases of *Smith* v. *Marrable* (*ubi sup.*), and *Wilson* v. *Finch Hatton* (*ubi sup.*), or at least the judgments in those cases, have been relied on in support of the plaintiff's case. Each of those cases arose on a contract of hiring, and in each the hirer was defending himself against a claim for damages in respect of a refusal on his part to perform his contract of hiring, while in this case the plaintiff who is (in my opinion, erroneously) said to be in the position of hirer, is suing for damages. In those cases, if there was an implied condition that the thing, a furnished house, was fit for the purpose for which it was let, by reading into the contract to take the house "if fit for habitation," the defendant was excused. Here the plaintiff must establish that there was a warranty to that effect. In my opinion the plaintiff cannot establish that there was such a warranty as that on which he must rely, and the defendants are, as regards this part of the claim, entitled to have the judgment reversed.

Judgment reversed.

Solicitors for plaintiff, *Lumley* and *Lumley*.

Solicitors for defendants, *Ashurst, Morris, Crisp*, and *Co.*

Thursday, July 7, 1881.

(Before Brett, Cotton, and Holker, L.JJ. and Nautical Assessors.)

The Farnley Hall.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Salvage—Amount—Apportionment—Deviation—Discretion of judge—Circumstances under which Court of Appeal will interfere—Statutory signal of distress.

The Court of Appeal will alter an award of salvage made by the court below, where there is reason to believe that the court below has not taken into consideration the circumstance that rendering a salvage service to property alone constitutes a deviation in point of law, however small the deviation may be in point of fact.

In a service mainly rendered by the steam power of the salving ship, and which had occasioned a deviation in point of law, and in rendering which the crew are exposed to some peril, an apportionment of two-thirds to the shipowner and one-third to the master and crew altered to five-ninths to the shipowners and four-ninths to the master and crew, and the total award increased from 600l. to 900l.; owners' share increased from 400l. to 500l.; master's share increased from 80l. to 100l., crew's share increased from 120l. to 300l.

This was an appeal of the plaintiffs from a decision of Sir Robert Phillimore assisted by Elder Brethren of the Trinity House, by which, on the 28th July 1881, he had awarded the sum of 600*l.* for the salvage services rendered by the s.s. *Ariel* and her crew to the s.s. *Farnley Hall*. The plaintiffs were the owners, master, and crew of the s.s. *Ariel*, which was a vessel of 1108 tons gross registered tonnage, with engines of 550 effective horse power, and of the value of 13,000*l.* Her crew consisted of the master, first and second mates, first, second, and third engineers, and seventeen hands, including two lads. The *Farnley Hall* was a screw steamship of 941 tons register, and of the value of 12,000*l.*

On the 19th Nov. 1880 the salving vessel, the *Ariel*, which was under a time charter, and laden with a cargo of pig-iron and coal, on a voyage from Troon in Scotland to Savona in Italy, suffered some damage to her engines and boats in a gale of wind.

About noon on that day she observed the *Farnley Hall* near the island of Porquerollas on the south coast of France. The *Farnley Hall* had a signal flying, consisting of three flags, which meant "want assistance;" the signal not being urgent the *Ariel* continued on her voyage, when the *Farnley Hall* hoisted a signal, consisting of two flags, N.C., all two-flag signals being, by the International Code, urgent signals, and which means "In distress, want assistance," and which signal is especially provided as a signal of distress by the Merchant Shipping Act 1873, sect. 18 (*a*).

(*a*) *Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85) 18.—The signals specified in the first schedule to this Act shall be deemed to be signals of distress.

Any master of a vessel who uses or displays, or causes or permits any person under his authority to use or display, any of the said signals, except in the case of a vessel being in distress, shall be liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of such signal having been supposed to be a signal of distress, and such compensa-

Thereupon the *Ariel* altered her course and went to the *Farnley Hall*.

The *Farnley Hall* was found to be broken down, though her engineers were engaged in repairing the damage, and it was alleged she could have been able to steam a little in some hours time, and did in fact succeed in turning the engines before the *Ariel* began to tow. The wind and sea were high, but she was at a distance from the shore, variously stated at from one to four miles. It was also disputed whether the direction of the wind was such as to drive the *Farnley Hall* towards the shore or not.

The boat of the *Farnley Hall* was used to bring the hawsers from one ship to the other. The following agreement was entered into by the masters of the ships:

S.S. *Farnley Hall*, 19th Nov. 1880:—The s.s. *Farnley Hall* having become totally disabled through the breaking of the thrust bearing and forward coupling bolts of main shafting four miles off Porquerollas Island, thereby placing the steamer in a dangerous position, with a S.W. gale, and showing urgent signals requiring assistance, was fallen in with by the s.s. *Ariel*, in a heavy sea, at noon on the 19th Nov, 1880, it was agreed by Capt. Armstrong, of s.s. *Ariel*, that he should take hold of the *Farnley Hall* on the following conditions, *i.e.*: 100*l.* to be paid to the owners of s.s. *Ariel* for the *bonâ fide*, attempt to tow *Farnley Hall* to Savona, and the whole award for the service rendered to be settled by the respective owners. (Signed) N. Lowther, Master s.s. *Farnley Hall*. To the owners of s.s. *Farnley Hall*.

Please settle the claim as per agreement on other side. —N. Lowther, Master of s.s. *Farnley Hall*. Robert Irvine and Co.

The case came on for hearing before Sir R. Phillimore and Elder Brethren of the Trinity House on the 27th July 1881.

Dr. *W. G. F. Phillimore* and *Verney* for plaintiffs, owners, master, and crew of the *Ariel*.

Butt, Q.C. and *Myburgh* for defendants, owners of the *Farnley Hall*.

Sir R. Phillimore.—This is a meritorious case of salvage, in which I have had the advantage of consulting with the Elder Brethren of the Trinity House upon the various questions which arose with respect to the damage done to the ship to which the services were rendered. The services began on the 9th Nov. 1880. The salving vessel was the *Ariel*, an iron screw steamship of 1180 tons gross, and of the value of 13,000*l.* The vessel to which the services were rendered was also a screw steamship called the *Farnley Hall*, of something less than 1000 tons, and of the value of 12,000*l.* She was in ballast, and therefore there is no question of cargo or freight. On the 19th Nov. the *Ariel*, which was bound with a cargo of coals froom Troon in Scotland to Savona in Italy, received considerable injuries to herself. About 1 a.m. of that day there was a heavy gale and high sea, and the sea struck the starboard side of the deck-house and broke in the doors over the engine-room and stokehole, flooding the stoke-hole. About 4 a.m., the gale still continuing, the *Ariel* was running under reefed foresail and topsail, and at 8 a.m. it was found that most of the steam-pipe covers and beds were washed away from the deck. About noon of that day the *Ariel* sighted the *Farnley Hall* near the island of Porquerollas, and, after going round her once or twice, I think, took her in tow. The *Farnley Hall* had urgent signals applying for assistance. The first thing the court has to consider is the danger of the position in which the *Farnley Hall* was when the *Ariel* came up to her. I have consulted with the Elder Brethren upon that point especially, and they are of opinion that the *Farnley Hall* was in a position of very great danger. Having regard to the nature of the coast, and to the fact that the wind was on shore and the island within a mile under her lee, it is evident that she was in a position of great peril, and that from this peril she was rescued by the *Ariel*. The mischief which had occurred to the *Farnley Hall* is stated very clearly both in the agreement set out in the statement of claim and in a letter from her master to her owners, to which I will just refer. In the letter the master writes: "On Wednesday, the 18th, I left Savona bound to Palmores; weather fine, strong sea. All went well until 11.30 p.m. on Thursday night, when off Porquerollas light—it is about eight or nine miles—that being the entrance to the Gulf of Lyons, the sea very heavy and the wind on the land, the engines were running heavy; the coupling bolts broke at the fore end of the shaft, causing the thrust block to break right in two totally disabled the ship. We drifted to within a mile of the land. At daylight we hoisted signals for assistance. About 2 p.m. of the 19th (Friday) we saw a steamboat, it bore down to us. The captain came on board. We were then four or five miles from the land. He told me he was bound to Savona, and would tow us there. I inclose the following agreement made betwixt us." There is not the least suggestion in the letter that the agreement was not fairly and honestly made. The agreement in question was in the following terms: [His Lordship here read the agreement set out above, and continued:] Another circumstance has to be considered in this case, which is the danger incurred by the two ships and by the men of the *Ariel* in getting the ropes on board, which the Elder Brethren estimate as a service of great value, and consider that a very considerable danger was incurred in performing that necessary operation. The *Farnley Hall* was towed, it is true, to the port of Savona, to which the *Ariel* was bound, and therefore the argument for increasing the remuneration which arises in some cases does not arise in this. The salving vessel did not go out of her way, but went directly on her own course to the port to which she was destined. The services lasted altogether about twenty-eight hours, and the distance the *Farnley Hall* was towed was somewhere about 120 or 130 nautical miles. I have already said that the position from which the *Farnley Hall* was rescued was one of danger, and I should add to that that it appears to us that, but for the aid of the *Ariel*, the *Farnley Hall* would have had very great difficulty indeed in avoiding running on the rocks, or some part of the lee shore, and although she might have escaped, the chances were very much against her, having regard to the state in which her propeller was, and her impaired means of locomotion. Taking all these things into con-

tion may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable.

Schedule I.—Signals of Distress: In the daytime. The following signals, numbered 1, 2, and 3, when used together or separately, shall be deemed to be signals of distress in the daytime.

2. The International Code signal of distress indicated by N C

sideration, and that there is no tender, and that the value of the *Farnley Hall* is 12,000*l.*, I shall make what is, in my opinion, and in that of the Elder Brethren, a fair award if I pronounce 600*l.* to be the amount of remuneration in this case. I think the proper apportionment to make will be to give 400*l.* to the owners, 80*l.* to the master, and the rest to the crew.

From the award the plaintiffs appealed on the ground of its insufficiency.

March 7.—The appeal came on for hearing before Brett, Cotton, and Holker, L.JJ., assisted by two nautical assessors.

Dr. *W. G. F. Phillimore* and *Verney* for the appellants.—The award is insufficient. Appeals in salvage cases were, it is true, discouraged by the Privy Council, but that was because of the great expense attending them; that reason no longer exists, as appeals to this court are not attended with the same expense as appeals to the Privy Council. But even the Privy Council would interfere where they considered the award either too little by one-third:

The Scindia, L. Rep. 1 P. C. 241; 2 Mar. Law Cas. O. S. 232;
The True Blue, L. Rep. 1 P. C. 250;

or too much by two-fifths:

The Amerique, 2 Asp. Mar. Law Cas. 460; 31 L. T. Rep. N. S. 854; L. Rep. 6 P. C. 468;

and we say that this award ought to be increased by more than one-third. The learned judge based his award partly on the ground that there had been no deviation; but that is not the case, as the fact of delaying the voyage or going out of the way to save property when such a course was not necessary to save life, or even if necessary to save life if such a course was persevered in to save property when there had ceased to be danger to life, is such a deviation as to render all policies void, and to defeat the usual exceptions in contracts of carriage, and therefore the judge should have taken that fact into consideration:

Scaramanga v. *Stamp*, 4 Asp. Mar. Law Cas. 161, 295; 42 L. T. Rep. N. S. 840; 5 C. P. Div. 295.

[Brett, L.J.—The judgment finds as a fact that "the men of the *Ariel* in getting the ropes on board" performed "a service of great value," and "that a very considerable danger was incurred in performing" it, and he gives 120*l.* to be divided amongst twenty-two of them, which, considering that several are officers and would take larger shares, would leave scarcely 4*l.* apiece for the seamen.] That is true, and it is an insufficient sum considering that the fact of the *Ariel* in her damaged condition being taken so near a dangerous coast really imperilled the lives of all on board her; but, if the court increases the award to the seamen, it will increase the award in a similar proportion to the ship. In all these cases where the principal salvor (so to speak) is the steam power of the ship, without which the salved vessel could not have been rescued, and which also brought her safely into a port where she could be repaired, the court is in the habit of apportioning the sum awarded, two-thirds to the ship (that is, to the owners) and one-third to the master and crew:

The Cleopatra, L. Rep. 3 P. Div. 145;
The Castlewood, 42 L. T. Rep. N.S. 702; 4 Asp. Mar. Law Cas. 278.

Butt, Q.C. and *Myburgh*, Q.C. for respondents.—The award in this case is, to say the least, liberal. The defendants are not concerned with the apportionment. If the court thinks the crew have not got a sufficient share, it can direct a different division, but the total amount is quite enough. There was no danger to the *Ariel* in performing the service, and the danger, if any, to which the *Farnley Hall* was exposed was already passed when the *Ariel* took her in tow. The judgment is incorrect in finding she was within a mile of the shore. She had been perhaps within a mile, but at the time she was taken in tow she was four or five miles off the land. It is so stated in the captain's letter, which letter the learned judge adopts as a correct statement of fact in his judgment. Six hundred pounds would be a liberal reward for the services in any event, but here a smaller award would have been quite sufficient, seeing that the salvor has by agreement altered the nature of the service; a salvage service proper is carried out on the principle "no cure no pay," but here the salvor was to get 100*l.* in any event. No doubt the rendering of that service was technically a deviation, but that is not the question the learned judge was dealing with. He means that there was little loss of time and no great extra expenditure of coals and stores as there would have been if the vessel had been taken to a port out of the route of the salving vessel, *e.g.*, if she had turned back and taken her to Toulon or Marseilles, which no doubt would have been more convenient for the salved vessel, and for which convenience she would have paid more; besides it is well known that steamers' bills of lading and charter-parties, if not policies of insurance, almost invariably at the present time contain a clause giving "liberty to assist and tow vessels in distress," and there is no evidence that the charter-party and bills of lading of the *Ariel* did not contain this usual provision. If the salvors proposed to enhance their claim on the ground of such technical deviation, they should have given evidence of some facts from which it could be shown that they incurred any and what risk in law. There is certainly nothing so inequitable as to "shock the conscience of the court:"

The Carrier Dove, 2 Moore P. C. Cases, N. S. 254.

Dr. *W. G. F. Phillimore* in reply.

Brett, L.J.—In this case we labour under the great difficulty of having to interfere with the action of the court below in awarding compensation for salvage, because it is against our desire to interfere in such cases, and we do not wish to deviate from a rule which we have laid down. The circumstances of this case, however, seem to us somewhat peculiar. The steamship *Farnley Hall* in this case was in great danger of becoming a wreck upon the rocks, because she had just suffered from the storm of the night, which might have returned at any moment. If the help of the *Ariel* had not come to hand, she would have been, in my opinion, in great danger of going on the island. I am of that opinion, notwithstanding the argument of Mr. Butt to the contrary. Another steamer, the *Ariel*, however, came to her assistance, and that steamer had a cargo on board which was certainly not perishable; but if there had been any delay in its delivery or loss of

it, the owners of the *Ariel* would have been liable. It was a disagreeable cargo—one of pig iron and coals. The *Ariel*, seeing the signals of distress, put herself into a dangerous position. She had to wait for hours before she could get the ropes from the *Farnley Hall* on board. The danger then was certainly over; but during the time of this operation the *Ariel* was in great danger. All the time the *Farnley Hall* was in danger of drifting on islands and on a lee shore, and at the time was in an almost helpless condition. In fact, for a time, both the ships were in a dangerous position. There were twenty-three men on board the *Ariel*, and if only 200*l.* was to be distributed among the captain, the first and second mates, the chief engineer and the second engineer, and the crew, it would go but a short way. To the crew—as distinguished from the officers—who did the greater part of the work, the allowance of the court below would not amount to 4*l.* per man. It has been said that the *Ariel* did not go out of her course to tow the *Farnley Hall* into Savona, in Italy, as she was going there; but she was not bound to go out of her way and expose herself to danger, and by deviating from her course she was causing delay and danger to her cargo. It took her much longer to complete the voyage than if she had not rendered assistance to the *Farnley Hall*. If this vessel had met with another storm, which was not unlikely, she might have become a total wreck. We think that the learned judge in the court below has not given due consideration to the circumstances of the case, and to the danger to the cargo of the *Ariel* which was risked. This is a case which does not come within the ordinary rules, and therefore we must consider the case as it presents itself. We think that the salvage in this case ought to be increased from 600*l.* to 900*l.*, and we desire to apportion it as follows: 500*l.* to the owners of the *Ariel*, 100*l.* to the captain, and 300*l.* among the crew, who did the major portion of the manual labour in connection with the towing of the *Farnley Hall* off the shore.

COTTON and HOLKER, L.JJ. concurred.

Solicitors for appellants, owners, master, and crew of the *Ariel*, *E. Flux* and *Leadbitter*, agents for *Laws. Glynn*, and *Ryott*.

Solicitors for respondents, owners of *Farnley Hall*, *Pritchard* and *Sons*, agents for *Turnbull* and *Tilly*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

Nov. 4, 5, *and* 9, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE CACHAPOOL.

Collision — Launch — Reasonable notice — Necessary precautions—River Mersey—Compulsory pilotage—"Proceeding to sea"—Mersey Docks Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *ss.* 138, 139.

Where a launch was about to take place in the river Mersey at high water, and the usual general notice had been given, and the launch was dressed with flags and all usual precautions taken, and in due time before the launch a tug proceeded to a vessel lying at anchor off the place where the launch was about to take place and warned her thereof, and subsequently in sufficient time offered to tow her out of the way; but, owing to the conduct of those on board the vessel at anchor, whose pilot was aware before she anchored that the launch was about to take place, that vessel was still in the way, when the launch, which was delayed as long as it was prudent to do so, took place, and the launch struck the vessel and sank her: it was held that the owners of the launch had taken every possible precaution and were not to blame for the collision, and that the vessel at anchor was alone to blame.

Semble, a vessel at anchor in the track of a vessel about to be launched is bound to get out of the way of the launch if she has had warning of the launch in due time and facilities for moving out of the way in time (such as a tug offering and being ready to tow her), are afforded by those in charge of the launch.

When a vessel leaves a dock in the Mersey on her voyage to sea and receives slight injuries to a yard-arm, necessitating repairs, and in consequence is anchored under the directions of the pilot in the river, intending to go to sea on the next day, the pilot remaining in charge, but on the next morning before resuming her voyage and whilst still at anchor she gets into collision and does damage to another vessel, she is not "proceeding to sea" within the meaning of the 139*th section of the Mersey Docks Act Consolidation Act* 1858 (21 *&* 22 *Vict. c. xcii.*), *and the pilot is not in charge by compulsion of law.*

THIS was an action *in rem* instituted by the owners of the barque or vessel *Gladstone*, the owners of her cargo, and her master and crew, against the screw steamship *Cachapool*, and against the owners thereof intervening, to recover damages in respect of injuries sustained by the *Gladstone* in a collision which occurred between that vessel and the *Cachapool* about 10.30 a.m. on the 9th Aug. 1881 in the river Mersey.

The plaintiffs' statement of claim was as follows:

1. The plaintiffs are the owners, master, and crew of the late barque or vessel *Gladstone*.

2. On the 8th Aug. 1881 the *Gladstone*, which was a barque of 334 tons register belonging to the port of South Shields, left the Salthouse Dock, Liverpool, manned by a crew of eleven hands all told, and in charge of a duly licensed pilot, for the port of Liverpool. The *Gladstone* was laden with a cargo of salt in bulk, and was bound for Viborg in Russia.

3. Shortly after leaving the said dock, and whilst in the course of proceeding to sea on the said voyage, the said barque was, by direction of the said pilot, brought to an anchor in the river Mersey about abreast of Tranmere Ferry landing stage.

4. At about 10 a.m. on the 9th of the said month the weather was fine and clear with a fresh breeze from about north-west by north, and the tide was last quarter flood and of the force of about four knots, and the *Gladstone* was lying at anchor in the same place, when a tug called the *Hercules* came to the *Gladstone* and told those on board her that a launch was going to take place from a building yard on the Cheshire side of the river, and asked the pilot of the *Gladstone* if the said ship was not in the way. The *Gladstone* could not then be moved without assistance, and those on board inquired if the *Hercules* had authority to and would help to move her.

5. The *Hercules*, which was in attendance at the launch, and employed by the defendants and their servants, who had the conduct thereof, declined at that time to render any assistance in moving the *Gladstone*, and went away.

6. Shortly afterwards the *Hercules* returned to the *Gladstone*, and at the request and by the direction of those on board the said tug the tow rope of the *Gladstone* was passed on board the *Hercules*, which commenced to tow the barque, and the helm of the *Gladstone* was ported to sheer her out into the river, but the *Hercules* getting out of position and nearly carrying away the *Gladstone's* head gear, slipped the hawser.

7. The hawser was then again passed on board the *Hercules*, which again began to tow; but before the *Hercules* had towed the *Gladstone* ahead of her anchor the launch, which proved to be the *Cachapool*, belonging to the defendants, left the ways and approached the *Gladstone* at great speed, and caused risk of collision, and, notwithstanding orders were given to veer away the *Gladstone's* chain, the *Cachapool* with her stern struck the *Gladstone* on the port side, doing so much damage that the *Gladstone* sank almost immediately, and, with her cargo, and the effects of her master and crew, became a total loss.

8. Those in charge of the *Cachapool* and of the said launching operations improperly neglected to keep a good look-out.

9. The *Cachapool* was improperly launched, having regard to the position of the *Gladstone* prior to and at the time of the said launch, and the state of the wind and tide.

10. Those in charge of the *Cachapool* and of the said launching operations improperly neglected to supply the *Cachapool* with efficient anchors and cables, and improperly neglected to take proper measures and precautions for checking, controlling, arresting, or directing the course and speed of the *Cachapool*, and improperly neglected before the collision to bring her up or to keep her clear of the *Gladstone*.

11. Those in charge of the *Cachapool* and of the said launching operations improperly neglected to give due notice of the said launch taking place, and improperly neglected to take due and proper precautions for the safety of vessels lawfully in the neighbourhood of the said launch.

12. The said collision and the damages consequent thereon, were caused by the neglect, or default, or want of proper care and skill on the part of those having charge of the *Cachapool*, and of the said operations for launching her, and were not caused or contributed to by those on board the *Gladstone*.

In answer to this, a statement of defence was filed by the owners of the *Cachapool* in the following terms:

1. The defendants admit that the barque *Gladstone* left the Salthouse Dock, Liverpool, on the 8th Aug. 1881, and that she brought up to an anchor in the river Mersey about abreast of the Tranmere Ferry landing stage on the same day.

2. About 7.5 a.m. on the 9th Aug. 1881, 10 a.m. on that day being the time appointed for the launch in the statement of claim referred to, those in charge of the launch sent the tug *Hercules* to warn those in charge of the barque *Gladstone* and of other vessels to move their ships, as they were in the way of the proposed launch. The *Hercules* gave such warning first to the *Gladstone*, but those in charge of the *Gladstone* refused at that time to move. The *Hercules* went on to the other vessels, which moved, and then came back to the *Gladstone* and advised her to sheer to the eastward, so as to drag her anchor and go to the southward with the tide and get clear of the launch. At this time the tide was running flood. Those on board the *Gladstone*, however, refused and neglected to do anything.

3. Later on the *Hercules* returned to the *Gladstone* and offered to tow her out of danger, and asked for a hawser. After some delay those on board the *Gladstone* passed a hawser on to the *Hercules*, which at once began towing her out of the way to the north and east, but in consequence of those on board the *Gladstone* neglecting to assist by heaving on their anchor the *Hercules* got out of position and had to slip the hawser.

4. The *Hercules* went back to the *Gladstone* to get her hawser again, but those on board the *Gladstone* then for a long time refused to give the *Hercules* a hawser. When they did give the *Hercules* a hawser again, she at once went ahead, towing to the north and east, and the *Gladstone* was moved ahead by her.

5. When those in charge of the launch saw the *Gladstone* being thus towed ahead it was considerably past the time appointed for the launch, which could not with safety to life and property be further delayed, and the launch was let go from the ways. Very shortly afterwards it appeared that the *Gladstone* had been brought up by her chain, and that the launch was moving in the direction of the *Gladstone*. The anchor of the launch was then let go immediately, the *Hercules* towed away at the *Gladstone* and got her ahead of her anchor, and the *Gladstone* was hailed to pay out chain. Those on board the *Gladstone* neglected to pay out chain, and the anchor of the launch dragged and she with her stern struck the port side of the *Gladstone* about the main rigging, and suffered considerable damage. This was about 10.30 a.m. The *Gladstone* unfortunately sank in a few minutes.

6. Save as aforesaid, the defendants deny the several allegations in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the statement of claim. Those in paragraphs 8, 9, 10, 11, and 12 they deny altogether.

7. The date of the said launch had been fixed for several days, and the defendants had given all the usual and necessary notices of the same. The launch and the *Hercules* and other vessels in attendance were dressed with flags. Those in charge of the *Gladstone* knew, or had full notice and means of knowing, of the intended launch, and that it could not with safety be postponed, and had ample time to move her or cause or suffer her to be moved out of the way, but they neglected and refused to do so until it was too late.

8. Those on board the *Gladstone* improperly neglected to move her out of the way, and improperly refused and delayed to take the assistance offered by the *Hercules*.

9. Those on board the *Gladstone* neglected to get in chain on her anchor so as to suffer her to drag her anchor, and when she was being towed, and it was too late to get in chain for this purpose, they neglected to pay out chain and to take any steps so as to enable the *Hercules* to tow her further ahead of her anchor and into a position of safety.

10. The collision was caused by some or all of the matters and things stated in the 7th, 8th, and 9th paragraphs thereof or otherwise by the negligence of the plaintiffs or of those on board the *Gladstone*.

11. The collision was not caused or contributed to by the defendants, or by any of those on board the *Cachapool*.

And the defendants repeated the allegations contained in their statement of defence, in their counter-claim, and counter-claimed for the damage suffered by them in the collision.

On this the plaintiffs joined issue, and in their reply to the counter-claim, after denying the allegations, therein further said that, if and so far as the said collision was occasioned by any neglect or default on the part of those on board the *Gladstone*, such collision was solely occasioned by some default or incapacity on the part of the said pilot, who was a duly qualified pilot acting in charge of the *Gladstone* within a district where the employment of such pilot was compulsory by law within the true intent and meaning of sect. 388 of the Merchant Shipping Act 1854.

The 137th and 139th sections of the Mersey Docks Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.) are as follows:

Sect. 138. If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings, and no more, provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound

shall leave the river Mersey to commence her voyage, or, being inward bound, shall enter the river Mersey.

Sect. 139. In case the masters of any vessels, being outward bound, and not being a coasting vessel in ballast or under the burthen of one hundred tons, for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

It appeared in evidence at the hearing that the *Gladstone* had on the previous day left the Salthouse Dock, Liverpool, with a pilot on board, intending to proceed to sea, but shortly after leaving the basin she received some slight injury to one of her yardarms which necessitated repairs, and the pilot therefore brought her to anchor off the Tranmere Ferry, remaining on board and in charge, intending to proceed to sea the next morning. On the part of the owners of the launch, it was proved that they had taken all the usual precautions. Notices had been posted for some time before in the pilot office and elsewhere, the launch was dressed with flags by 7 a.m. and tugs were in attendance, one of which, the *Hercules*, proceeded to the *Gladstone* immediately after nine o'clock, and warned her that the launch was going to take place, the tug then proceeded to warn other vessels and then returned to the *Gladstone*. As to what occurred from that time to the time of the collision the evidence was conflicting, and the result will be found in the judgment.

Butt, Q.C. (with him *Myburgh*) for the plaintiffs.—If a vessel is lying in a river and refuses to move, another ship is not justified in running into her:

Davies v. *Mann*, 10 M. & W. 546.

The *Gladstone* was lawfully there on Aug. 8, and continued there on the 9th, and anything running into her and disturbing her occupation of that part of the river was clearly to blame. Assuming that the notice was sufficient, if the *Gladstone* had been moving up or down the river, it would have been her duty to keep clear of the launch. But the *Gladstone* was occupying a position in the river to which she was entitled, and, so long as she continued to occupy it, those in charge of the launch ought not to have proceeded with it to the danger of the *Gladstone*. At any rate, the latter were bound, if they wished to go on with the launch and the *Gladstone* was in the way, to provide in due time for the towing away of the *Gladstone*, and they were to blame for launching the vessel or for proceeding with the launch so far that they could not stop before the *Gladstone* was out of the way. It was the duty of the owners to have taken such precautionary measures as would have prevented a collision, they ought not to have calculated on the *Gladstone* moving sufficiently quickly to avoid the launch. They were bound to be certain of safety. The notice was not sufficient:

The Andalusian, 4 Asp. Mar. L. C. 22; 29 L. T. Rep. N. S. 204; L. Rep. 2 P. Div. 231.

On the evidence we were ready to move if the tug would have towed us, but she alleged that she had no orders and refused to do so until too late. In any case, the owners of the *Gladstone* are not responsible, as that vessel was proceeding to sea in charge of a duly licensed pilot:

The City of Cambridge, 2 Asp. Mar. L. C. 193, 239; L. Rep. 3 Adm. & Ec. 161; 35 L. T. Rep. N. S. 781; L. Rep. 5 P. C. 451.

Cohen, Q.C. (with him Dr. *Phillimore*), for the defendants.—In this case every reasonable precaution was taken by the owners of the *Cachapool*. It is true that in *The Andalusian* (*ubi sup.*), the putting up of a notice in a pilot house was held to be insufficient in itself, and that that could not avail as a substitute for other precautions, but in that case no other precautions were taken, while in the present case all other possible precautions were taken in addition to that. The *Gladstone* was not justified in remaining in that place so as to stop the launch. The tug did not offer a rope on her first visit, but proceeded to warn other vessels, but on the second she offered to tow her away, and would have done so long before the collision, but for the conduct of the *Gladstone* in refusing a rope, and in refusing to get her anchor up. The *Gladstone* was not proceeding to sea within the language of the 139th section of the Mersey Docks and Harbour Board Act 1858 (21 & 22 Vict. c. xcii.) It is plain from the 137th section that the employment of the pilot was optional on the master.

SIR R. PHILLIMORE.—This is an action arising out of a collision which happened in the river Mersey at about twenty-five minutes past ten o'clock on the morning of the 9th Aug. last about abreast of the Tranmere Ferry. The vessels that came into collision were the *Gladstone* and a launch. The *Gladstone* was lying at anchor with her head down the river ready to go to sea, and was about abreast of the Tranmere Ferry stage. The launch was a vessel named the *Cachapool*, and with her stern-post she struck the port side of the *Gladstone* near the main rigging, and the *Gladstone* sank almost immediately after the collision. The law with respect to the notice that must be given by vessels about to be launched has been several times discussed in this court, and for that purpose I will only cite the case of *The Glengarry*, (2 Asp. Mar. L. C. 230; L. Rep. 2 P. Div. 235; 30 L. T. Rep. N. S. 341). In that case, in which I gave judgment, I said: "There is no doubt whatever as to the law which has been laid down for a considerable period and always observed in this court, namely, that it is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening from that event, and that the burthen of proof lies on them. There is no doubt at all that those who defend the cause of the launch have the obligation cast upon them of showing that it took place in such circumstances as ought with reasonable precautions on the other side, not to have brought her into collision. What is reasonable notice must of course depend very much on the facts of each case." To that law so laid down I intend to adhere in the judgment I am about to deliver in this case. The dates and times in the case are not immaterial. It is pleaded in the 4th article of the statement of claim that at about 10 a.m. the weather was fine and clear, "and the *Gladstone* was lying at anchor when a tug called the *Hercules* came to the *Gladstone* and told those on board her that a launch was going to take place." That is a misstatement of nearly an hour

and a quarter, and the time is made very material in the history of this case. It appears that flags were up at seven o'clock, and the vessel was not launched until after ten o'clock, and it is alleged, and has been admitted, that notice was given at nine o'clock, the collision not taking place until 10.30. The questions are, Whether the notice was sufficient, which it is admitted to be; whether there was any misconduct on the part of the launch; and whether the *Gladstone* was to blame. The Elder Brethren say, and I agree with them, that the conduct of the pilot appears to be reprehensible. He appears to have been quite indifferent as to what was taking place on shore. According to his own showing he had seen the notice posted in the pilot office as to the launch, and on the morning of the collision he came on deck at nine o'clock, and, if he was vigilant, it was his duty to get out of the way, to have got clear, and have been towed over to the north-east, and, if necessary, to have let his starboard anchor go. The Elder Brethren are of opinion that this launch was delayed as long as it was prudent to do so. It has been contended that it was the duty of the owners of the launch to have taken such precautionary measures as would have prevented a collision taking place; but it was well known that the launch was about to take place at high water—that was, at ten minutes past ten o'clock. It appears to us that every reasonable precaution was taken by them, not only by the decorations of the vessel, but by sending notice to all steamers and vessels in the river near the spot that a launch was going to take place. The *Hercules* tug came up between nine and five minutes past, and warned the *Gladstone* to get out of the way of the launch, which was about to take place. The *Gladstone* contends that no offer was made as to being towed and the tug admits that she made no such offer. She went away to look after some other vessels, and returned in about five minutes, and after her return she offered to tow the *Gladstone*. It appears upon the evidence that when the tug came the second time and offered to take the hawser of the *Gladstone*, the pilot said, "I will not give it you but the captain may if he likes." From fifteen to twenty minutes was wasted in arguing about the question of towing the vessel out of the way. A question which has been much considered is whether, even after the vessel was taken hold of by the tug at half-past nine or a quarter to ten o'clock there was any contribution to the mischief in consequence of what the *Gladstone* did, that is, in the interval when the tug was made fast to her. The Elder Brethren are of opinion that if the *Gladstone* had, on the *Hercules* first making fast, assisted in the operation by getting her anchor with ordinary speed so as to enable her to be towed away at once, the result would have been different. The *Gladstone* was obstinate, and if she had allowed the tug to take her to the north-east she would have been clear. For this the Elder Brethren think the *Gladstone* was to blame. We are of opinion that notice was given of the launch to the *Gladstone*, and that her conduct was such that she was alone to blame for the collision. With regard to the plea of compulsory pilotage, it does not appear that the *Gladstone* was a vessel going to sea so as to come within the operation of sect. 139 of the Mersey Docks Act as to pilotage, so that the owners are not relieved upon that ground.

Solicitors for the plaintiffs the owners of the *Gladstone*, *Cooper* and *Co.*

Solicitors for the defendants the owners of the *Cachapool*, *Toller* and *Sons.*

Dec. 9, 10, 11, 12, *and* 13, 1881.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE BREADALBANE. (*a*)

Collision—Article 11 *of the Regulations for Preventing Collisions at Sea — Light astern—Binnacle light—Crossing ship—Overtaking ship.*

The provisions of article 11 *of the Regulations for Preventing Collisions at Sea, that a ship being overtaken by another shall show from her stern a light, are not complied with where the only light astern is the binnacle light in the binnacle.*

Semble, that where two ships are on converging courses, with the difference of a point and a half, the one having the other on her quarter four or five points abaft the beam, they are crossing ships, and not within the overtaking rules.

This was an action *in rem.* instituted by the owners of the cargo laden on board the brig *Conrad* at the time of her loss, and the master and crew of the said brig proceeding for their effects, against the ship or vessel *Breadalbane*, her tackle, apparel, and furniture, and against the owners intervening, to recover the damages sustained by the *Conrad* in a collision which took place between that vessel and the *Breadalbane* during the night of the 21st Oct. 1881, off the coast of Cornwall, a short distance to the north and west of the Longships.

The case on behalf of the plaintiffs was that the *Conrad*, a brig of 322 tons register, bound at the time of the collision on a voyage from Cardiff to Stockholm, with a crew of ten hands and a cargo of coal, was shortly before 11 p.m. on the 21st Oct. 1881 off the coast of Cornwall, the Longships Lighthouse bearing about south by east, there being a strong wind from about south-east by south, the tide about two hours flood of the force of about two knots an hour. The *Conrad* was at the time under fore and main lower topsails, reefed upper main topsail and fore topmast staysail and reefed main staysail, and was sailing close-hauled on the starboard tack, heading about east by north, and making about one and a-half knots an hour. Under these circumstances those on board the *Conrad* observed a full rigged ship about half a mile off, and bearing about four points abaft the starboard beam. This ship, which was the *Breadalbane*, had either no lights or bad lights. She was watched, and was seen to be off the wind, and heading for the *Conrad*, and to be overtaking her, and coming down upon her, with the wind and sea, and a collision was imminent. The helm of the *Conrad* was put to starboard, and then her lee braces were let go, and her weather main braces were hauled in, and she was paying off. But by this time the *Breadalbane*, which was very high out of the water, had got near enough to take the wind out of her sails. The fore-topsail of the *Breadalbane* then blew away, and, though she was hailed to set more canvas, those on board had refused or neglected to do so, and as she drew ahead the main topsail of the *Conrad* filled, the latter came up a little into the wind, and the *Breadalbane* with her lee main-yard caught the

weather braces of the fore topsail yard, and the two vessels became entangled and remained working against each other in the heavy sea till the *Breadalbane* had done the *Conrad* so much damage that she sank with everything on board. Shortly after the two vessels separated, the master and crew having previously saved themselves by getting on board the *Breadalbane*, and the plaintiffs alleged that those on board the *Breadalbane* did not keep a good look-out, and improperly neglected to keep out of the way of the *Conrad*, and that the *Breadalbane* was undermanned and not under proper control, and was not carrying and did not set proper canvas, and that the collision was wholly caused by those on board the *Breadalbane*.

On the other hand it was alleged in the statement of defence filed on behalf of the owners of the *Breadalbane*, that about midnight on the 21st Oct. 1881 their vessel, the *Breadalbane*, a ship of 1427 tons register, was, whilst in the prosecution of a voyage from Hamburg to Cardiff, in ballast in the English Channel off the Longships, which bore about south, and that at that time it was blowing a strong gale from about south-east. The tide was about flood, running with a force of about two knots an hour, and the *Breadalbane*, which was under lower main topsail and lower fore topsail, was hove to, close-hauled on the starboard tack, heading about north-east by east half east, making about one knot an hour. Her regulation sidelights were duly exhibited and burning brightly, and a good look-out was being kept on board of her. Under these circumstances the green light of the *Conrad* was seen at a distance of about a quarter to half a mile, and bearing about five or six points abaft the port beam. The *Breadalbane* was kept on her course, and a bright light was shown over her stern, and when the *Conrad*, which was overtaking the *Breadalbane*, was seen to be approaching on the port quarter of the *Breadalbane* so as to involve risk of collision, the *Conrad* was loudly hailed to put her helm hard up, but the *Conrad* continued to approach, and with her starboard cathead struck the port quarter near the mizen rigging of the *Breadalbane*, doing her considerable damage, and the defendants alleged that the collision was caused by the *Conrad*, which was an overtaking ship, improperly neglecting to keep out of the way of the *Breadalbane*, and counter-claimed for the damage sustained by that vessel in the collision. The evidence produced at the hearing was extremely conflicting, each vessel contending that the other was the overtaking vessel. It appeared that no special light was shown from the stern of the *Conrad* to satisfy Art. 11 of the Regulations, but the usual binnacle light was burning.

Article 11 of the Regulations for Preventing Collisions at Sea is as follows:

> A ship which is being overtaken by another shall show from her stern to such last mentioned ship a white light or a flaming light.

C. Russell, Q.C. (with him *Myburgh*) for the plaintiffs.—The *Breadalbane* was, on the evidence, an overtaking ship. The binnacle light of the *Conrad* was amply sufficient to satisfy Art. 11 of the Regulations for Preventing Collisions at Sea. A white light is all that is required by that rule, and such a light as the binnacle light is sufficient to satisfy it.

Webster, Q.C. (with him Dr. *Phillimore*).—The *Conrad* is in this case solely to blame. The evidence shows that she was sailing faster than the *Breadalbane*, and overtaking her. She had more sail set, and, according to her own story, was heading E. by N., and must have been from one point to one point and a half free from the wind, whereas the *Breadalbane* was sailing as close to the wind as possible. Even if the vessels were crossing, the *Conrad* is to blame. Lastly, taking the *Conrad's* version of the facts, she violated Art. XI. of the regulations by neglecting to show astern a white light in compliance with that rule. The binnacle light was clearly insufficient.

Russell, Q.C. in reply.

Sir R. PHILLIMORE.—This is a case of collision, which took place at eleven o'clock at night on the 21st Oct. in this year, between a Swedish brig and a sailing ship off the coast of Cornwall, off the Longships Lighthouse. The direction of the wind was about S.E. by S. The vessels which came into collision were a brig called the *Conrad*, of 322 tons register, bound from Cardiff to Stockholm, with a crew of ten hands and a cargo of coal, and a ship called the *Breadalbane*, manned by a crew of seventeen hands, of 1427 tons register, on a voyage from Hamburg to Cardiff, in ballast, which ran into the starboard side of the brig and sank her. The action is brought by the owners of the cargo of the *Conrad*, and the owners of the cargo contend that the collision was caused by the *Breadalbane* neglecting to take proper steps to keep out of the way of the *Conrad;* and, on the other hand, the defendants contend that it was caused by the *Conrad* not keeping out of the way of the *Breadalbane*. Now, it appears that the *Conrad* was heading about E. by N., and was close-hauled on the starboard tack; and that the *Breadalbane* was heading N.E. by E. ½ E., also close-hauled on the starboard tack. The speed of the vessels was between one and two knots an hour. The *Conrad* says she saw the *Breadalbane* about half a mile off, and about four points abaft the starboard beam, and the *Breadalbane* says she saw the *Conrad* from a quarter to half a mile off, about five or six points abaft the port beam. The Elder Brethren advise me that, if either of these statements be true, considering there was one and a half points of difference between them, these vessels were crossing and not overtaking ships. In this view of the case the Elder Brethren think that the *Breadalbane* was alone to blame, because she was to windward, and one and a half points off the wind, whilst the *Conrad* was close hauled. But this is not the case set up in the pleadings, nor argued before me. The contentions of the *Conrad* has been that one of the two vessels was overtaking the other, and that therefore the overtaking vessel was bound to keep out of the way. A careful consideration of the evidence leads us to the conclusion that the *Breadalbane* was, owing to the loss of her sails, brought into close quarters with the other vessel, and came bodily down upon her and sunk her. Now article 11 of the Sailing Rules provides that, "a ship which is being overtaken by another shall show from the stern of the last-mentioned ship a light or a flare-up light." We are clearly of opinion that the binnacle light of the *Conrad* did not

comply with the rule as to carrying a stern light, The rule does not provide that it is to be a fixed stern light, and the placing of a binnacle light cannot satisfy the statute and the rule, because the light itself could not be seen, but only the reflected rays of it. The *Conrad*, therefore, would be to blame, and cannot recover unless this disobedience of the rule did not contribute to the collision. The Elder Brethren are of opinion that the showing of the light could not have any weight in this case, and could not possibly have contributed to the collision. Looking to the whole of the evidence, that of the *Conrad* is the most trustworthy. It only remains to say which vessel is to blame, and whether, as is the opinion of the Elder Brethren, they were crossing vessels, or whether they were overtaking vessels as pleaded, we think that the *Breadalbane* is alone to blame for the collision, and I pronounce accordingly.

Solicitors for the plaintiffs, the owners of the *Conrad*, *Ingledew* and *Ince*.

Solicitors for the defendants, the owners of the *Breadalbane*, *Gregory*, *Rowcliffes* and *Co*.

Wednesday, Feb. 1, 1882.

(Before Sir R. PHILLIMORE.)

MacADAM (app.) *v.* THE MASTER AND CREW OF THE SAUCY POLLY (resps.); THE MAC.

Salvage—Appeal from justices—Merchant Shipping Act—Mudhopper—Definition of ship—Used in navigation—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 2, 460-465.

A mudhopper barge used for dredging a river and not propelled by oars is not used in navigation, and is therefore not a ship within the meaning of the Merchant Shipping Act 1854, *ss.* 2 *and* 458, *unless she habitually goes to sea, and hence magistrates have no jurisdiction in salvage proceedings against such a vessel under sect.* 460 *of that Act, unless it is shown that she habitually proceeds to sea.*

THIS was an appeal brought by James Nicholl Macadam, the owner of the hopper barge *Mac*, under the 464th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), from an award of the justices of the peace for the borough of King's Lynn, in the county of Norfolk, made on the 31st Oct. 1881, in pursuance of sects. 460 and 461 of the same Act, adjudicating upon a claim made by Henry Petts, the master of a fishing smack called the *Saucy Polly*, of the port of Great Yarmouth, and trading from the port of King's Lynn, on behalf of himself, the owner, and the rest of the crew of the said smack, against James Nicholl Macadam, of No. 1 New Bridge-street, Blackfriars, in the city of London, engineer and contractor, for a certain amount of salvage not exceeding 1000*l.* for that on the 15th Oct. 1881 a certain ship, boat, or barge, being a hopper barge called the *Mac*, belonging to the said James Nicholl Macadam, was in distress, a wreck derelict drifting on the sea, in a place known as the Wash, between the counties of Norfolk and Lincoln, and that the said Henry Petts and seven other fishermen, being the crew of the *Saucy Polly*, rendered certain services in respect of the said hopper barge by rescuing and conveying the same to the port of King's Lynn; and ordering James Nicholl Macadam, on notice of the award, to pay Henry Petts the sum of 50*l.* for services of every description as aforesaid rendered by himself and the others of the crew of the *Saucy Polly*.

It appeared from the evidence taken before the justices on behalf of the respondents, the alleged salvors, that on Monday, the 10th Oct. 1881, the dandy fishing smack *Saucy Polly*, of thirty-one tons register owned by Mathew Chase, of Lynn, in the county of Norfolk, belonging to the port of Yarmouth, and manned by a crew of nine hands all told, left Lynn for the fishing grounds off Boston, and was fishing off Boston until the evening of Thursday, the 15th Oct. On Thursday night a gale sprung up, and the smack was moored in the Wash in a place called the Cots from two to three miles from Boston shore. During the whole of Friday it was blowing a hurricane, the wind veering from W.N.W. to N.N.W., and the smack continued at her moorings. Soon after midnight on Friday the master of the smack was called up, there being then a moderate breeze from the W.N., with a heavy sea, and all hands went on deck. The *Mac* was then seen by those on board the smack to be drifting from the eastward to the westward, and the crew of the smack then proceeded to the *Mac*, and finding that she was dragging her anchor, and that there was no one on board, boarded her, and subsequently obtaining a spare anchor and chain from the smack anchored her until the morning and then towed her to Lynn Harbour and moored her there. It further appeared that the barge was a hopper barge, and that she had a rudder and was steerable; that there was a pole which could be used as a mast on which a small sail could be fixed, and that the pole could also be used to hoist a light on; that the barge was seventy-three feet long, and ninety-three feet wide, and constructed of iron plates three-sixteenths of an inch thick, rivetted throughout, air-tight compartments at side, cabin at each end, hopper fitted with lifting doors and apparatus complete; that a vessel like the barge was usually towed, having no propelling power, but that she would drive by wind and tide. She was used for dredging purposes.

On behalf of the appellant the owner of the *Mac*, witnesses were called to prove that the barge was purchased in Holland for 383*l.* 13*s.* 4*d.*, and was towed across, that she was not navigable, and not fitted with masts or sails, and had no propelling power. The rest of the appellant's evidence was directed to the slight amount of danger in which the barge was in the locality in which she was found.

Notice of appeal to the Probate, Divorce, and Admiralty Division was given by the owner of the *Mac* on the 8th Nov. 1881, and the grounds on which the appellant principally relied were stated to be the following:

1. That the justices had no jurisdiction to hear and adjudicate upon the said claim.

2. That there was in the circumstances of the case no such jurisdiction in any justice.

3. That the hopper barge was not a ship or boat, and was not in distress or a wreck.

4. That the said Henry Petts and the rest of the crew of the *Saucy Polly* did not render any services to the *Mac* as alleged.

5. That the said Henry Petts and the rest of the crew of the *Saucy Polly* are not entitled to any salvage in respect of any act or thing done by them.

6. That if they are so entitled the amount adjudged to be paid to them by the said award is excessive.

The appeal came on for hearing before Sir R. Phillimore on the 1st Feb. 1882.

The following sections of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), were cited in argument :

Part of sect. 2. "Ship" shall include every description of vessel used in navigation not propelled by oars. "Wreck" shall include jetsam, flotsam, logan, and derelict, found in or on the shores of the sea or any tidal water.

Sect. 458. Whenever any boat or ship is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

(1) In assisting such ship or boat ;
(2) In saving the lives of the persons belonging to such ship or boat ;
(3) In saving the cargo or apparel of such ship or boat or any portion thereof ;

And whenever any wreck is saved by any person other than a receiver within the United Kingdom ;

There shall be payable by the owners of such ship or boat, cargo, apparel, or wreck to the person by whom such services or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned.

Sect. 460. Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel, or wreck as aforesaid, and the salvors as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof, by arbitration or otherwise, then if the sum claimed does not exceed two hundred pounds, such dispute shall be referred to the arbitration of any two justices of the peace resident as follows ; (that is to say,)

In case of wreck, resident at or near the place where such wreck is found :

In case of services rendered to any ship or boat, or to the cargo, or apparel belonging thereto, resident at or near the place where such ship is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises. . . . .

And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salved, or of their respective agents.

Dr. *Phillimore* for the appellants.—The *Mac* is a vessel used for deepening the Witham by dredging, and the evidence in this case shows that no salvage services were rendered to her. She would have taken no harm if left alone, and her owners were rather injured than otherwise by their vessel being taken to King's Lynn. [Evidence read and chart put in.] Further, the magistrates had no jurisdiction in this case. Their jurisdiction is derived solely from the 459th and 460th sections of the Merchant Shipping Act 1854 [reads section]. This barge is, on the evidence, neither ship, boat, nor wreck under those sections. To bring the case within these sections there must be either "a wreck" or "a ship or boat stranded, or otherwise in distress on the shore of a sea or tidal water." The *Mac* was not on the shore. Further, the *Mac* was not a ship at all :

The C. S. Butler, L. Rep, 4 A. & E. 238 ; 31 L. T. Rep. N.S. 459; 2 Asp. Mar. L. Cas. 408.

The definition of a ship is to be found in the 2nd section of the Merchant Shipping Act. The *Mac* cannot be said to be a "ship" under that definition, because she is not used in navigation. A chance going to sea will not satisfy this definition ; it must be the real business of the vessel. Again, if the *Mac* is a ship, the justices of King's Lynn have no jurisdiction. The accident was the drifting, and when brought up by the second anchor she was in safety, and was then lying in safety within the limits of Boston harbour. Under the section, therefore, the dispute ought to have been decided by the Boston and not by the King's Lynn justices.

Bucknill for the respondents.—The *Mac* is a mudhopper, and it is a matter of general knowledge that she must perpetually be going to sea to deposit the mud she raises from the bottom of the river. She goes to sea then, and she is pulled by steam power, and not propelled by oars, and she is therefore a ship within the meaning of the Merchant Shipping Act. In *Ex parte Ferguson* (L. Rep 6 Q. B. 280 ; 24 L. T. Rep. N. S. 96 ; 1 Asp. Mar. Law Cas. 8) Blackburn, J. says : "What then is the meaning of the word 'ship' in this Act ? It is this, that every vessel that substantially goes to sea is a ship. I do not mean that a little boat going out for a mile or two to sea would be a ship ; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purposes of this Act. Whenever the vessel does go to sea, whether it goes to sea for the purposes of fishing or anything else, it would be a ship." The *Mac*, whose business it is to go to sea constantly to deposit mud is clearly within this definition. As to the jurisdiction of the Lynn justices, it is sufficient to establish their jurisdiction that the vessel was brought into the port of Lynn, it being impossible, on account of the wind, for the *Saucy Polly* to tow her into Boston. Again, it has been argued that the *Mac* was not "a ship or boat stranded or otherwise in distress on the shore of a sea or tidal water." This has long ago been decided in favour of the respondents. In *The Leda* (Swab. 40) Dr. Lushington says : "What did the Legislature mean by the words 'otherwise in distress on the shore of any sea ?' It is clear that the Legislature did not mean stranded only, for that expression precedes it, 'on the shore,' is, as I admit, a very ambiguous term. I do not think that being 'in distress on the shore' means that the property, ship, or goods should be exactly on the shore itself, and I think so for several reasons : first, because if such were the true meaning, it would be difficult to distinguish such case from stranding, and the statute evidently contemplates a case of distress distinguished from stranding : secondly, because, independently of other expressions, which in some degree tend to the same conclusion, the 459th section refers to wreck, and the definition of wreck in the statute, and the nature of wreck so described, shows that it cannot be confined to what has touched the land. For these reasons I have come to the conclusion that the words 'in distress on the shore of any sea' in the 458th section refer to vessels in distress in the vicinity of the shore, provided it be within the limits of the United Kingdom, and that it is not confined to what touches the shore itself."

Dr. *Phillimore* in reply.—There is nothing in

the evidence to show that this vessel substantially goes to sea.

Sir R. PHILLIMORE.—I do not see my way in this case to say that this mudhopper was used in navigation. I think that this is certainly a vessel "not propelled by oars," but there is no evidence before me that she was "used in navigation," as required by the statute. There is no evidence that she habitually went to sea. I must therefore decide that the magistrates had no jurisdiction, and I do so on that ground only, that I have no evidence before me that the vessel was used in navigation. I allow the appeal with costs.

Solicitors for the appellant, the owner of the *Mac, Whyte, Collinson*, and *Prichard*.

Solicitors for the respondents, the owner, master, and crew of the *Saucy Polly, Tompson, Pickering*, and *Co*.

Feb. 7 and 8, 1882.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE R. L. ALSTON.

Collision—Rules for the Navigation of the River Tees, Art. 22—"Interpretation"—"Maximum speed of six miles an hour"—Through the water—Over the ground.

In rule 22 of the Rules for the Navigation of the River Tees, providing that "no steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum speed of six miles an hour," the speed mentioned is speed through the water and not over the ground, and a vessel exceeding that speed through the water is to blame if a collision ensues to which such speed contributes.

THIS was an action *in rem* instituted by the owners of the steamship *Lady Mostyn*, and by the owners of her cargo against the steamship *R. L. Alston*, and her owners intervening to recover the damages sustained by the *Lady Mostyn* in a collision which took place between that vessel and the *R. L. Alston* between 1 and 2 a.m. on the 6th Nov. 1881 in the river Tees below the fourth buoy light on the east side.

The plaintiffs alleged that at about 1.50 a.m. on the day of the collision their vessel, the *Lady Mostyn*, a screw steamship of 467 tons register and of 80 horse-power nominal, whilst on a voyage from Middlesbrough to Llanelly with a cargo of pig iron, and manned by a crew of fourteen hands all told, and in charge of a Tees pilot, was proceeding down the river Tees on her way to sea, the weather at the time being fine with a moderate breeze from the west-south-west. The statement of claim then proceeded: The tide was about the last quarter flood, and of the force of about three knots an hour; and the *Lady Mostyn* was proceeding down the river, and keeping on the starboard side of the river, which was her proper side. Her regulation and masthead lights were duly exhibited, burning brightly, and a good look-out was being kept. At such time, and when the *Lady Mostyn* was in the vicinity of the sixth buoy beacon, and making about five knots over the ground, the red and masthead lights of a steamer, which afterwards proved to be the *R. L. Alston*, were seen about two miles distant, and bearing about two points on the starboard bow of the *Lady Mostyn*. As the *Lady Mostyn* was rounding the bend of the river in the vicinity of the fourth buoy light the *R. L. Alston* opened her green light on the port bow withal, and the *Lady Mostyn*, having rounded and steadied the *R. L. Alston* shut in her green light, and approached with her masthead and red lights only open as if intending to pass on the port side of the *Lady Mostyn* as she could and should have done, but she suddenly opened her green light, and approached so as to render a collision imminent, and although the engines of the *Lady Mostyn* were stopped and reversed full speed, and her helm hard-aported, the *R. L. Alston*, which just before the collision shut in her red light, at great speed, with her stem struck the port side of the *Lady Mostyn* a little forward of her fore-rigging, and did her so much damage that her master was compelled to run her aground opposite the place of collision to prevent her sinking in deep water; and the plaintiffs alleged that a good look-out was not kept on board the *R. L. Alston*, and that she was not navigated on the starboard side of mid-channel, although it was safe and practicable, contrary to article 21 of the Regulations, that her helm was improperly starboarded before the collision, and that she did not stop and reverse in due time, and further that she improperly neglected to comply with the provisions contained in clauses 17, 18, and 19 of the bye-laws made by the River Tees Conservancy, and that the collision was caused by the neglect or default of those on board the *R. L. Alston*.

The defendants on their side pleaded that shortly before 2 a.m. on the day of the collision, their vessel, the *R. L. Alston* a steamship of 452 tons nett and 900 tons gross register, bound on a voyage from Riga to Middlesbrough, with a crew of fifteen hands and a cargo of sleepers, was in the river Tees in charge of a licensed Tees pilot. The wind was about south-west, a moderate breeze. The weather was fine but hazy, the tide was last quarter flood, of the force of about one knot an hour. The *R. L. Alston*, under steam, was proceeding up on the north or starboard side of the river, heading about south-west half south, and between three and four knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board her. In these circumstances, and as the *R. L. Alston* had got up to about the third buoy, and was proceeding onwards to the fourth buoy, those on board of her observed the green and masthead lights of the *Lady Mostyn* about a mile off, and bearing about south-west by west. The *R. L. Alston* kept on her course along the north side. The *Lady Mostyn* drew nearer and opened her red right, and the helm of the *R. L. Alston* was put hard aport, but the *Lady Mostyn* rapidly approached the *R. L. Alston*, and a collision occurred, the port midships of the *Lady Mostyn* rather before the bridge striking the *R. L. Alston* and forcing the *R. L. Alston* ashore on the north side and doing her great damage, and the defendants alleged that the *Lady Mostyn* did not keep a good look-out, and that she was on her wrong side of the river, and that her helm was not ported sufficiently or in due time, and that she disobeyed rules 17 and 18 of the bye-laws and rules in force for the navigation of the river Tees, and that the collision was caused by the neglect or default of the *Lady Mostyn*, and the defendants counter-claimed against the owners of the

Lady Mostyn for the damages received by the *R. L. Alston*.

The following clauses of the bye-laws of the River Tees Conservancy were cited in the course of the case:—

17. Every ship navigating the river shall keep the starboard side, so that the port helm may always be applied to clear vessels proceeding in the opposite direction.

18. Every steamship, when approaching another ship on an opposite course, or from an opposite course or from an opposite direction shall, before approaching within thirty yards, slacken her speed, and keep as near as possible to the starboard side of the river, so as to afford the greatest facility for passing the approaching ship.

22. No steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum speed of six miles per hour.

23. Whenever there is a fog no steamship shall be navigated in any part of the river at a higher rate of speed than three miles per hour.

The plaintiffs' evidence corroborated the plaintiffs' statement of claim as to the fact that the tide was running up at the rate of three knots per hour, and that the *Lady Mostyn* was going down the river at the rate of five knots over the ground, which was equivalent to eight knots through the water; and at the close of it Webster, Q.C., for the defendants, submitted that the *Lady Mostyn* was to blame thereon for the collision for a breach of rule 22 of the bye-laws of the Tees Conservancy, which prescribed that no vessel should at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles an hour. It was then agreed that this point should be argued before the defendants' witnesses were called, and thereupon

Webster, Q.C. (with him Dr. *Phillimore*) for the defendants.—In this 22nd rule a rate of six miles per hour must mean six miles per hour through the water. The rule obviously intends to establish a fixed rate of speed, and it could not have been the intention of the conservancy that vessels should have to watch the tide, and be continually increasing and decreasing their speed. The usual and only meaning of such a phrase as six miles per hour with respect to ships is six miles through the water.

Butt, Q.C. (with him *Myburgh*) for the plaintiffs.—The meaning of these rules must be gathered from local circumstances, and from the other rules. The evidence is that the tide in the Tees sometimes runs up at the rate of four knots an hour. Now, if the meaning of the rule is "six miles an hour through the water," a vessel meeting this tide could only go at the rate of two miles an hour over the ground, while another vessel with the tide could come towards her at the rate of ten miles an hour without disobeying the rule. This is palpably absurd, and the true meaning is, "six miles over the ground." Vessels need not be always altering their speed. The rule merely gives a maximum speed which must not be exceeded. It is further clear from the following rule, the 23rd, which provides for fog, that the meaning must be over the ground. That rule provides a maximum speed of three miles an hour. Consequently, if the meaning were "through the water," a vessel could not advance at all against a four-knot tide, and vessels going with the tide could approach vessels at anchor at a speed of seven knots an hour. The rule could not have had this intention. Further, the evidence shows that we had by stopping and reversing reduced our speed to six knots in sufficient time before the collision to satisfy this rule, even if the meaning is "through the water."

Webster, Q.C. in reply.

Sir R. PHILLIMORE.—In this case the *Lady Mostyn* was going at the rate of eight miles an hour a few seconds before the collision, whereas clause 22 of the bye-laws of the river Tees Conservancy is as follows: No steamship shall at any time be navigated in any part of the river at a higher rate of speed than a maximum rate of six miles per hour. It is contended, however, that although she was going through the water at a speed of eight miles, yet as she was meeting a tide running at the rate of three knots she was only going at the rate of five miles an hour over the ground, and was therefore not infringing the rule I have read. I think I must put the natural construction upon the words of the rule. The rule was framed by the Tees Conservancy with reference to the local circumstances to which it had to be applied, and that which the framers of the rule had in their minds was, I think, that the velocity of the speed should not exceed six miles an hour, and that vessels should not be navigated so that their maximum speed should exceed six miles an hour with reference to other vessels navigating in the same fluid. The rule cannot mean that vessels have to decrease their speed as the tide increases, and I am therefore led to the conclusion that the framers of the clause contemplated going through the water, and not over the ground. I therefore pronounce that the *Lady Mostyn* did in this case contribute to the collision.

Webster, Q.C.—Under these circumstances the defendants admit that they are also to blame, and offer no evidence.

Sir R. PHILLIMORE.—I pronounce both vessels to blame.

Solicitors for the plaintiffs, the owners of the *Lady Mostyn*, *Gregory Rowcliffes* and *Co.*

Solicitors for the defendants, the owners of the *R. L. Alston*, *Pritchard* and *Sons*.

April 19 *and* 25, 1882.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE DOUGLAS.

Damage—Collision—Wreck—Possession and control—Liability of owner—Conservators—Public nuisance—Private injury—Duty to give warning.

Where a vessel, through the negligence of those in charge of her becomes a wreck and a dangerous obstruction in a navigable river, it is the duty of those originally in charge of her, though not actually in possession at the time, to take steps to warn approaching vessels of her position.

Semble, this duty attaches until the wreck is removed or taken possession of by competent authority.

The D., in consequence of a collision caused by the negligence of those in charge of her, sank in the river Thames. Some hours afterwards the M. N. ran into the wreck, which was not marked in any

way. The owners of the D. were held to blame, and not to be excused by reason of the impossibility of any person remaining on board the wreck, or by having given notice of the wreck to the proper authority.

THIS was an action *in rem* to recover damages sustained by the s.s. *Mary Nixon*, in consequence of a collision between that vessel and the steamship *Douglas*, whilst the latter was lying sunken in Gravesend reach in the river Thames about midnight on the 26th-27th Oct. 1881.

About 6 p.m. on the day previous to the collision in question in this action, the *Douglas*, while proceeding down the river Thames, had come into collision with a screw steamer called the *Duke of Buckingham* whilst the latter was lying at anchor, and subsequently had been in collision with another screw steamer called the *Orion*. In consequence of these collisions the *Douglas* had sunk in the river. Each of the vessels, *Duke of Buckingham* and *Orion*, had brought actions against the *Douglas* in respect of the said collisions, and the *Douglas* had been found alone to blame in respect of each of them; and it was formally admitted for the purposes of this action that the collision with the *Duke of Buckingham*, which caused the *Douglas* to sink, was caused by the negligence of those on board the *Douglas*.

The statement of claim alleged (*inter alia*).

7. No lights or warning of any sort were exhibited on or near the wreck of the *Douglas*, and there was nothing to warn those on board the *Mary Nixon* of the said wreck.

13. The *Douglas*, in the position in which she sank, was an obstruction to navigation, and was a source of danger to vessels navigating the river.

14. The plaintiff says that in the circumstances aforesaid it became and was the duty of the defendants to warn approaching vessels of the said wreck.

15. The defendants were guilty of negligence in causing their vessel to become an obstruction and a danger to navigation in the river.

16. The defendants were guilty of negligence in not taking means to warn approaching vessels of the obstruction aforesaid.

To these allegations the defendants made the following defence:

4. As soon as possible after the said collision (with the *Duke of Buckingham*) a white light was placed in the main rigging of the *Douglas* as a warning to approaching vessels, which light remained there until the *Douglas* sank.

5. After the *Donglas* sank, and before the *Mary Nixon* struck upon the sunken wreck of the *Douglas*, a reasonable time to exhibit lights or a warning on or near the wreck of the *Douglas* had not elapsed.

6. The *Mary Nixon* was warned of the fact that the *Douglas* lay sunk in the river, and of her position, by hailing from another vessel in sufficient time to have enabled her to avoid the *Douglas*.

8. As an alternative defence the defendants say that at the time when the *Mary Nixon* struck the *Douglas*, the *Douglas* was a wreck lying sunk in the bed of the river Thames, and that before and at the time when the *Mary Nixon* struck the *Douglas*, the defendants had wholly ceased to have the possession, management, and control of the same.

On these defences the plaintiffs joined issue, and the cause came on for trial on the 19th April, when witnesses were examined on both sides.

Butt, Q.C. and *Bruce* for the plaintiffs, owners of the *Mary Nixon*.—When a vessel is, in consequence of her own default or negligence, sunk in such a place as the Gravesend Reach of the river Thames, it is the duty of her owner and his servants to take measures (*a*) to prevent what, if no measures are taken, is almost inevitable, the collision of other vessels with the wreck. This is, in fact, practically admitted by the defendants. When they say in paragraph 5 of the defence that a reasonable time had not elapsed, it implies that if a reasonable time had elapsed it was their duty to take some measures. If the only question is whether, considering the time which had elapsed, it was reasonable or not for the defendants to have taken some steps, surely in a place like this, close to Gravesend, it is reasonable to suppose that a light might have been exhibited from some parts of the masts which were above water as a warning to vessels, or a boat stationed to give such warning, seeing that the original accident had taken place six hours before the one which has given rise to this action. The alternative defence of paragraph 8 (*ubi sup.*) cannot avail the defendants; there was no such abandonment of the *Douglas* in this case as is contemplated by those words on which the defendants rely. Here it is obvious that, though temporarily dispossessed of the possession of the ship by the fact of her being under water, there was an *animus revertendi* when she should be raised. The vessel was neither a derelict in a legal sense nor abandoned as a total loss to the underwriters, nor parted with, as by a sale, to any other persons. There is no direct authority for saying that under such circumstances as these a shipowner is bound to mark the position of a wreck; but such authority as there is, when properly considered, tends in that direction, as indeed common sense, apart from any direct authority, must require. In *Brown* v. *Mallett* (5 C. B. 599) it was held, indeed, that when a vessel was sunk by accident, and without any default in the owner or his servants in a navigable river, there was no obligation on the owner to take steps to make its position known; but that was on the ground that what had happened to the owner was a private disaster, giving rise possibly to a public injury, but for which disaster he was not responsible, as it happened without default on his part: but that is not the case here, where the public injury is caused by the wrongful act of the defendant in the first instance. No doubt, when the possession of the wreck and its control are taken out of the hands of the defendant by the conservancy under their statutory powers, his duty to mark its position would cease; but that event did not occur till the next morning, some ten hours after the accident happened. Even when the accident causing the obstruction is inevitable, and not as in this case the result of the wrongful act of the owner of the ship creating the obstruction, the owner of the ship is bound to give warning of the obstruction: *White* v. *Crisp* (10 Ex. 312; 23 L. J. 317, Ex.) It is clear from both the cases cited that the actual physical possession of the ship is not the limit of the proprietor's liability to give warning, for it is said in *Brown* v. *Mallett*, and quoted with approval in *White* v. *Crisp*, that "his liability is the same

(*a*) The following rule of the Thames Conservancy appears to prescribe the measures to be taken in such cases: Order in Council, 18th March, 1880, rule 9: "All vessels when employed to mark the positions of wrecks or other obstructions shall exhibit two bright lights, placed horizontally not less than six nor more than twelve feet apart."—[REP.]

whether his vessel be in motion or stationary, floating or aground, under water or above it; for in all these cases the vessel may continue to be in his possession, and under his management and control." The cases only show that when the proprietor has divested himself altogether of his property, either by sale or abandonment, or has been dispossessed either temporarily or permanently by proper authority, that his liability ceases, and this is consistent with *Harmond* v. *Pearson* (1 Camp. 515). Further, it must be noted here that the cause being *in rem*, the defendants, by appearing to protect their interest in the ship, admit that they had not abandoned her at the time. For the plaintiffs it is immaterial who was the person responsible for leaving the wreck in the position in which it was, and not taking steps to warn others. Our suit is against that person whoever he was, and the defendants by appearing to defend admit the property, and therefore the responsibility to have been theirs.

Myburgh, Q.C. and *Bucknill* for the defendants. —If the court should be satisfied that the *Mary Nixon* was hailed by someone before coming into collision with the wreck, she cannot recover from us, even if we were not the people who hailed her. But the only duty to mark the position of a wreck is of a public nature: (*Brown* v. *Mallett*, *ubi sup.*) That being so, it is immaterial what was the cause of the nuisance; the only question is the existence of the nuisance. It can therefore make no difference who was to blame in the first instance for the wreck of the *Douglas*. The only question is, whose duty was it, if it was the duty of anyone, to mark the position of the wreck? It was our duty, no doubt, so long as we were in possession, and we fulfilled it; but when we were dispossessed by the vessel sinking, that duty ceased so far as we were concerned, devolving then on the Thames Conservancy in the interests of the public:

The Ettrick, 6 P. D. 127, *sub nom. Prehn* v. *Bailey and another*, 4 Asp. M. L. C. 428, 465; 45 L. T. Rep. N. S. 399.

Whatever duty then devolved on us was satisfied by our exhibiting a light whilst we remained in possession, and as soon as we were forced to abandon possession, giving notice of the fact to the proper authorities, the Thames Conservancy. For any accident which happened before the Conservancy took charge, no one is liable, supposing the Conservancy to have shown due diligence; it is a public misfortune. The legal liability is an incident attaching to the control of the vessel: (*White* v. *Crisp*, *ubi sup.*) Negligence in causing the wreck has nothing to do with the question of liability, because the negligence is not the proximate cause of the accident.

Butt, Q.C. in reply.

Cur. adv. vult.

April 25.—Sir R. PHILLIMORE.—This is an action of damage in consequence of a collision between the screw steamship *Mary Nixon* and another screw steamer, the *Douglas*, that occurred in Gravesend Reach, at midnight, on the 27th Oct. 1881. The *Douglas* had previously come into collision with the steamship *Duke of Buckingham*, and had in consequence, sunk. It is admitted for the purposes of the case that the collision with the *Duke of Buckingham* was due to the negligent navigation of the *Douglas*. At the time of the collision with the *Mary Nixon*, the *Douglas* was lying sunk in the river, about mid-channel, with one of her masts above the water. The contention of the *Mary Nixon* was, that it was the duty of the defendants, the owners of the *Douglas*, to warn approaching vessels of the wreck, and that no such warning was given, and therefore that she was responsible for the damage. The defence of the *Douglas* is, that a white light was placed in her main rigging within a reasonable time; that the *Mary Nixon* was warned by hailing from another vessel in sufficient time to enable her to avoid the *Douglas*; and, as an alternative defence, that the defendants had wholly ceased to have possession, management, or control of the *Douglas* and therefore were not responsible. To deal first with the facts: I am of opinion that no sailing on the part of the *Douglas* is proved. I have consulted the Trinity Masters, and I agree with them in their opinion, that a reasonable time had elapsed between the collision with the *Duke of Buckingham* and the collision with the *Mary Nixon* for giving some warning to approaching vessels of the position of the *Douglas*, and that the means for such warnings could have been obtained without difficulty. It appears that a light was put in the main rigging of the *Douglas* after her collision with the *Duke of Buckingham*, which light remained till the *Douglas* sank; but at the time of the collision with the *Mary Nixon* there appears to have been no light exhibited and no kind of warning given. I have now to deal with the question of law arising on these facts. The plaintiffs contend that the *Douglas*, having had her lights knocked out by the previous collision, was bound to adopt some measures of warning, by lights, or otherwise, to approaching vessels. The defendants say that, there being no persons left on board the *Douglas*, it was not the duty of any private person to give such warning, but that it became a matter for the intervention of public authority; that, during the period between the crew leaving the ship and the intervention of public authority, the risk, however unfortunate, must be borne by the public; and that in this case, although there was an *animus revertendi*, still the control and possession of the ship had been given up. I confess I listened to this argument with great alarm. The consequences of such a doctrine are fraught with danger to the interests of navigation, and also to human life. It is, however, not necessary, with the view which I take of this case, to decide the exact point where the private obligation ends, and that of the public authority begins. Two cases were relied upon, *Brown* v. *Mallett* (5 C. B. 599), and *White* v. *Crisp* (10 Ex. 312; 23 L. J. 317, Ex.). The principles of law applicable to cases of this description appear to me to be contained in the judgment of Alderson, B. in *White* v. *Crisp*, there, citing the opinion of Maule, J. in *Brown* v. *Mallet*, he says, "that it is the duty of a person using a navigable river with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others," and he adds that "his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it." Now, in my opinion, it has been proved that the possession, management, and control of the *Douglas* was not abandoned by the defendants and the master and crew; and, consequently, that

their duty continued up to the time of the collision with the *Mary Nixon*. I must therefore pronounce for the plaintiffs, with costs.

Solicitors for the plaintiffs, owners of the *Mary Nixon*, *Gellatly, Son*, and *Warton*.

Solicitors for the defendants, owners of the *Douglas, W. A. Crump* and *Son*.

Tuesday, April 25, 1882.

(Before Sir R. PHILLIMORE, Bart.)

THE CLAN GORDON.

Demurrer — Compulsory pilotage — Public Act— Private Act—Repeal—Incorporation—10 *Vict. c.* 27, *ss.* 5, 74; 17 *&* 18 *Vict. c.* 104, *s.* 388; 27 *&* 28 *Vict. c. cclxvii., ss.* 2, 39.

A section in a private Act cannot by implication repeal a provision of the common law or of a public statute.

A private Act rendering the owner of a ship, &c. liable for any damage caused, permitted, or suffered to be done wilfully or carelessly by such ship, &c., by any person having the care of such ship, &c., does not render the owner liable where the damage has been done by the negligence of a pilot whose employment on board such ship was, at the time and place, compulsory by law.

Semble, for the purposes of such a private Act a pilot employed by compulsion of law is not a person having the care of the ship on board which he is so employed.

THIS was a demurrer to a portion of a statement of defence.

The action was brought *in rem* by the New Brighton Pier Company against the steamship *Clan Gordon* for damages done to the New Brighton Pier by the *Clan Gordon* coming into collision with it on the 4th Oct. 1881.

The plaintiff company is incorporated under an Act of Parliament, the material parts of which are set out below in the statement of claim, paragraph 2 of which is as follows:

2. By sect. 39 of the said Act, if any person having the care of any ship, boat, barge or other vessel, should wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the said pier or works by any such ship, boat, barge, or other vessel, then and in every such case the owner or owners of every such ship, boat, barge, or other vessel was made answerable, and liable to make satisfaction to the plaintiff for all such damage or injury.

Then follow allegations that the *Clan Gordon* by the negligence of those in charge of her came into violent contact with the pier, doing the damage complained of. To this claim the statement of defence pleaded (*inter alia*):

2. The defendants deny that this damage was permitted or suffered by any person having the care of the *Clan Gordon* within the meaning of the statute relied upon in the second paragraph of the statement of claim.

3. The defendants also say that before and at the time of the said collision, and at the time when the said damage was caused, the *Clan Gordon* was in the charge of a duly licensed pilot, whom the owners and master of the *Clan Gordon* were bound by law to employ, and put their vessel in charge of within the meaning of sect. 74 of the Harbour, Docks, and Piers Clauses Act 1847.

4. The defendants further say that the collision and damage were not caused or contributed to by any negligence of the defendants, or of their servants, or of any person other than the duly licensed pilot, who was, as aforesaid, by compulsion of law, in charge of the *Clan Gordon*, and who was directing and controlling the management and navigation of the *Clan Gordon*. They admit that the collision and damage were caused by the *Clan Gordon* being brought improperly near the plaintiffs' pier, or by her being brought so near at an improper rate of speed; but they deny all the other allegations in paragraph 5 of the statement of claim.

To these three paragraphs the plaintiffs demurred,

On the grounds that the said pilot was a person having the care of the *Clan Gordon* within the meaning of sect. 37 of the New Brighton Pier Act 1864, and that the defendants, as owners of the *Clan Gordon*, are answerable for the damage carelessly caused by him, and on other grounds sufficient in law to sustain this demurrer.

April 25.—The demurrer came on for argument. The enactments on which the argument principally turned were the following:

The Harbours, Docks, and Piers Clauses Act 1847 (10 *Vict. c.* 27).

Sect. 5. *Form in which portion of this Act may be incorporated in other Acts.*—For the purpose of incorporating part only of this Act with any Act hereafter to be passed, it shall be enough to describe the clauses of this Act with respect to any matter in the words introductory to the enactment with respect to such matter, and to enact that the clauses so described, or that this Act with the exception of the clauses so described, shall be incorporated with such Act, and thereupon all the clauses of this Act so incorporated shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act, and such Act shall be construed as if such clauses were set for the time with reference to the matter to which such Act relates.

Sect. 74. *Owner of vessel answerable for damage to works.*—The owner of every vessel or floating timber shall be answerable to the undertakers for any damage done by such vessel or floating timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master (*a*) or person having the charge of such vessel or floating timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or floating timber until sufficient security has been given for the amount of damage done by the same; provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104).

Sect. 388. (*b*) *Limitation of liability of owner where pilotage is compulsory.*—No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

The New Brighton Pier Act 1864 (27 *&* 28 *Vict. c. cclxvii.*)

Sect. 2. 8 *&* 9 *Vict. cc.* 16 *and* 18; 10 *&* 11 *Vict. c.* 27; 23 *&* 24 *Vict. c.* 106; *and* 26 *&* 27 *Vict. c.* 118, *incorporated*.—The Companies Clauses Consolidation Act 1845, and part 1 of the Companies Clauses Act 1863, the Lands Clauses Consolidation Act 1845, with respect to the purchase of land by agreement only, the Lands Clauses Consolidation Acts Amendment Act, 1860, and the Harbours, Docks, and Piers Clauses Act 1847 shall be incorporated with and form part of this Act, save and so

(*a*) Master, by the definition clause (sect. 2), shall be understood to mean the person having the command or charge of the vessel for the time being.

(*b*) Sect. 388 is the final section of Part V. of the Act, the application of which part is by its first section (sect. 330) limited to the United Kingdom.

far as any of the clauses and provisions of those Acts and parts respectively are expressly varied or excepted by or are inconsistent with the Act: Provided nevertheless, that the sections of the last-mentioned Act numbered 16, 17, 18, 19, and 25 shall not be enforced for the purposes of the Act, except in so far as the same may be called into operation by the Lord High Admiral of the United Kingdom of Great Britain and Ireland, or the commissioners for executing the office of Lord High Admiral aforesaid.

Sect. 39. *Shipowners to be answerable for damage done by their servants.*—If any person having the care of any ship, boat, barge, or other vessel, shall wilfully or carelessly cause, permit, or suffer any damage or injury to be done to the said pier or works by any such ship, boat, barge, or other vessel, then and in every such case the owner or owners of every such ship, boat, barge, or other vessel shall be answerable and liable to make satisfaction to the company for all such damage or injury.

W. R. Kennedy (with him *Webster*, Q.C.), for the plaintiffs, the New Brighton Pier Company, in support of the demurrer.—Compulsory pilotage is no legal defence in this case, for two reasons: (1) The object of sect. 39 of the New Brighton Pier Act was to override the general law of compulsory pilotage. Had it not been so it would have been sufficient to incorporate sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 simply, and this would have been effected by sect. 2 of the New Brighton Act; but sect. 74 of the general Act is inconsistent with sect. 39 of the New Brighton Act, and therefore by the operation of sect. 2 of the New Brighton Act is excepted from the general incorporation of the general Act with the local Act. (2) The pilot has the charge or direction of the navigation of a ship, but the master continues at all times to have the care of her. There is nothing unreasonable in the proposition that the pier being in a sense public property, or, at all events, a work for the benefit of the public, should be entitled to a protection which is denied to private property. The words of the local Act of 1864 are plain and obvious, and in their natural sense would cover damage done by a ship no matter who is in fault for that damage, and the shipowner may have his remedy over against the pilot if he (the shipowner) pays in such a case in the first instance. No doubt the defendants will rely on the case of *The Conservators of the River Thames* v. *Hall and another* (L. Rep. 3 C. P. 415; 18 L. T. Rep. N. S. 361; 3 Mar. L. C. O. S. 73), but that was on a section of a local Act very differently worded from the one in this Act on which we rely. No douht a pilot is a "person employed in or about" the ship; but, as the relationship of master and servant does not exist between the compulsory pilot and the "master or owner" of the ship, therefore the summary method of recovery over did not apply to a compulsory pilot, and therefore he was held not to be included in the clause on which the case was decided. It appears, from the judgment of Lord Blackburn in *The River Wear Commissioners* v. *Adamson* (3 Asp. M. L. C. 242, 521; 2 App. Cas. 743; 37 L. T. Rep. N. S. 543), that, if the special provision of the Merchant Shipping Act had not been inserted in sect. 74 of the Harbours, Docks, and Piers Clauses Act, compulsory pilotage would have been no defence in the case then under consideration, notwithstanding the common law doctrine of agency, and the special provision of sect. 388 of the Merchant Shipping Act. For certain purposes the master remains responsible, notwithstanding the presence of a compulsory pilot, as *e.g.*, when the duty is laid on the "person in charge" to stand by after a collision (3 Mar. L. C. O. S. 242; *The Queen*, L. Rep. 2 A. & E. 354; 20 L. T. Rep. N. S. 855), and it is his duty to supersede the pilot if incompetent or incapable: (*The Duke of Manchester*, 4 Notes of Cases, 582.) The act of running down a pier is an act of such gross negligence or incompetency that it would be the duty of the captain to supersede the pilot, and prevent such a thing being done, and therefore there is nothing inequitable in requiring the owner to pay for damage which the master could and ought to have prevented.

Butt, Q.C., *Cohen*, Q.C., *M'Leod*, Q.C., and Dr. *Phillimore*, *contra*.—The general Act is to be incorporated (sect. 5) except where "expressly varied or excepted." Sect. 74 of that Act is not "expressly varied or excepted" by sect. 39 of the private Act, and therefore they must be read together, and the exception of compulsory pilotage remains. Doubtful words in a private Act cannot repeal a general enactment without express words; the section may not have any reference to the case of a pilot at all. The marginal note speaks only of servants. It may have been enacted to render owners liable for the "wilful" misconduct of their servants, for which, without it, they would not be so liable:

The Druid, 1 W. Rob. 391;
The Ida, Lush 4; 1 L. T. Rep. N. S. 417.

The irresponsibility of an owner where a pilot is employed by compulsion of law exists in the common law, and is declared by sect. 388 of the Merchant Shipping Act 1854, and it is not competent for a private local Act to repeal a general public Act. Besides, a pilot is not a "person having the care of the ship," and therefore the section is not applicable at all when the damage is done by the negligence or default of the pilot. To bring the case within the enactment it would be necessary to show negligence on the part of the captain, or of some person for whose due performance of his duties the captain is responsible. In any event the demurrer is bad as a question of pleading so far as it relates to paragraph 4 of the defence.

Kennedy in reply.—A section of an Act passed in 1847 cannot be prospective so as to govern the principles on which the Act in which it occurs is to be incorporated in Acts passed by future Parliaments. The principle of incorporation laid down by it is general, and in 1864 the Legislature, in passing the New Brighton Act, allowed a somewhat diffent principle of incorporation to be adopted for the purposes of that Act. Sect. 39 of the private Act does not repeal sect. 74 of the general Act, nor sect. 388 of the Merchant Shipping Act, except locally, for vessels actually coming into contact with the pier. If the Act is to be read as if the master was the person referred to alone as having the care of the ship, then the owners would not be responsible for damages occasioned by the negligence of a look-out man, or a helmsman, or of an inferior officer.

Sir R. PHILLIMORE.—I am of opinion that this demurrer cannot be sustained, and that it must be overruled. In order to sustain it it was necessary for the counsel, who has argued this case with great ability, to contend that by implication sect. 388 of the Merchant Shipping Act 1854

(17 and 18 Vict. c. 104) and sect. 24 of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27) were repealed so far as the New Brighton Pier is concerned. That is a conclusion to which the court would be very loth to come, and very anxious to avoid if possible. I am of opinion that sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 remains unaffected by this private Act, the New Brighton Pier Act 1864 (27 & 28 Vict. c. clxvii.); and, further that the argument of Mr. Butt with respect to the description of the person having the care of a ship, boat, barge, or vessel does not properly or necessarily apply to a pilot. I am of opinion that the argument, which, speaking in general terms, is neither more nor less than that the general law upon the question of compulsory pilotage, and sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 are repealed by implication by sect. 39 of the New Brighton Pier Act, cannot be sustained, and I dismiss the demurrer with costs.

Solicitors for plaintiffs, the New Brighton Pier Company, *Laces, Bird, Newton*, and *Richardson*.

Solicitors for defendants, owners of the *Clan Gordon*, *Bateson, Bright*, and *Warr*.

April 18 *and* 25, 1882.

(Before Sir R. PHILLIMORE.)

THE VESTA.

Compulsory pilotage—Foreign ships—Differential dues—6 *Geo.* 4, *s.* 125, *ss.* 59, 60; 17 *&* 18 *Vict. c.* 104, *ss.* 332, 333, 358, *Table U.*; 24 *&* 25 *Vict. c.* 47, *ss.* 2, 10, 11, 14; 39 *&* 40 *Vict. c.* 36, *s.* 141 *—Orders in Council* 18*th Feb.* 1854 *and* 1*st Nov.* 1862.

Pilotage is compulsory on a foreign ship carrying passengers and trading between London and ports between Boulogne and the Baltic.

The Order in Council of the 18*th Feb.* 1854, *extending the exemptions from compulsory pilotage, applies only to British vessels.*

A charge for compulsory pilotage on a foreign ship is not a differential due within the meaning of the Harbours and Passing Tolls Act 1861, *and is therefore not abolished by that Act.*

The Hanna (2 *Mar. Law Cas. O. S.* 434; *L. Rep.* 1 *Ad. & Ecc.* 283; 15 *L. T. Rep. N. S.* 334) *followed.*

THIS was an argument of a question of law arising in the case which had been ordered under Order XXXIV.

The question was whether the *Vesta* was or was not in charge of a pilot by compulsion of law.

The *Vesta* is a German steamship of considerable size. At the time in question she was in Blackwall Reach in the river Thames, bound on a voyage from London to Hamburg with a cargo, and also with passengers on board.

Under these circumstances, and whilst she had a duly licensed Trinity House pilot on board, she came into collision with the barge *Audacious*; and this action was brought against her to recover the damages sustained in the collision, to which the defence of compulsory pilotage was (*inter alia*) set up.

The argument turned principally upon the construction of the following enactments:

The Pilotage Law Amendment Act 1825 (6 *Geo.* 4, *c.* 125).

Sect. 59. *Masters of certain ships may pilot same, so long as not assisted by any unlicensed pilots.*—Provided always, that for and notwithstanding anything in the Act contained, the master of any collier, or any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader in coals from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British register, and coming up either (a) by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided, or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties of this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

Sect. 60. *His Majesty may authorise certain ships to be conducted without pilots, &c.*—Provided also, that from and after the passing of this Act it shall and may be lawful for His Majesty, by and with the advice of his Privy Council, or by any order or orders in council, to permit and authorise ships and vessels not exceeding the burthen of sixty tons, and not having a British register, to be piloted and conducted without having a duly licensed pilot on board, upon the same terms and conditions as are by this Act imposed on British ships and vessels not exceeding the like burthen.

Order in Council, 18*th Feb.* 1854. (*a*)

Regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of the 59th section of the Act 6 Geo. 4, c. 125, submitted by the Corporation of the Trinity House for the con-

(*a*) Though not directly referred to in the argument it may be as well to note that the order in Council of the 18th Feb. 1854 was made under the provisions of sect. 21 of the Pilotage Amendment Act 1853, after reciting which section, given below, it proceeds to recite that the Trinity House have submitted rates of pilotage in lieu of those in force under 6 Geo. 4, c. 125, and likewise certain regulations for the extension of exemptions from compulsory pilotage then existing, and for the conduct of the pilot service of the port of London, it then recites that such rules and regulations are reasonable, and approves them; then follow the regulations given in the text. Sect. 9 of the same Act appears also to be germane to the subject of differential dues, and is therefore also appended.—[REP.]

The Pilotage Law Amendment Act 1853 (16 *&* 17 *Vict. c.* 129).

Sect. 9. *Rates on foreign vessels claiming benefit; reciprocity treaties.*— . . . . All rates or prices which may be lawfully demanded or received by any pilots under the government of the said Trinity House for the pilotage of foreign vessels, the owners, masters, agents, or consignees of which claim, by virtue of any treaty of reciprocity, to be entitled to the privileges of British vessels, shall be recoverable from the same persons, in the same manner, and subject to the same conditions from whom and subject to which pilotage rates on British vessels are recoverable under the 44th and 45th sections of the said Act (6 Geo. 4, c. 125).

Sect. 21. *Power to pilotage authorities with consent of Her Majesty to make and extend exemptions from compulsory pilotage.*—It shall be lawful for every pilotage authority, by regulation or bye-law made with the consent of Her Majesty in Council, from time to time to do

sideration of Her Majesty in Council, pursuant to 16 & 17 Vict. c. 129, s. 21.

The masters of the undermentioned ships and vessels shall, subject to the provisions contained in the 59th section of the Act of Parliament 6 Geo. 4, c. 125, in respect of the employment of unlicensed persons, be exempted from compulsory pilotage, viz.:

Of ships and vessels trading to Norway, or to the Cattegat, or Baltic, or round the North Cape, or into the White Sea, when coming up by the South Channels:

Of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on the outward passages, and when coming up by the south passages:

Of ships and vessels passing through the limits of any pilotage district on their voyage from one port to another port, and not being bound to any port or place within such limits, nor anchoring therein.

Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *Part V.*

Sect. 332. *Power of pilotage authorities to make and extend exemptions from compulsory pilotage.*—Every pilotage authority shall have power, by bye-laws made with the consent of Her Majesty in Council, to exempt the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots, and to annex any terms or conditions to such exemptions, and to revise and extend any exemptions now existing by virtue of this Act or any other Act of Parliament, law, or charter, or by usage, upon such terms and conditions, and in such manner as may appear desirable to such authority.

Sect. 333. *Powers of pilotage authority.*—Subject to the provisions contained in the fifth part of this Act, it shall be lawful for every pilotage authority by bye-laws made with the consent of Her Majesty in Council from time to time, to alter all or any of the following things within its districts; that is to say,

(5.) *To alter and reduce rates of pilotage.*—To fix the rates and prices or other remuneration to be demanded and received for the time being by pilots . . . . or to alter the mode of remunerating such pilots . . . . so that no higher rates or prices be demanded or received from the masters or owners of ships in the case of the Trinity House than the rates and prices specified in the table marked U. in the schedule hereto . . . .

TABLE U.

Rates of pilotage to be demanded and received by qualified pilots for piloting ships within the undermentioned limits.—The table contains a variety of charges depending on the distance the vessel is piloted, and the draught of water, and has the following note:

NOTE I.—Foreign ships are to pay one fourth more than British ships, except where privileged to enter the ports of the United Kingdom upon paying the same duties of tonnage as are paid by British ships, in which case such ships are to pay the same rates of pilotage only as are payable by British ships.

Sect. 353. *Compulsory pilotage, in what mode to be enforced.*—Subject to any alteration to be made by any pilotage authority in pursuance of the powers hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same were by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force . . . .

Sect. 379 makes certain alterations in and extensions of the exemptions for compulsory pilotage in the London district and in the Trinity House outport districts, but only in the case of ships not carrying passengers, and therefore not applicable to the present case.

An Order in Council was made on the 1st Nov. 1862, which, after reciting sect. 333 of the Merchant Shipping Act set out above, approves another table of pilotage rates differing in detail from Table U., and not containing Note 1 of that table.

The Harbours and Passing Tolls Act 1861 (24 & 25 *Vict. c.* 47).

Sect. 2. In the construction of this Act the following expressions shall have the meanings hereby assigned to them, unless such meanings are inconsistent with the context, that is to say . . . .

Differential Dues.

The expression "differential dues" shall include any dues, rates, or taxes levied on foreign ships, or on goods carried in foreign ships, which are not levied under like circumstances on British ships or on goods carried in British ships; and shall also include any excess of dues, rates, or taxes levied on foreign ships, or on goods carried in foreign ships, over the dues or taxes levied under like circumstances on British ships or on goods carried in British ships, excepting always such duties as the Commissioners of Customs may be empowered to levy for the use of Her Majesty under any Act of Parliament in the events therein mentioned.

Part IV.—Abolition of Differential Dues and Compensation therefor.

Sect. 10. *Abolition of differential dues.*—All differential dues shall cease and be abolished on and after the 1st Jan. 1862.

Sect. 11. *Compensation for differential dues, when to cease.*—All payments which would, but for such abolition, have been made out of public moneys by way of compensation for differential dues under the authority of the Acts enumerated in the 2nd schedule hereto annexed, or of any other Act or Acts relating to such dues, shall continue until the 1st Jan. 1872, and shall then cease.

Sect. 14. . . . . No rates or dues of any kind shall, in pursuance of the power hereby given, be made payable in respect of any foreign ships . . . over and above the rates and dues made payable under like circumstances in respect of British ships. . . . .

Sched. 2 contains (*inter alia*) 59 Geo. 3, c. 54 s. 9, and 8 & 9 Vict. c. 90, s. 9.

An Act to carry into effect a Convention of Commerce concluded between His Majesty and the United States of America, and a Treaty with the Prince Regent of Portugal, 1819 (54 *Geo.* 3, *c.* 54)

Sect. 8. *Duties leviable on American and Portuguese vessels entering the ports of this kingdom to be the same as those payable on British vessels.*—And whereas by the aforesaid Convention it is provided that no higher or other duties or charges shall be imposed in any of the ports in any of His Majesty's territories in Europe, on the vessels of the United States of America, than shall be payable in the same ports on British vessels. And whereas a similar provision was made in a treaty of amity, commerce, and navigation, concluded between His Majesty and His Royal Highness the Prince Regent of Portugal, dated the 19th day of February 1810; and whereas certain rates and duties, under the denomination of light duties, pilotage, ballast, buoyage, and beaconage rates, harbour duties and other dues, are now payable by law, charter, special privilege, or grant, to the corporation of Trinity House of Deptford, Stroud, &c. . . . . on foreign ships and vessels over and above the rates and duties payable on British ships; and whereas it is expedient that the object of the said treaties should be effectually carried into execution; be it therefore enacted that no higher or other rates or duties shall be levied on ships or vessels of the United States of America or on Portuguese ships or vessels entering or touching at any of the ports of the United Kingdom, or of His Majesty's territories in Europe,

all or any of the following things in relation to pilots and pilotage within the respective districts; viz.:

(4) To exempt the masters of any ships or vessels, or of any classes of ships or vessels, from being compelled to employ pilots, and to make any terms or conditions to such exemptions, and from time to time to revoke or alter any exemptions so made, and to revise and extend any exemptions now existing by virtue of any Act of Parliament or charter, upon such terms and conditions and in such manner as such authority with such consent as aforesaid may think fit.

than are now or which may become hereafter payable on British ships.

Sect. 9 gives compensation to the various corporations and persons affected by sect. 8 out of the Consolidated Duties of Customs.

An Act for granting Duties of Customs, 1845 (8 & 9 *Vict.* c. 90).

Sect. 9. From and after the ratification of any treaty heretofore made by Her Majesty or any of her royal predecessors subsequently to the enactment of the said Act (59 Geo. 3, c. 54) or of any treaty which may hereafter be made by Her Majesty, her heirs and successors, with any such foreign power, in which treaty has been or shall be contained provisions similar to those recited in the said recited Act, all and every the provisions, clauses, matters, and things in the said recited Act contained shall apply and extend to the trade and shipping of such foreign powers respectively as fully and effectually to all intents and purposes as to the trade and shipping of the said United States, and of the said kingdom of Portugal, and also shall apply and extend to differential duties or charges on goods imported or exported in the ships of such foreign powers as well as to differential duties on the ships of such foreign powers.

The Customs Consolidation Act, 1876 (39 & 40 *Vict.* c. 36).

As to Coasting Trade.

Sect. 141. *Foreign ships in coasting trade subject to same rules as British ships, and foreign ships employed in the coasting trade not to be subject to higher rates than British ships.*—Every foreign ship proceeding either with cargo or passengers or in ballast or any voyage from one part of the United Kingdom to another, or from the islands of Guernsey, Jersey, Alderney, Sark, or Man, to the United Kingdom, or from the United Kingdom to any of the said islands, or from the said islands to any other of them, or from any part of any of the said islands to any other part of the same, shall be subject, as to stores for the use of the crew and in all other respects, to the same laws, rules, and regulations to which British ships when so employed are now subject; but no such foreign ship, nor any goods carried therein, shall, during the time she is so employed, be subject to any higher or other rate of dock, pier, harbour, light, pilotage, tonnage, or other dues, duties, tolls, rates, or other charges whatsoever, or to any other rules as to the employment of pilots, or any other rules or restrictions whatsoever, than British ships employed in like manner or goods carried therein, any law, charter, special privilege, or grant to the contrary notwithstanding; nor shall any body corporate or person having or claiming any right or title to any such higher or other rates, duties, tolls, or other charges as aforesaid, be entitled to any compensation in respect thereof under any law or statute relating thereto, or otherwise howsoever.

April 18.—The point of law came on for argument.

Phillimore and *Bucknill* for the plaintiffs, the owners of the barge *Audacious*.—The sole question is whether pilotage is or is not compulsory for this vessel. She is a foreign vessel carrying passengers and cargo, bound from London to Hamburg. No doubt, if she was a British vessel under such circumstances she would be under no obligation to take a pilot. *The Moselle* (2 Asp. Mar. L. C. 586; 32 L. T. Rep. N. S. 570), and cases cited therein, especially *The Earl of Auckland* (Lush. 164, 327; 1 Mar. L. C. O. S. 27, 177; 3 L. T. Rep. N. S. 786; 5 L. T. Rep. N. S. 558), show that all the exemptions granted by 6 Geo. 4, c. 125, and by the Order in Council of Feb. 1854, continue as exemptions in force at the time of the passing of the Merchant Shipping Act 1854, notwithstanding the repeal of the former Act itself by the Merchant Shipping Repeal Act 1854. The question is, whether the fact of this vessel being a foreign vessel disentitles her to exemption which had she been British she would no doubt be entitled to. We say that she is entitled to exemption on two grounds: (1) Because the Order in Council of Feb. 1854 applies to foreign as well as British vessels; and (2) even if it does not, the abolition of differential rates on foreign vessels by the Harbours and Passing Tolls Act 1861 (24 & 25 Vict. c. 47) renders it illegal to levy a compulsory pilotage rate on foreign ships to which British ships are not liable. With reference to the Order in Council, it is to be observed that it does not follow the wording of sect. 59 of the Pilotage Act 1825. There certain vessels are exempted under certain conditions. The conditions are in some respects incomplete *e.g.*, in exempting "constant traders from ports between Boulogne and the Baltic," only when bound "inwards," and "coming up either by the North Channel, but not otherwise," the wording of which provision shows there has been some oversight in the section. Therefore the Order in Council was made to get rid of those anomalies primarily, but also to extend the exemptions to foreign vessels, and therefore the exemptions are stated indifferently for ships and vessels of all nations. If the Order in Council applies only to British vessels, then the last exemption given by it, and which is altogether different from any previous exemptions under the Act of Geo. 4, involves the anomaly that a foreign vessel bound up channel from a foreign port to Antwerp might, on a subsequent visit to a British port, be compelled to pay pilotage dues, having passed through a pilotage district, whilst a British vessel doing the like would be exempt. If, however, for the sake of argument it be assumed that the Order in Council of 1854 was intended to apply only to the classes of vessels mentioned in the Pilotage Law Amendment Act 1826 (6 Geo. 4, c. 125, s. 59), yet now all foreign vessels are entitled to claim the same immunity as British vessels in the like circumstances. The compulsory pilotage chargeable on a foreign vessel, and not a British vessel is a differential due within the definition of sect. 2 of the Harbours and Passing Tolls Act 1861 (24 & 25 Vict. c. 47), and is therefore abolished by sect. 10 of that Act. This is stated expressly with reference to Newcastle-on Tyne (Pritchard's Adm. Digest, 2nd edit. vol. 1, pp. 456, 457, and Parliamentary Paper, No. 264 of 1863, p. 68), and must be so in all other cases. Sect. 11 of the Harbours and Passing Tolls Act 1861 makes a special provision for compensation to persons entitled to differential dues under various Acts of Parliament which are enumerated under sched. II. of the Act; that schedule contains (*inter alia*) 59 Geo. 3, c. 54, s. 9, and that section refers to persons entitled to compensation under sect. 8, which, giving the grounds of compensation, includes pilotage dues, so far as the United States and Portugal are concerned, as such dues were inconsistent with treaties of reciprocity with those states. This special provision for the United States and Portugal became unnecessary when the Harbours and Passing Tolls Act 1841 did that for all nations which had been done by the special Act for those nations, and by 8 & 9 Vict. c. 90, s. 9, for other nations, and the provisions in the general Act superseded those in the special Acts. But it shows that pilotage is a rate, and a differential rate when charged on foreign ships and not on British vessels, and therefore compensation for a definite period is given by the general Act (s. 11) for its abolition, such

as was given for an indefinite period in the case of specially favoured nations by special Acts. That which makes pilotage compulsory in point of law is merely the obligation to pay a rate, whether the pilot were employed or not:

Sect. 353 Merchant Shipping Act 1854;
The Agricola, 2 W. Rob. 10.

Pilotage is expressly specified as a rate in table U of the Merchant Shipping Act 1854 made in pursuance of sect. 333 of that Act, and moreover a differential rate between British and foreign ships is expressly mentioned in the note to that table.

Butt, Q.C. and *Stubbs*.—The Order in Council was obviously made to provide for a *casus omissus* in the Pilotage Act (6 Geo. 4, c. 125) as to voyages on which British ships were to be exempt. That Act is expressly limited to ships having British registers, except in the case of vessels on coasting voyages where it was unnecessary at the time (A D. 1825) to say anything about British registers, as the trade was not open to any vessels except British vessels. If the Order in Council applies to foreign vessels this extraordinary anomaly will appear, that whereas British and foreign vessels alike are exempt under the Order in Council when trading to ports between Boulogne and the Baltic, &c., when coming up by the South Channels, or on their outward voyages by either North or South Channels, yet as the Pilotage Act (6 Geo. 4, c. 125) is the only authority for an exemption when vessels are coming up by the North Channel, and then only when such vessels have British register, a foreign vessel under such circumstances is still bound to take a pilot if coming by the North Channel, though free to come without one up the South Channel, and a similar anomaly appears in the case of vessels "trading to Norway, &c." There is besides direct authority for considering the Order in Council only subsidiary to sect. 59 of the Pilotage Act:

The Earl of Auckland, *ubi sup.*

On the second point, compulsory pilotage cannot be called in strictness a rate; it clearly is not a charge, for, in discussing this very point, *i.e.*, whether a foreign vessel was under a treaty of reciprocity exempted from compulsory pilotage when a British vessel would have been exempt, Dr. Lushington says, "compulsory pilotage is not a charge upon vessels, but rather a regulation for their benefit:"

The Hanna, 2 Mar. Law Cas. O.S. 434; L. Rep. 1 Ad. & Ecc. 283, 290; 15 L. T. Rep. N.S. 334.

Moreover, even if it be a rate at all, it is not a rate within the meaning of a "differential due" in sect. 2 of the Harbours and Passing Tolls Acts 1861, for that only includes a rate levied on a foreign ship, &c., whereas this is a penalty upon the captain or owner. Sects. 363, 523 of the Merchant Shipping Act 1854 show that the ship is only liable in the ultimate result for pilotage dues where the services of a qualified pilot are obtained, whereas compulsory pilotage is the obligation to pay for a pilot whether his services are obtained or not. A difference as to the obligation to employ a pilot is not a differential due, though a difference in his scale of payment is; therefore the note which appears in table U. of the Merchant Shipping Act 1854, making foreign vessels in all cases pay one-fourth more than British vessels, does not appear in the revised rates authorised by Order in Council, 1st Nov. 1862, *i.e.*, the year after the passing of the Harbours and Passing Tolls Act 1861. (For the Order in Council, see Maude & Pollock, 4th edit., vol. 2, Orders in Council, p. 74.) Where it has been the intention of the Legislature to put foreign vessels on the same footing precisely as to compulsory pilotage as British vessels, it has been found necessary to pass a statute expressly to do so, as sect. 141 of the Customs Laws Consolidation Act 1876 (39 & 40 Vict. c. 36) in regard to the coasting trade, where the compulsory employment of a pilot is not spoken of as a pilotage rate, but as another rule "as to employment of pilots."

Phillimore in reply.—By 8 & 9 Vict. c. 90, s. 9, the provisions of the special Act of 59 Geo. 3, c. 54, concerning the United States and Portugal, was extended to other countries with which treaties of reciprocity were or might be made, and there the provisions as to rates which include payments for pilotage are expressly spoken of as differential duties and charges, the precise words used in the Harbours and Passing Tolls Act 1861, which repeals all such differential dues. *The Hanna* (*ubi sup.*) is no authority on this point, because the Harbours and Passing Tolls Act 1861 was not referred to either in argument or judgment, and therefore could not have been before the court.

Cur. adv. vult.

April 25.—Sir R. PHILLIMORE.—This was a case of collision between the sailing barge *Audacious*, and the screw steamship *Vesta*, which took place last September in the lower part of Blackwall Reach. The defendants' ship was a German vessel, and therefore not having a British register, but having on board passengers and cargo, and was bound from London to Hamburg. It was admitted at the trial, for the purposes of this argument, that the collision was due to the fault of the pilot on board the *Vesta*; and the only question for decision at present is, whether or not the pilot was taken on board by compulsion of law. The plaintiffs contended that there was no such compulsion, and founded their argument on two grounds: First, that previously to the passing of the Merchant Shipping Act 1854, the *Vesta* would have been exempt under the 6 Geo. 4, c. 125 s. 59, coupled with an Order in Council of the 18th Feb. 1854, and it is admitted that sect. 353 of the Merchant Shipping Act 1854 preserved all previously existing exemptions; secondly, that pilotage dues or rates are "dues, or rates or duties" within the meaning of the Harbour and Passing Tolls Act 1861 (24 & 25 Vict. c. 47), which Act abolishes all differential dues, and that to impose the pilotage on foreign vessels where it is not imposed on British vessels would be to impose a differential due. I will deal first with the contention of the plaintiffs founded upon the Act of Geo. 4, and the Order in Council. The 6 Geo. 4, c. 125, s. 59, provides that "the master of any collier or any ship or vessel trading to Norway or to the Cattegat or the Baltic, or round the North Cape, or into the White Sea, on their inward or outward passages, or of any constant trader inwards from the ports between Boulogne (inclusive) and the Baltic, all such ships and vessels having British registers, and coming up either by the North Channel, but not otherwise" (whatever this may mean), "shall and may lawfully,

and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel." The clumsy and careless language of this section leaves two important omissions. No provision is made—first, for vessels trading outwards to the ports between Boulogne and the Baltic; and, secondly, for vessels coming up by the south channels, the north being the only one mentioned. The Order in Council is intituled "A regulation for the extension of the exemptions from compulsory pilotage now existing under the provisions of sect. 50 of the Act 6 Geo. 4, c. 125;" and it provides that the exemption from compulsory pilotage shall be allowed to masters "of ships and vessels trading to Norway or to the Cattegat or Baltic or round the North Cape or into the White Sea, when coming up by the south channels; of ships and vessels trading to ports between Boulogne (inclusive) and the Baltic on their outward voyages and when coming up by the south passages; of ships and vessels passing through the limits of any pilotage district on their voyages from one port to another port, and not being bound to any port or place within such limits or anchoring therein." The plaintiffs contend that the words "ships and vessels" mean all ships and vessels foreign as well as British. It is somewhat strange that no judicial decision as to the meaning of these words should have been given, but such I am informed and believe is the case. If the plaintiffs' construction be right, the order, which was clearly intended to remedy a defect, would have introduced a new one, inasmuch as the court would not be bound to hold that if a foreign ship trading to ports between Boulogne and the Baltic were coming inwards by the North Channel, and not outwards, she would not be exempt at all, the exemption in the Order in Council being expressly confined to vessels on their outward voyages, and when coming up by the south passages. The exemption does not exist under the 59th section of the Act of Geo. 4, which expressly relates to British ships alone. In other words, according to this construction, by the joint operation of that section and of the order, a foreign ship would be liable to compulsory pilotage when coming in by the North Channel, and exempt when going out by any passage or coming in by the south passage. I am of opinion that this absurdity cannot be intended, and that the Order in Council does not apply to foreign vessels, but the words "ships and vessels" must mean British ships and vessels which alone are dealt with by the statute to which this order is subsidiary, and of which it is explanatory. I think, moreover, that this was the opinion to which Dr. Lushington inclined in the cases of *The Earl of Auckland* (Lush. 164, 387; 1 Mar. Law Cas. O. S. 27, 177; 3 L. T. Rep. N. S. 786; 5 L. T. Rep. N. S. 558), and of *The Hanna* (2 Mar. Law Cas. O. S. 434; L. Rep. 1 Ad. & Eccl. 283; 15 L. T. Rep. N. S. 334). I now come to the second point relied upon by the plaintiffs, namely, that all differential dues are abolished by the Harbours and Passing Tolls Act 1861 (24 & 25 Vict. c, 47), and that a pilotage due imposed on a foreign ship which is not imposed on a British ship would be a differential due, and, therefore, ceased to exist. The sections relied on are the 2nd, 10th, and 11th. By the 2nd section the term differential duties includes any dues, rates, or taxes levied on foreign ships, &c., which are not levied, under like circumstances, on British ships, and the plaintiffs contend that that term would include compulsory pilotage. To this argument I cannot accede. In the first place, the Act clearly did not comtemplate the subject of compulsory pilotage at all, and it would be a very forced construction of the statute to hold that any regulation on the subject was indirectly affected by it. In the next place, the subject seems to be already disposed of by Dr. Lushington's judgment in the case of *The Hanna* (*ubi sup.*) already referred to. In that case reliance was placed on the expression contained in a convention of commerce between this country and Sweden. Dr, Lushington, referring to the 6 Geo. 4, c. 125, s. 59, as showing that the exemption under that section could not apply to a vessel not having a British register, said, "But the plaintiffs would escape from this difficulty by invoking a convention of commerce and navigation between this country and Sweden in March 1826, that is to say, a few months before (*a*) the passing of the 6 Geo. 4, c. 125. The second section of the Convention is as follows: British vessels entering or departing from the ports of the kingdom of Sweden and Norway, and Swedish and Norwegian vessels entering or departing from the ports of the United Kingdom of Great Britain and Ireland, shall not be subject to any other such ship duties or charges than are or shall be levied on national vessels entering in or departing from such ports respectively. The plaintiffs contend that compulsory pilotage was a charge within the meaning of the above section of the Convention, and, consequently, that, notwithstanding anything in the 59th section of the 6 ,Geo. 4, c. 125, Norwegian vessels could not be subject to compulsory pilotage where vessels were exempt. This view, however, seems to me untenable. The theory of the Legislature, whether right or wrong, must be taken to be that compulsory pilotage is not a charge upon vessels, but matter of legislation instituted for their benefit." With this opinion I entirely agree. I have considered the argument founded on the 59 Geo. 3, c. 54. It seems to me not to affect the question of compulsory pilotage, though it may, perhaps, refer to pilotage dues where the legal necessity to take a pilot does not exist. Upon the whole, I am of opinion that the plaintiffs have failed to establish their position that the *Vesta* was not under compulsion of law to employ a pilot, and I must, therefore, pronounce for the defendants on the question of law on which my decision has been sought.

Solicitors for the plaintiffs, owners of the *Audacious*, *J. A.* and *H. E. Farnfield*.

Solicitors for the defendants, owners of the *Vesta*, *Stokes*, *Saunders*, and *Stokes*.

(*a*) *Sic* in the reports quoted, but seeing that the 6 Geo. 4 is A.D. 1825, it should apparently be "after." —REP.]

April 28 *and May* 2, 1882.

(Before Sir R. PHILLIMORE.)

THE RONA.

Admiralty jurisdiction—County Court—City of London Court—Damage to cargo—Agreement for carriage of goods in ship—Owner domiciled in England—Right of Appeal to Court of Appeal— 24 *Vict. c.* 10 *s* 6—31 *&* 32 *Vict. c.* 71, *ss.* 1, 2, 3—32 *&* 33 *Vict. c.* 51, *ss.* 1, 2, 3.

The County Courts have jurisdiction in Admiralty to entertain cases up to the amount of 300*l.*, *where damage to cargo is caused by, and the claim arises out of, an agreement made in relation to the carriage of goods in a ship, notwithstanding that an owner or part owner of the ship is domiciled in England or Wales.*

The County Court Admiralty Jurisdiction Amendment Act 1869 *is not limited to cases in which the High Court of Admiralty had jurisdiction at the time.*

The Alina (*sup.* 257; *L. Rep.* 9 *Ex. Div*, 234; 42 *L. T. Rep. N. S.* 517) *followed.*

Allen *v.* Garbutt (*a*) (6 *Q. B. Div.* 165) *distinguished.*

In cases raising important points of law the court will give leave to appeal to the Court of Appeal where, on a proper construction of the Acts governing appeals, such leave is necessary.

THIS was an appeal from the City of London Court (Admiralty jurisdiction) in a case of damage to cargo.

The action was brought by Messrs. Cole and Kirkman, of Liverpool, the legal holders of two bills of lading of cargo, then lately laden on board the ship *Rona*, against the owners (unknown) of the said ship. The owners, who were domiciled in England, appeared, and at the hearing the objection was taken that the court had no jurisdiction.

The Commissioner decided that he had no jurisdiction.

The following is a copy of the judgment, which was given on the 28th April 1881, so far as it is material:

Whereas the plaintiffs Messrs. Cole and Kirkman, of Liverpool, in the county of Lancaster, the legal holders of two bills of lading of cargo lately laden on board the

(*a*) *Nov.* 8 *and Dec.* 13, 1880.

ALLEN *v.* GARBUTT.

THIS was an action *in rem*, instituted in the City of London Court against the ship *Merthyr*, for necessaries supplied to that vessel. On Nov. 8th, 1880, the defendant moved the Queen's Bench Division (Manisty and Bowen, JJ.) for a prohibition to restrain the Judge of the City of London Court from proceeding with the action, on the ground that the *Merthyr* was a British ship, the owners of which were domiciled in England or Wales, and that the Court had therefore no jurisdiction. The facts of the case, and the arguments, sufficiently appear from the judgment.

Gainsford Bruce for the defendant.

Myburgh, for the plaintiff, showed cause.

Cur. adv. vult.

Dec. 13. MANISTY, J. (delivering the judgment of the Court).—This is a proceeding *in rem*, by action in the City of London Court for necessaries supplied to the ship *Merthyr*. On the 8th of November Mr. Gainsford Bruce moved for a prohibition to restrain the judge of that court from proceeding further with the action, on the ground that the ship was a British ship, the owners of which were domiciled in Great Britain, and that, consequently, as he contended, the court had no jurisdiction to entertain the action. Mr. Myburgh showed cause. It has long been settled law that, independently of statute, the Court of Admiralty has no jurisdiction to entertain a suit for necessaries: (*The Neptune*, 3 Hagg. 120; 3 Knapp P. C. C. 94; 12 Moore P. C. C. 346; *The Pacific*, Br. & L. 243). By 3 & 4 Vict. c. 65, sect. 6, jurisdiction was given to the Court of Admiralty to decide claims for necessaries supplied to any foreign ships or seagoing vessels, but that statute only applied to foreign vessels: (*The Ocean Queen*, 1 W. Rob. 457.) By sect. 5 of the Admiralty Court Act 1861 (24 Vict. c. 10), it is enacted that the Court of Admiralty shall have jurisdiction over any claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown, to the satisfaction of the court, that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. This section applies to British ships only: (*The Ella A. Clark*, Br. & L. 32.) By sect. 2 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), her Majesty in Council was empowered to give Admiralty jurisdiction to County Courts, and by sect. 3 it is enacted that any County Court having Admiralty jurisdiction shall have jurisdiction to try and determine, amongst other things, any cause as to a claim for necessaries in which the amount does not exceed 150*l.* By sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 and 33 Vict. c. 51), any County Court having Admiralty jurisdiction is empowered to try and determine causes as to, among other things, any claim arising out of any agreement made in relation to the use or hire of any ship; and by sect. 3 of that Act, it is enacted that the jurisdiction conferred by that Act and by the Act of 1868, may be exercised either by proceedings in *rem* or by proceedings in *personam*. By sect. 88 of the Judicature Act 1873, her Majesty is empowered to confer on any inferior Court of civil jurisdiction, the same jurisdiction in Admiralty as any County Court then had or might hereafter have. By virtue of this provision and an order in Council, the City of London Court has the same Admiralty jurisdiction as a County Court. Mr. Bruce contended that the Act of 1868 did not confer upon a County Court a more extensive jurisdiction in the case of a claim for necessaries than that possessed by the Court of Admiralty, and that, inasmuch as the Court of Admiralty could not have entertained the present action, neither could the City of London Court entertain it. In support of that contention he cited the case of *The Dowse* (3 Mar. L. C. O. S. 424; L. Rep. 3 A. & E. 135; 22 L. T. Rep. N. S. 627. decided in 1870, in which it was held that the County Court Admiralty Jurisdiction Act 1868 does not confer on a County Court a more extensive jurisdiction as to a claim for necessaries than that exercised by the Court of Admiralty. The case followed and adopted the principle of the decision of the Court of Common Pleas in the case of *Everard* v. *Kendall* (3 Mar. L. C. O. S. 391; L. Rep. 5 C. P. 428; 22 L. T. Rep. N. S. 408). Mr. Myburgh, on the part of the plaintiff, admitted that the Court of Admiralty could not have entertained the action in question, but he contended that, according to the true construction of the Acts of 1868 and 1869, a County Court, and consequently, the City of London Court, can entertain it. In support of that contention he cited the case of *The Alina* in the Court of Appeal (*sup.*) 257; L. Rep. 5 Ex. Div. (C.A.) 227; 42 L. T. Rep. N. S, 517), decided in February 1880. Upon referring to that case it will be found that it was a decision as to the effect of the Act of 1869, with reference to an action for a breach of a charter-party as to which jurisdiction was given to the County Court in express terms by sect. 2, sub-sect. 1, of the Act of 1869. The Court of Appeal followed and adopted the decision of the Privy Council in 1872, in the cases of *Cargo ex Argos* and *The Hewsons* (1 Asp. Mar. L. C. 360, 519; L. Rep. 3 A. & E. 568, 5 P. C. 134; 27 L. T. Rep. N. S. 64, and 28, p. 77). These decisions have reference to the construction of the Act of 1869, and do not touch the present question, which depends upon the construction of the Act of 1868. The case of *The Dowse* (*ubi sup.*) is in point as to the construction of the Act of 1868, and we should probably have felt bound to follow it, even if we had doubted its correctness; but we do not entertain any such doubt. There will therefore be a rule absolute for a prohibition.

Solicitors, for the plaintiff, *Maples, Teesdale* and *Co.*

Solicitors, for the defendant, *J. A.* and *H. E. Farnfield.*

ship *Rona*, entered an action in this court in the sum of 300*l.* against the ship *Rona*, her tackle, apparel, and furniture, for damage to cargo carried on board the said ship *Rona*, and whereas Messrs. E. B. Hatfield and Co. of Liverpool, in the county of Lancaster, shipowners, entered an appearance in the said action as owners of the said ship *Rona*. The said action coming on this day for trial, it is adjudged that the said action do stand dismissed out of this court for want of jurisdiction.

On the 14th June 1881 the judge gave leave to the plaintiffs to appeal, notwithstanding the time for appealing had expired.

On the 21st April 1882 the appeal came on for hearing.

The arguments turned on the proper construction of the following enactments:

The Admiralty Court Act 1861 (24 *Vict. c* 10.

Sect. 6. *As to claims for damage to cargo imported.*—The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ships, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover 20*l.*, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

An Act for conferring Admiralty Jurisdiction on the County Courts 1868 (31 *&* 32 *Vict. c.* 71.)

1. *Short title.*—This Act may be cited as "The County Courts Admiralty Jurisdiction Act 1868.

2. *Appointment of County Courts for Admiralty purposes.*—If at any time after the passing of this Act it appears to Her Majesty in Council, on the representation of the Lord Chancellor, expedient that any County Court should have Admiralty jurisdiction, it shall be lawful for Her Majesty, by Order in Council to appoint that court to have Admiralty jurisdiction. . . . .

3. Any County Court having Admiralty jurisdiction shall have jurisdiction and all powers and authorities thereto to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes). . . . .

(2) As to any claim for towage, necessaries, or wages, —any cause in which the amount claimed does not exceed 150*l.*

(3) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed 300*l.*

An Act to amend the County Courts (Admiralty Jurisdiction) Act 1868, *and to give Jurisdiction in certain Maritime Causes;* 1869 (32 *&* 33 *Vict. c.* 51).

1. *Short title.* This Act may be cited as "The County Courts Admiralty Jurisdiction Amendment Act 1869," and shall be read and interpreted as one Act with the County Courts Admiralty Jurisdiction Act 1868.

2. *Extension of jurisdiction over ships and goods.*—Any County Court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:

(1) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l.*

(2.) . . . .

3. *Proceedings in rem or in personam.*—The jurisdiction conferred by the Act and by the County Courts Admiralty Jurisdiction Act 1868 may be exercised either by proceedings *in rem* or by proceedings *in personam*.

Bucknill for appellants.—It is clear that the County Court has jurisdiction under the County Courts Admiralty Jurisdiction Amendment Act 1869, even if it had not under the original County Courts Admiralty Jurisdiction Act 1868. This was held to be the case in *The Cargo ex Argos* and *The Hewsons* (1 Asp. Mar. Law Cas. 360, 519; L. Rep. 3 A. & E. 568; 5 P. C. 134; 27 L. T. Rep. N. S. 64, and 28, p. 77). The cases at common law to the contrary effect (*Simpson* v. *Blues*, 1 Asp. Mar. Law Cas. 326; L. Rep. 7 C. P. 290; 26 L. T. Rep. N. S. 697; *Gunestead* v. *Price* and *Fullmore* v. *Wait*, 2 Asp. Mar. Law Cas. 543; L. Rep. 10 Ex. 65; 32 L. T. Rep. N. S. 499) are overruled by the Court of Appeal in the case of *The Alina* (*sup.* 257; 5 Ex. Div. (C. A.) 227; 42 L. T. Rep. N. S. 517). And the only case now to be considered is *Allen* v. *Garbutt* (L. Rep. 6, Q. B. D. 165), on which no doubt the respondents rely. If it is necessary to distinguish that case, it is sufficient to say that it was a suit for necessaries, the right to sue for which under the Admiralty jurisdiction of the County Court rests entirely on the Act of 1868; that was an Act to confer Admiralty jurisdiction pure and simple, and therefore the courts of common law had ground for holding that it conferred no more extensive jurisdiction than the Court of Admiralty had in respect of the same matters, and that therefore in a claim for necessaries the jurisdiction of the County Courts was limited to the case where the owner was domiciled in England or Wales, the fifth section of the Admiralty Court Act 1861 relating to necessaries containing a provision to that effect similar to the sixth section in the case of damage to cargo. But the amending Act of 1869 in its title professes not only to amend the former Act, but to "give jurisdiction in certain maritime causes." Amongst those are cases of breach of contract to carry goods, and of tort in carrying goods (sect. 2, sub-sect. 1). That section is wholly inoperative if the jurisdiction remains limited as under the former Act. Moreover, by sect. 1 of the amending Act the two Acts are to be read together, and therefore, whilst the case of necessaries remains as it was, there being no extension of jurisdiction there, the case of "damage to cargo" is expressly extended. Even if the High Court had no original jurisdiction in those matters where an owner was domiciled in England, there is nothing unreasonable in its having an appellate jurisdiction; the same reasons which induced the Legislature to confer on the High Court in 1861 a special jurisdiction *in rem* in certain matters in the case of foreign ships to enable the plaintiff to recover summarily here instead of having to pursue his remedy in a foreign country, might well have induced it in 1868 and 1869 to confer a similar jurisdiction in small matters on the County Court, not only over foreign but also over British ships, to enable the injured party to pursue his remedy at once in the place where the ship discharged her cargo instead of having to pursue the remedy in some distant part of the United Kingdom where the owner might chance to reside. And then the High Court of Admiralty, having a similar jurisdiction, would be the natural and proper court to hear the appeals. [Sir R. PHILLIMORE.—The case of the court having appellate jurisdiction where it had no original jurisdiction is not without

precedent. Revenue appeals from the West Indies were formerly heard here, though the court had no original jurisdiction in such matters.]

Myburgh, Q.C. and *Kennedy* for the respondents.—Admitting that the County Courts Admiralty Jurisdiction Amendment Act 1869 does give the County Courts jurisdiction in some matters which the High Court did not at the time possess, and that the cases of *The Cargo ex Argos* and *The Alina* are correct, and that *Simpson* v. *Blues* cannot now be considered good law, yet this case is not within that extended jurisdiction. This is simply a case of "damage to cargo," the jurisdiction in respect of which is given only by the Act of 1868; it is not like *The Cargo ex Argos* and *The Alina*, a question of breach of contract for the "hire of any ship" under the amending Act of 1869; it therefore stands precisely on the same footing as a claim for necessaries, and the necessity for the owner to be domiciled in this country exists exactly as much as in the case of *Allen* v. *Garbutt*. That case followed *The Dowse* (3 Mar. Law Cas. O.S. 424; L. Rep. 3 A. & E. 135; 22 L. T. Rep. N. S. 627), which was a decision of this court to the same effect so far as necessaries are concerned, and is consistent with *Everard* v. *Kendall* (3 Mar. Law Cas. O. S. 391; L. Rep. 5 C. P. 428; 22 L. T. Rep. N. S. 408) and the other cases on the interpretation of the "damage by collision" clause. The court is not asked merely to follow *The Alina*, and hold that in cases of charter-party, &c., when an action is brought under the Amending Act the County Court has jurisdiction where the High Court had none, but to hold that the amending Act is not only to be read with but to supersede and repeal the original Act.

Bucknill, in reply, referred to *The Sussex Peerage case* (11 Cl. & F. 143), as to the construction of Acts of Parliament.

Cur. adv. vult.

May 2.—Sir R. PHILLIMORE.—This is an appeal from a decision of the judge of the City of London Court in an action for damage to cargo. The action was an action *in rem* brought in that court by the holders of a bill of lading against the owners of the ship *Rona* for damage to goods on board the *Rona* alleged to have been caused by the negligence of the master during a voyage from New York to this country. At the trial it was contended by the defendants that the action was brought under the Admiralty Court Act 1861 and the County Courts Admiralty Jurisdiction Act 1868, and that therefore, as the owners of the *Rona* were domiciled in England, the City of London Court had no jurisdiction. The learned judge, who considered himself bound by the judgment in *Allen* v *Garbutt*, dismissed the action for want of jurisdiction, and the plaintiffs have appealed to this court. It was admitted, at least for the purposes of the appeal, that the owners of the *Rona* are domiciled in England, and that the jurisdiction of the City of London Court is the only question now to be decided. This question mainly depends upon the construction to be put upon the following sections in three several Acts of Parliament. It is enacted by the Admiralty Court Act 1861 (24 Vict. c. 10), sect. 6, that [his Lordship here read the section set out above]. The 3rd section of the County Court Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 7) provides that [his Lordship here read the section and sub-section (3) set out above]. Lastly, the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), the full title of which, it is important to observe, is "An Act to amend the County Courts (Admiralty Jurisdiction) Act 1868, and to give jurisdiction in certain maritime causes." The second section of this Act of 1869 provides that [his Lordship here read the section set out above]. The 3rd section provides that the jurisdiction conferred by the two Acts of 1868 and 1869 may be exercised "either by proceedings *in rem* or by proceedings *in personam*." The appellants, who were plaintiffs in the court below, contend that their action was brought under sub-sect. 1 of sect. 2 of the Act of 1869, and that therefore it came within the Admiralty jurisdiction of a County Court, notwithstanding that in consequence of the exception in sect. 6 of the Admiralty Court Act 1861 (which I have already read) it would not have come within the jurisdiction of the High Court of Admiralty unless brought thither by way of transfer or by way of appeal. I may say here that the City of London Court, by virtue of an Order in Council, possesses the Admiralty jurisdiction of a County Court, and all the law relating to the Admiralty jurisdiction of County Courts applies equally to that court. I have been referred to several cases which I have carefully examined, and which I think it expedient to mention in chronological order: April 1870, *Everard* v. *Kendall*; June 1870, *The Dowse*; May 1872, *Simpson* v. *Blues*, the decision in which case it was admitted could not be relied upon; July 1872, *The Cargo ex Argos*, and Dec. 1872 and Feb. 1873, the same cases on appeal; Feb. 1880, *The Alina*; Dec. 1880, *Allen* v. *Garbutt*. The appellants supported their contention by citing *The Cargo ex Argos*, a case which like the present arose on a bill of lading, and is so far directly in point, and *The Alina*, which was decided in 1880 by the Court of Appeal, and expressly approved *The Cargo ex Argos*. On the other hand, the respondents (defendants in the court below) contend that the action was brought, not under the Act of 1869, but under the 3rd section of the Act of 1868, which section expressly mentions claims for damage to cargo; and they argue that therefore, as the High Court of Admiralty could have had no jurisdiction in such a case (inasmuch as the owner's domicile was English), so neither can a County Court have jurisdiction. They rely upon the authority of *Allen* v. *Garbutt*, which, following the earlier cases of *Everard* v. *Kendall* and *The Dowse*, decided that an action for necessaries which had clearly been brought under the Act of 1868, where the owners of the ship were domiciled in England, did not come within the Admiralty jurisdiction of a County Court. It was alleged on both sides that these decisions (*The Alina* and *Allen* v. *Garbutt*) are distinguishable from each other, and do not necessarily conflict; the former dealing with an action under the Act of 1869, the latter with one under the Act of 1868. It is not necessary to determine whether these cases are reconcilable or not, because in fact the issue is narrowed to this point: Was the action against the *Rona* brought under the Act of 1868 alone, or under that of 1869, read and interpreted as one with the previous Act? It appears to me

to follow, from the arguments of the respondents, that the action could not properly have been brought under the act of 1868, and I am of opinion that this is "a claim arising out of an agreement made in relation to the carriage of goods in a ship," and that the action clearly falls within the words of the 1st sub-section of sect. 2 of the Act of 1869. I hold, therefore, that the City of London Court has jurisdiction, and that the appeal must be allowed.

Kennedy, on behalf of the appellants, asked for leave to appeal to the Court of Appeal, there being some doubt on the construction of the County Courts Act 1875, s. 10, Supreme Court of Judicature Act 1873, s. 45, Appellate Jurisdiction Act 1876, s. 20, and Order LVIII., r. 19 whether it was necessary to obtain leave to appeal further where the judgment of the Admiralty Division varied the judgment of the County Court sitting in Admiralty.

Sir R. Phillimore.—If it is necessary that I should give leave to appeal further, I do so, as the question is one of importance.

Solicitors for plaintiffs, *Pritchard* and *Sons*.
Solicitors for defendants, *Toller* and *Sons*.

QUEEN'S BENCH DIVISION.

Reported by A. H. Poyser, Esq., Barrister-at-Law.

Feb. 23, 24, *and March*, 24, 1882.

Before Pollock, B., Manisty and Stephen, JJ.)

The Chartered Mercantile Bank of India, &c, *v.* The Netherland Steam Navigation Company Limited.

Shipping—Bill of lading—Exceptions—Collision—Negligence or default of master or servants—Negligence of servants on board another ship—Liability of shipowner—Damages.

The 9th sub-section of the 25th section of the Judicature Act 1873 *does not affect the old common law rules as to damages in actions by owners of goods against the owners of the ship on board of which they have shipped their goods, because no variance previously existed in such actions between the Admiralty rule and the common law rule.*

The 8th sub-section of the 25th section of the Judicature Act 1873 *only applies to actions for damages arising out of collision brought by the owner of one ship against the owner of another ship, or by the owner of goods on board one ship against the owner of another ship.*

Where a quantity of specie was shipped on board the Crown Prince *under a bill of lading which contained the following exceptions: "The act of God, the king's enemies, restraint of princes and rulers. . . . accidents and damages from . . . . collision . . . . and all the perils, dangers, and accidents of the sea, rivers, land carriage, and steam navigation of whatsoever nature and kind soever, and accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, masters, mariners, or other servants of the company, in navigating the ship, or from any deviation, excepted," and whilst on her voyage the* Crown Prince *came into collision with another steamship belonging to the same owners, and a quantity of the specie was lost, and the jury found that this latter vessel was principally in fault but that the* Crown Prince *was also in some degree to blame; the exception in the bill of lading as to collision did not protect the shipowners from liability for a collision caused by the negligence or default of their servants on board a vessel other than the* Crown Prince, *neither were they protected by the clause which excepted their liability for the negligence of their servants, as that applied only to the negligence of their servants who were navigating the* Crown Prince.

Motion for judgment.

Butt, Q.C., *Myburgh*, Q.C., and *Barnes* for the plaintiffs.

Benjamin, Q.C., *Cohen*, Q.C., and *Raikes* for the defendants.

The facts and arguments sufficiently appear from the judgments.

Cur. adv. vult.

Pollock, B.—This is an action brought by the plaintiffs, who are bankers carrying on business in London, against the defendants, who are a joint-stock company limited, constituted and duly registered pursuant to the Companies Act 1862, having their head offices in London, to recover the value of a quantity of specie which in the month of Nov. 1875 was shipped by the plaintiffs at Singapore on board the defendants' steamship called *Wilhelm Kroon Prinz de Nederlanden* (which I shall call the *Crown Prince* for the sake of brevity), to be carried by the defendants from Singapore to Sourabaga, and there delivered in good order and condition to the order of the plaintiffs, they paying freight for the same upon the terms of the bill of lading, which contained the following exceptions: "The act of God, the king's enemies, restraint of princes and rulers, pirates, or robbers by sea or land, accidents and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam, and all the perils, dangers, and accidents of the sea, rivers, land carriage, and steam navigation of whatsoever nature and kind soever, and accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship, or from any deviation, excepted." The *Crown Prince* sailed from Singapore on her voyage to Sourabaga, and in the course of it she came into collision with another steamship of the defendants called the *Atjeh*, and was sunk with the plaintiffs' specie on board. Some of the specie was recovered, and the action is brought to recover the value of the residue which was lost. The plaintiffs alleged, by paragraph 4 of their statement of claim, that the collision was caused by the negligence of the defendants' servants on board the *Atjeh*, and that the loss of the specie was not caused by any of the perils excepted in the bill of lading. The defendants, by their statement of defence, admitted that their steamship the *Crown Prince* in the course of her voyage came into collision with their steamship called the *Atjeh*, and was sunk with the plaintiffs' goods on board, but they denied that the collision was caused by negligence, and alleged that, if it was so caused, such negligence was wholly that of their servants on board their ship the *Crown Prince*, and that such negligence is one of the perils specially excepted in and by the bill of lading. The defendants also denied the allega-

tion in the 4th paragraph of the plaintiffs' statement of claim, that the loss was not caused by any of the perils excepted by the bill of lading. In other words, they alleged that the loss was caused by a peril or by perils excepted by the bill of lading. The plaintiffs joined issue upon the defendants' statement of defence. The cause came on for trial at the Guildhall Sittings on the 15th Dec. last before Manisty, J., and a special jury. A great deal of evidence was given on both sides as to the cause of the collision, and in the result the jury found that the *Atjeh* was mainly in fault, but that the *Crown Prince* was also in some degree to blame. Upon these facts it was contended before us, on the part of the plaintiffs, that the defendants are liable for the loss of the specie, first, by reason of the contract into which they had entered by the bill of lading for carriage of it, and secondly, that they are liable in tort as owners of the *Atjeh* for the negligence of their servants, the master and crew of that vessel, whereby the collision was mainly occasioned. In the view which I have taken of this case, it becomes unnecessary to consider the questions which arise out of the second contention. As to the first question it was suggested for the defendants that the contract contained in the bill of lading was not governed by English law. I cannot, however, think that there is room for serious argument upon this point. The goods were shipped at an English port; the plaintiffs are an English company; the defendants are a limited company, whose registered office is in London, and by their memorandum of association they describe as one of the objects for which the company is established the hiring of vessels. The bill of lading is in the English language throughout, and the defendants are therein described as "The Netherlands India Steam Navigation Company Limited," which obviously has reference to the Companies Act 1862, whereby the liability of the members of limited companies is limited to the amount unpaid on the shares held by them, or to the amount which the members may undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound-up. Under all these circumstances, adopting the well-known rule of law as acted upon in *Lloyd* v. *Guibert* (2 Mar. Law Cas. O. S. 26, 283; 10 L. T. Rep. N. S. 570, and 13, p. 602; L. Rep. 1 Q. B. 115), the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and there exist here none of those facts from which the court were in that case led to infer the contrary. Assuming, then, that the English law governs, two matters must be dealt with before the liability of the defendants can be determined, viz.: first, what is the true construction of the bill of lading? and, secondly, have the defendants succeeded in showing that the event whereby the loss of the plaintiffs' specie was occasioned was within the excepted perils? With regard to the perils excepted by the bill of lading they may be divided into two classes: first, those which are dealt with by the first clause and mentioned by name, one of these being "collision;" and, secondly, those which are covered by the second clause, which provides for "accidents, loss, or damage, from any act, neglect, or default whatsoever of the pilots, masters, or mariners, or other servants of the company in navigating the ship," which would include all acts so caused, and therefore, *inter alia* collision, if it was caused by the neglect or default of the defendants' servants in navigating the *Crown Prince*. Dealing first with the second of these clauses, it is obvious that, had the loss been occasioned wholly by those who were navigating the *Crown Prince*, the defendants would have been protected, but the jury having found that the crew of the *Atjeh* were mainly in fault, although the *Crown Prince* was also in some degree to blame, it appears to me that the defendants are not protected by this clause, inasmuch as they have not succeeded in showing that the loss was occasioned wholly by the neglect or default of those who were navigating the *Crown Prince*. With respect to the first clause there is no doubt that the loss in question was occasioned by collision, and the only question that arises is, whether the word "collision," as here used, applies to a collision which was mainly brought about by the negligence of those who were servants of the defendants engaged in the navigation of one of their vessels other than that in which the specie was shipped. It is necessary here to bear in mind that the clause in question is inserted in limitation of the common law liability which could otherwise attach to the defendants in the discharge of their duty as carriers, and should its intention and effect be open to doubt it must be construed most strongly against the carriers. This proposition is very clearly dealt with by Story, J., in sect. 512a. of his work on Bailments, in which speaking of the well-known and long-established exception contained in maritime contracts for the carriage of goods, of "perils of the sea," he says: "The phrase perils of the sea, whether understood in its most limited sense, as importing a loss by natural accident peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still, in either case, be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is that, if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." The same principle of construction has been acted upon by the English courts and applied to the case of a loss occasioned by collision. Thus, in *Lloyd* v. *The General Iron Screw Collier Company Limited* (2 Mar. Law Cas. O. S. 32; 10 L. T. Rep. N. S. 586; 3 H. & C. 284), it was held that the exception in the bill of lading of "accidents or damages of the seas, rivers, and steam navigation of whatever nature or kind soever," did not exempt the shipowner from responsibility for the loss of goods which arose from a collision caused by the negligence of the master or crew. This decision was discussed and followed in *Grill* v. *The General Iron Screw Collier Company Limited* (2 Mar. Law Cas. O. S. 362: 14 L. T. Rep. N.S. 711: L. Rep. 1 C. P. 600). A similar construction was given to a

bill of lading which contained a clause that the shipowner "is not to be accountable for leakage or breakage," in the earlier case of *Phillips* v. *Clarke* (2 C. B. N. S. 256), and more recently in *Czech* v. *The General Steam Navigation Company* (3 Mar. Law Cas. O. S. 5; 17 L. T. Rep. N. S. 246; L. Rep. 3 C. P. 14). These cases show that but for the general words excepting the neglect or default of the defendant's servants in navigating the *Crown Prince*, the defendants would not be protected in the event of a collision occasioned by such neglect or default, and as there are no words in the bill of lading which apply to a collision arising from the neglect or default of the defendants' servants in navigating another vessel, the word "collision" itself is of no avail, and it is hardly necessary to add that, where goods are damaged by reason of a collision occasioned by the fault of the master or crew of a vessel, other than that in which they are shipped, or by the default of those on board both vessels, the owner of the carrying vessel, in the absence of an express stipulation to the contrary, is liable for their loss. The law as to this will be found in 3 Kent's Commentaries, lecture 47, s. 5, and in Parson's Law of Shipping, vol. 1, p. 269. It was pressed upon us by the defendants' counsel in argument that it bore hardly upon the defendants to extend their liability beyond the negligence of those of their servants who were engaged in carrying out the contract of carriage, and that it ought not to be supposed that under any circumstances they could intend to make themselves liable for the acts of their servants who were navigating another vessel, whose duties had no connection with the performance of the contract for carriage upon which the plaintiffs are suing. There is much that is plausible in this, but it only raises in another form the question already answered, by saying that the defendants as carriers are liable for all events other than the act of God, which they have not excepted by their bill of lading, and although, if the collision had taken place between two ships which were the only vessels owned by the defendants, and these were engaged in wholly different voyages, and happened to meet by accident upon the high seas, the result might appear to be more unforseen and peculiar than in the present case, it must be remembered that the defendants are owners of ships which are engaged in a carrying trade between certain fixed ports, and make regular voyages over the same seas, and in saying that they are liable for a loss occasioned by the negligence of their crews on board a vessel other than that in which the plaintiffs' goods are shipped, is only applying a rule, the equity of which would not be contested if it were applied to a carrying company who own a large fleet of vessels trading in such a manner to and from a port that in the course of their voyage they would constantly pass or meet in a river or harbour, or would be brought up in close proximity to the same loading wharf. The liability of the defendants being established, a question still arises, what is the proper amount of damages? Until recently the defendants, who had contracted to carry the specie in question from Singapore to Sourabaga, and had failed to do so by reason of a peril against the occurrence of which they were not protected by the contract of carriage, must have been held to be liable for the full value of the specie. A doubt, however, has been raised by reason of the language contained in sect. 25, subsect. 9 of the Judicature Act 1873. The language of that sub-section is as follows: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail." If this provision is applicable to the present case, inasmuch as both the *Crown Prince* and the *Atjeh* were found by the jury to have been in fault, the Court of Admiralty rule must be held to apply; and that rule is that, where both parties to a collision are to blame, they must share the loss equally: (see *The Milan*, Lush. 388; 1 Mar. Law Cas. O. S. 185; 5 L. T. Rep. N. S. 590; and *Hey* v. *Le Neve*, 2 Shaw Sc. App. Cas. 395.) The language of this sub-section is no doubt very general, but, before effect is given to it, it would seem necessary to refer to what was the condition of the law before the passing of the Judicature Act. The only cause or proceeding for damages arising out of a collision between two ships, in which the rules in force in the Court of Admiralty were at variance with those in force in the courts of common law, were cases in which actions were brought by the owner of one ship against the owner of another ship, or by the owner of goods on board one ship against the owner of another ship in respect of a collision. In either of these cases the Admiralty rule and the common law rule with respect to damages differed, the Admiralty rule being as I have already expressed it, and the common law rule being that where both vessels were in fault in the sense that those navigating the plaintiff's ship were guilty of negligence which substantially contributed to the collision, the plaintiff could not recover. It was, I apprehend, to prevent this variance, and to make the practice in both courts uniform, that this sub-section was passed; but it seems to me equally clear that its effect must be confined to those cases in which such variance previously existed. Where the action is brought, not by one shipowner or goods owner against a ship which has run into the carrying vessel, but by the goods owner who seeks to enforce the contract for carriage against the owner of the ship to whom he has intrusted his goods, no such variance in practice could arise.

Manisty, J.—I concur with my brother Pollock in the conclusions at which he has arrived, and in the reasons which he has stated in support of them, but, as the case is somewhat novel, and as it will probably be submitted to a higher tribunal, I wish to add a few observations of my own as to the liability of the defendants upon their contract. The question which lies at the root of the case is, to what cause ought the loss of the plaintiffs' goods to be attributed? Doubtless the collision of the defendants' ship the *Crown Prince*, with the defendants' ship, *Atjeh*, was the *causa proxima* but according to the finding of the jury the negligence of the defendants' servants on board the two ships was the *causa causans* in other words, the efficient cause of the loss. Now it is a settled rule of law that, in the case of an action on a contract of marine insurance, regard is to be had to the *causa proxima* (see *Thomas* v. *Hopper*, E. B. & E. 1038); but in the case of an action for breach of a contract contained in a bill of lading, regard is to be had to the *causa causans*

(*Lloyd* v. *The General Iron Screw Company* 2 Mar. Law Cas. O. S. 32; 10 L. T. Rep. N. S. 588; 3 H. & C. 284, and the other cases cited by my brother Pollock). It was conceded on the part of the defendants that, but for the express exception in the bill of lading of the negligence of their servants on board the *Crown Prince*, they would have been liable for the loss in question, notwithstanding collision is one of the excepted perils in the bill of lading; but they contend that, without any express exception of the negligence, of their servants on board the *Atjeh*, they are protected by the exception of collision. I am unable to see any sound ground for the distinction between the negligence of the defendants' servants on board the *Crown Prince* and similar negligence of their servants on board the *Atjeh*. No authority was cited in support of it, but it was contended that there was an implied contract in the bill of lading that the defendants' servants on board the carrying ship (the *Crown Prince*) would use all reasonable care to carry safely, and that consequently it was necessary expressly to except their negligence, whereas there was no such implied contract wfth respect to their servants in any other ship, and therefore there was no need of any express exception of their negligence. It seems to me that this argument admits of a ready answer, that there is no implied contract whatever in the case. The contract contained in the bill of lading is express, namely, to carry the goods safely, and deliver them in good order and condition subject to certain specified exceptions which do not include the negligence of their servants on board either of the two ships. Having regard to the finding of the jury that the *Atjeh* was mainly to blame, but that the *Crown Prince* was also in some degree to blame, I think that the defendants are liable by virtue of their contract for the whole of the loss.

STEPHEN, J.—I have nothing to add to the judgment of my brother Pollock, in which I concur.

Judgment for the plaintiffs.

Solicitors: for the plaintiffs, *Waltons, Bubb, and Walton;* for the defendants, *Lovell, Son,* and *Pitfield.*

March 20 *and* 22. 1882.

(Before POLLOCK, B.)

KAY *v.* FIELD AND CO.

Shipping—Charter-party—Exceptions — Detention by ice—Customary manner of loading — Demurrage.

Where it was agreed by charter-party that the plaintiff's ship should "proceed to Cardiff, E. Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron; the cargo to be loaded as fast as the steamer can take on board, and stow within the customary working hours of the port, commencing when the steamer is in berth and ready to load. If longer detained, merchants to pay steamer 30*l. per day demurrage. Detention by frost, &c., not to be reckoned as lay days, &c.," and the ship was intended to be loaded with C. and Co.'s iron, though this fact was unknown to the plaintiff when the charter-party was made, C. and Co.'s wharf being some distance from the E. Bute Dock, situated upon a canal which leads into the W. Bute Dock, and their customary manner of loading being to bring rail iron from their wharf in lighters into the W. Bute Dock, and thence into the E. Bute Dock, and all other makers of rail iron, about six in number, having wharves upon one or other of the two docks, and loading vessels either directly from the quay, when they are alongside, or by lighters, and the ship arrived in the E. Bute Dock, and loading was commenced, but was interrupted for sixteen days by reason of a severe frost, which prevented the lighters coming down the canal from C. and Co.'s wharf to the W. Bute Docks, the docks themselves being free from ice, the defendants were held to be protected by the exception in the charter-party as to detention by frost.*

FURTHER CONSIDERATION.

The action was brought to recover sixteen day's demurrage for detention of the plaintiff's steamship *Cid*.

At the trial at Swansea Summer Assizes 1881, Pollock, B. referred all questions of fact in the cause to a special referee.

The facts, as found by the referee, are sufficiently set out in the judgment of the learned judge.

M'Intyre, Q.C. and *Brynmor Jones*, for the plaintiff, cited

Fairbridge v. *Page*, 1 Car. & K. 317;
Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46;
Lawson v. *Burness*, 1 H. & C. 396;
Postlethwaite v. *Freeland*, *sup.* 129; 42 L. T. Rep. N. S. 845; 4 Ex. Div, 155;
Hudson v. *Ede*, 3 Mar. Law Cas. O. S. 114; 18 L. T. Rep. N. S. 764; L. Rep. 2 Q. B. 566;
Thiis v. *Byers*, 3 Asp. Mar. Law Cas. 147; 34 L. T. Rep. N. S. 526; 1 Q. B. Div. 244;
Kearon v. *Pearson*, 7 H. & N. 386;
Fenwick v. *Smalz*, 3 Mar. Law Cas. O. S. 64; 18 L. T. Rep. N. S. 27; L. Rep. 3 C. P. 313.

Channel (*Dillwyn* with him) for the defendants.

Cur. adv. vult.

POLLOCK, B.—This case was tried before me at Swansea, and reserved for further consideration. It was an action on a charter-party of the steamship *Cid*, and the material facts as set out in the statement of claim are that the plaintiff's steamer should, with all possible despatch, sail and proceed to Cardiff East Bute Dock, and there load in the customary manner from the agent of the freighters a full and complete cargo of rail iron. The cargo was to be loaded as fast as steamer can take on board and stow within the customary working hours of the port (Sundays and holidays excepted), commencing when the steamer is in berth, and to be discharged as fast as the custom of the port of delivery will admit, but not less than 200 tons per working day, and, if longer detained, merchants to pay steamer 30*l.* per day demurrage. Then follows this clause: "Detention by frost, floods, riots, and strikes of workmen, accidents to machinery or quarantine, not to be reckoned as lay days." Under this charter-party the *Cid* proceeded to Cardiff East Bute Dock, and was there ready to take cargo, and it is admitted that there was delay in fact, the only question being whether this delay is excused by the exception in the charter-party. One argument on the construction of the charter-party I may notice and deal with at once. It is said that as the charter-party is made between the "owner and the agents of the freighters," the provision as to loading in the customary manner must be con

fined to the custom of loading adopted by Austen Brothers, but it is clear to me that in the ordinary acceptation of the words, they must mean all persons who would load such a cargo as the charter-party stipulates for, and therefore, amongst others would be, in the present case, Messrs. Crawshay, whose cargo it was, in fact, intended to ship. It is found as a fact, by the special referee, to whom this case was sent for a finding as to the facts, that the shipowner was ignorant of the existence of any custom prevailing at the port of loading; but *Hudson* v. *Ede* (*ubi sup.*) lays it down that ignorance on the part of the shipowner is immaterial if the custom is well known and acted on at the port of loading. I have already mentioned the objection that the name of Messrs. Crawshay, their iron, and their wharf, were not mentioned in the charter-party, and have said that they must be treated as agents of the freighters, and therefore, when we consider what the customary manner of loading is, we must take in all manners of loading so as to establish the usage. Another point made on the part of the plaintiff was that "customary manner" is equivalent to actual manner of loading the ship, and does not include the carriage of goods from a distance to the dock where the ship is lying, and *Lawson* v. *Burness* (*ubi sup.*) and *Tapscott* v. *Balfour* (*ubi sup.*) were quoted in support of this contention; but the point is not quite the same in the present case, for the argument is that the *Cid*, being in the dock where she is to load, there is a customary manner of loading which appertains to the port. The facts, as found by the special referee, are that there are two docks at Cardiff, the East Bute Dock and the West Bute Dock, connected by a canal with locks at both ends. The West Bute Dock is also connected by a junction canal with the Glamorganshire canal. Iron rails shipped at Cardiff are almost entirely manufactured by some five or six makers having their works at some distance from Cardiff, Messrs. Crawshay and Co. being one of such makers. With the exception of Messrs. Crawshay, the other manufacturers rent wharves or quays in the docks themselves for their own exclusive use, some of them in the East Bute Dock and some in the West Bute Dock. Messrs. Crawshay, who manufacture their rails about twenty-four miles from Cardiff, have no exclusive wharf in either dock, but they have a wharf on the Glamorganshire Canal nearly opposite the Junction Canal leading from the Glamorganshire Canal to the East Bute Dock. There are in the docks berths alongside the dock quays which are open to the public in turn on application to the dock authorities. Vessels are also moored in tiers in the dock basin for the purpose of being loaded with rails and other cargo from lighters brought alongside the vessels. A railway runs along the quays round both docks. Large steamers cannot go into the West Bute Dock, and shippers having wharves in the West Bute Dock send their iron by lighters into East Bute Dock to load vessels that may be in that dock. Crawshays forward their iron from their wharf in lighters propelled by lightermen to alongside vessels in the East Bute Dock, which vessels are moored at the top of that dock for the purpose of receiving their cargo from their canal wharf. On the 8th Jan., in anticipation of the *Cid's* arrival, the whole of the iron intended for her had been sent down from Messrs. Crawshay's works and deposited at their wharf. The *Cid* arrived on the 11th Jan., and was berthed at the top of the East Bute Dock, that being the place where Messrs. Crawshay always loaded vessels with their rail iron. On the 13th loading was commenced and continued, with some interruption from ice until the 16th. From the 16th Jan. all the usual approaches from Crawshay's wharf to the docks were impassable, and continued so until the 31st Jan., when iron was again sent through, and the shipping was completed on the 2nd Feb. Every exertion was made to forward the iron after the canal communication was practically open, and the irregular delivery after the 14th was occasioned by frost alone. During all this time the docks themselves were not frozen; steamers and lighters could move about, and vessels could go out to sea. No reasonable means could have been adopted to convey the iron from the wharf into the docks, neither could any marketable railway iron have been obtained from any other source. The result is that there are four methods of loading which may be said to be the usual modes of loading. First, loading from the wharf when the vessel is alongside; secondly, by lighters when the vessel is not alongside; thirdly, by lighters coming from the other dock through the canal joining the two docks; and fourthly, Messrs. Crawshay's iron brought in lighters from their wharf upon the other canal. Under the circumstances it seems to me to be substantially the same as if the iron had been in the West Bute Dock, and if so it would come within the finding in the ninth paragraph of the report. It seems to go one step further and say that, since the iron is taken from the Glamorganshire canal, and that was blocked with ice, the delay falls within the exceptions in the charter-party taken in conjunction with the "loading in the customary manner." I know of no case exactly similar to the present; that of *Hudson* v. *Ede* (*ubi sup.*) comes nearest to it. In that case "a charter-party provided that the ship should proceed to Sulina, or outside, in sufficient depth of water to load the ship, and there load from the agents of the merchants a complete cargo of grain. The cargo to be brought and taken from alongside the ship at the ports of loading and discharge at charterer's expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the laying days at 6*l.* a day; detention by ice and quarantine not to be reckoned as laying days. There are no storehouses at the port of Sulina itself; but the grain shipped at Sulina is kept at places higher up the Danube, and is brought by steam lighters down the river and unloaded direct into ships waiting their lading at Sulina. The ship being ready to load notice was given to the charterer; but after six days before any cargo had been supplied, the river immediately above Sulina became frozen up, and so remained for two months, the port of Sulina itself remaining open. The ship having been thus delayed waiting for cargo, held, that this was a detention by ice within the meaning of the charter-party; and that, though the circumstances of the port were unknown to the shipowner, yet, being well known in the grain trade, they must be taken to have been the basis

of the contract: and that whenever there was no access to the ship by reason of ice from any of the storing places from which merchandise was conveyed direct to the ship, the exception in the charter-party would apply." The ground of the judgment is put in this way, that the conveyance by the river is part of the act of loading, "and as there are no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore, from which of necessity the grain must be brought, and the vessel in which it must be loaded, so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against. The whole of that reasoning would apply to the present case, and as it must be taken to have been in the contemplation of both parties that the agents of the freighters would load in any of the modes customary in the port of loading, the latter had the option of loading in any of the four ways that are found to be customary. Another argument was based upon the case of *Kearon* v. *Pearson* (*ubi sup.*). It is said that the words "load with usual despatch" implied that the cargo was ready to be loaded, and it was argued that Messrs. Crawshay's iron ought to have been brought down from their wharf to the dock in readiness to be placed on board the steamer. If the iron had been at their manufactory I agree that this would have been a good argument; but the iron lying at Crawshay's wharf is ready for loading, according to the ordinary usage of the port, so that this case really has no application. I therefore think that there should be verdict and judgment for the defendants with costs.

Solicitors for the plaintiffs, *Ingledew* and *Ince*, for *Ingledew, Ince*, and *Vachell*, Cardiff.

Solicitors for the defendants, *Paines, Layton*, and *Pollock*.

March 20 *and* 22, 1882.

(Before POLLOCK, B.)

COVERDALE, TODD, AND CO. *v.* GRANT AND CO.

Shipping—Charter-party—Exception—Frost preventing loading—Demurrage.

Where it was agreed by charter-party that the plaintiffs' ship should proceed to Cardiff, and there load in the customary manner a cargo of iron, the charter-party containing the following clauses: "Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage at 40l. per day. Except in case of hands striking work, or frost, or floods, or any other unavoidable accidents preventing the loading and unloading, in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship," and the ship arrived at Cardiff, and the loading was commenced, but was afterwards interrupted by frost, it was held that the exception applied to delay occasioned by the excepted causes after the loading was commenced, and was not confined to the commencement of the loading being prevented.

FURTHER CONSIDERATION.

The action was brought to recover demurrage and damages for the detention of the plaintiffs' steamship *Mennythorpe*.

At the trial, at Swansea Summer Assize 1881, all issues of fact were referred by Pollock, B. to a special referee.

The following are the material facts found by the referee:—

It was agreed by charter-party of the 16th Dec. 1880 that the plaintiffs' ship should proceed to Cardiff East Bute Dock, and there load a full and complete cargo in the customary manner from the agents of the freighters. The cargo was to be supplied as fast as steamer can receive at all hatchways. The time to commence from the vessel being ready to load and unload, and ten days on demurrage at 40*l.* per day; except in case of hands striking work, or frosts or floods, or any other unavoidable accidents, preventing the loading, in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.

The steamer arrived in Cardiff on the 10th Jan. 1881, and commenced to load on the following day. On the 13th and the two following days loading was delayed by ice, and from Jan. 16th to the 21st it was entirely suspended, owing to the same cause. The delay in loading was caused by the frost alone, and the iron could not have been brought into the dock by any reasonable means, neither could the charterers have obtained or loaded the vessel with a like cargo from any other place or by any other means.

Brynmor Jones (the *Solicitor-General* with him) for the plaintiffs.

Bowen Rowlands, Q.C. and *Moulton*, for the defendants, were not called upon.

Cur. adv. vult.

POLLOCK, B. (after referring to the facts) said:—The same principle is involved in this case as in that of *Kay* v. *Field* (*ante*, p. 630), and I must give judgment for the defendants for the same reasons. There were, however, other considerations argued, which I will briefly notice. It was argued that the exception as to frost applies only to the clause in which it occurs; that is to say that it applies only to the "time to commence," and not to "cargo to be supplied." In my opinion, that is not the proper construction. The result of that argument is, that the exception would apply only to cases in which the loading had not been commenced, and that, as in the present case, the loading had been commenced and was afterwards interrupted by frost, it has no application. The argument may be supported by the strict grammatical sense of the word, but I think we are bound to give it the ordinary and popular sense, and the subsequent words "resume employment" tend to show that this is the proper construction. Again, it was urged that the stipulation as to the owners being at liberty to make use of the vessel for a short voyage shows that it was contemplated that the vessel would be empty; but the argument is based upon the ground of the inconvenience to the owner rather than on the construction of the agreement itself; and, unless the inconvenience were so great and so manifest that it was clear the parties could not have contemplated its occur-

rence, weight ought not to be attached to it. I therefore give judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiffs, *Shum, Crossman, and Co.*, for *Turnbull* and *Tilley*, West Hartlepool.

Solicitors for the defendants, *Clarke, Rawlings, and Clarke.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

March 21 *and* 22, 1882.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE STORNOWAY.

Lien—Freight—Hire of ship—Charter-party.

The goods of a shipper in a general ship are not affected by a clause in a charter-party between the person working the ship and the shipowner of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charter-party.

Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties.

T. hired a ship from M., and by the charter-party gave M. a lien on all cargo and freight for arrears of hire.

T. advertised the ship as a general ship, and gave no notice of the charter-party.

B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears.

Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention.

THIS was an action for non-delivery and wrongful detention of thirty-nine casks of linseed oil.

The plaintiff, a seed-crusher at Lowestoft, shipped the casks on board the *Stornoway* at that port on the 10th May 1881, to be carried to London. The *Stornoway* was a regular trader between Lowestoft and London as a general ship. No bills of lading were given in respect of the goods, but the agent of the steamer at Lowestoft gave a receipt for the goods. *The Stornoway* arrived at London on the following day, the 11th May.

The plaintiff was willing to pay the freight, 5*l.* 10*s.*, for the carriage of the goods, but the defendants claimed to detain them under the provisions of a certain charter-party, asserting that by that document they had a lien on the goods for the whole of the chartered freight then due.

The conditions in the charter-party on which the defendant relied, were stated in the statement of defence as follows:

5. . . . On or about the 10th Oct. 1880 the defendants, by a charter-party made between them and Julius H. Thompson and Co., let to the said J. T. and Co. the steamship *Stornoway* for the sole use and benefit of the said J. T. and Co. for the term of three or six calendar months from the 25th Oct. then next, at the charterers' option, they giving fourteen days notice of discontinuance. The hire of the said steamship was to be paid at and after the rate of 140*l.* sterling per calendar month, less a commission of 5 per cent. due to the charterers, and was to be payable fortnightly in advance in cash until the vessel was again returned by the said J. T. and Co. to the plaintiffs.

6. It was further agreed in the said charter-party, by and between the defendants and the said J. T. and Co., that the defendants were to have a lien upon the cargo and freight for arrear of hire of the said steamship, and that the charterers were to have a lien upon the said ship for the monthly freight, payable in advance, and also that, in default of payment of hire when due, the owners were to be at liberty immediately to resume possession of the said steamship, and to claim damages. . . . .

On the arrival of the said steamship at London the defendants had not received the last fortnightly instalment of hire due under the charter-party, and the charterers having suspended payment, the defendants landed the thirty-nine casks of oil at a wharf, and detained them to satisfy their claim for hire under the charter-party. Before the trial it had been arranged between the parties that the oil should be given up, the plaintiff paying the sum of 85*l.*, which was sufficient to cover the arrears of the hire of the steamer, to the defendants' solicitors, which sum was to be considered as representing the casks of oil.

The plaintiff in his reply averred that he had no notice of the alleged charter-party.

The case was heard on the 21st and 22nd March by Sir Robert Phillimore, assisted by assessors.

R. T. Reid for plaintiff.—The question is whether a shipowner can have a lien on goods shipped on board his vessel as a general ship by reason of a secret lien clause in a charter-party of which the shipper has no notice. The agent for the ship at Lowestoft signed receipts as agent for the ship and for J. T. and Co., thereby leading shippers to suppose that J. T. and Co. were owners of the ship, and J. T. and Co. could not detain these goods for freight due for the carriage of other goods; so long as the plaintiff paid, or was prepared to pay, the freight due for the carriage of his own goods, he was entitled to have them delivered to him. If the plaintiff had received bills of lading which incorporated the charter-party, he would be bound by the terms of the charter-party, but he would be entitled to refuse to have the goods carried on such terms and to have them returned to him, if he received no previous notice of the charter-party:

Peek v. *Larsen*, 1 Asp. Mar. Law Cas. 163; L. Rep. 12 Eq. 378; 25 L. T. Rep. N.S. 580.

The ground of that decision is that the shipper had no notice of the charter-party, and that is the case here. If a shipper contracts by bill of lading with the master of a ship, he is entitled to claim performance from the owner, if he had no knowledge that the ship was chartered:

Sandemann v. *Scurr*, 2 Mar. Law Cas. O. S. 446; L. Rep. 2 Q. B. 86; 15 L. T. Rep. N. S. 608;

That is, that the rights and remedies and obligations of the owner in such a case are the same as those of the charterer with whom the shipper has contracted on the supposition that he is the owner. Even if there were was a lien on these goods, it was lost when they were landed without the notice required by the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 28, being given. It was also vitiated by being asserted for more than the freight actually due at the time.

McLeod, Q.C. (with him *Butt*, Q.C.) for the defendants.—The lien for freight or hire of the ship

binds all goods upon the ship; the remedy of the shipper is against the charterer if he has no notice of the terms of the charter-party:

Small v. *Moates*, 9 Bing. 579.

R. T. Reid in reply.

Sir R. PHILLIMORE.—The question in dispute in the present case was clearly stated by the plaintiff's counsel in the course of his argument. The facts were proved or admitted; the point of law alone remains for decision. There are three sets of persons involved in the transaction out of which the action arises, but two only are parties to the action: (1) Barber, the plaintiff, is a seed crusher at Lowestoft, and owner of this oil; (2) Methuen and Co, the defendants and owners of the *Stornoway*; (3) Thompson and Co., who are not parties to the action; who have offices in London and Lowestoft, and who have, as I understand, suspended payment. In October 1870 Messrs. Thompson and Co. enter into a charter-party with Messrs. Methuen and Co., the owners of the s.s. *Stornoway*, and the defendants in the present action, for the hire of that vessel from 25th of that month for three or six months at charterers' option, on fourteen days' notice of discontinuance. It was agreed by the charter-party that the defendants should retain a lien on cargo and freight for the arrears of the hire due. Thompson and Co. then advertise the *Stornoway* as a general ship plying between London and Lowestoft, and in the advertisements the names of Thompson and Co. only appear, no notice being given of the charter party, or that any person other than Thompson and Co. were owners of the ship. The *Stornoway* begins to run on the 7th Jan. 1881, and the plaintiff says he frequently sent goods to London by her. Under these circumstances Messrs. Barber and Co., the plaintiffs, ship their goods on board the *Stornoway* in ignorance of the fact that the defendants were owners of the vessel, or that there was any charter-party from any person to Messrs. Thompson and Co. The goods are carried to London, and there seized and detained by the defendants, in virtue of the lien given by the charter-party. On the 16th May the plaintiff goes to Thompson and Co., in London, who by that time have suspended payment, and they inform him that the oil has been seized in consequence of a dispute between themselves and the defendants, Messrs. Methuen and Co. Correspondence ensues between plaintiff and defendants, the latter saying that they can only recognise Thompson and Co. as charterers, and that, as there are no bills of lading, they must be taken to be owners of the cargo as well. On the 24th May the plaintiff arrests the ship under the provisions of the Admiralty Court Act, the affidavit to lead the warrant affirming that there was no owner domiciled in England or Wales. She is, however, released at once—I believe the same day. On the 1st June the oil was given up on deposit of 85*l.* being made in place of it.

The issue really is whether the defendants, Methuen and Co., can claim a lien on goods the property of the plaintiff Barber, carried by the *Stornoway*, in respect of arrears of hire due from the charterers Thompson and Co., the plaintiff at the time of the shipment knowing nothing of the charter-party or its conditions. I have been referred to three cases upon the subject, only one of which, however, appears at all applicable to the present case, and I am sure that the industry of counsel would have furnished me with any others, did such exist. No direct precedent has, however, been produced, and the case must be decided on general principles. The marginal note of the one case (*Peek* v. *Larsen*, 1 Asp. Mar. Law Cas. 163; L. Rep. 12 Eq. 378: 25 L. T. Rep. N. S. 580), to which I have referred, and which was decided by Lord Romilly, Master of the Rolls, in 1871, is as follows: "Where a vessel about to sail is advertised as a general ship," as was the case here, "an intending shipper is not bound to inquire as to the existence of any charter-party. A person who, without notice of any charter-party, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading, except subject to a charter-party containing objectionable provisions. A Norwegian vessel was advertised as a general ship by Messrs. C. and Co., an English firm, described in the advertisement as brokers. The plaintiffs entered into an agreement with Messrs. C. and Co. for the carriage of certain goods at a stipulated rate of freight, and placed the goods on board before they had notice of any charter-party affecting the ship. It afterwards proved that Messrs. C. and Co. were charterers of the vessel, under a charter-party which provided that the owner should have a lien for freight, dead freight, and demurrage. The captain refused to sign the bills of lading, except subject to the charter-party, or to return the goods to the plaintiffs. Held, that the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charter-party, and that the plaintiffs were entitled to have the goods delivered to them free from any claim by the owners;" and in his judgment Lord Romilly says: "I am of opinion that this is a very clear case. I think that it depends upon this: Had the plaintiffs, the shippers, notice of this charter-party, or was it their bounden duty to inquire whether there was a charter party or not? I fully admit that every person is bound by the contents of a charter-party of which he has notice. If he does not choose to inquire what the contents of the charter-party are that is his own fault, and he must take the consequences of it. But I am of opinion that, until he is either set upon inquiry, or has notice of a charter-party, he is not bound to assume that there is a charter-party. All that the plaintiffs knew in this case was the advertisement. That advertisement was inserted in the paper in consequence of the charter-party entered into between the owner and Messrs. Claxton; but anyone reading it would suppose that Messrs. Claxton were the agents of the owner of the ship." It appears to me that this language of the learned Master of the Rolls is directly applicable to the present case. It seems to me that the defendants' contention is contrary to the general principles of equity and justice, and also to the decision which I have just quoted. I therefore pronounce in favour of the plaintiffs' claim, the question of damages for the detention of the oil to be referred to the registrar and merchants.

Solicitors for the plaintiffs, *Thos. Cooper* and *Co.*

Solicitors for the defendant, *Druce, Jackson*, and *Attlee.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by P. B. Hutchins, J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

March 24, 27, *and* 28, 1882.

(Before Lord Coleridge, C.J., Brett, and Holker, L.JJ.)

The Whitecross Wire and Iron Company Limited *v.* Savill and others.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Ship—General average—Damage to cargo by water used to extinguish fire.

Where a ship cauyht fire in harbour while discharging her cargo, and in order to extinguish the fire, water was poured down the hold on the part of the cargo that remained on board:

Held (affirming the judgment of Pollock, B.), that the shipowners were liable to a claim for general average contribution by the owner of the cargo in respect of damage to the cargo caused by the water.

This was an appeal from the judgment of Pollock, B. at the trial, which took place in London.

The action was brought by owners of cargo against shipowners to recover a general average contribution.

The jury were discharged at the trial, and the following facts were proved or admitted:

The plaintiffs were consignees of certain fencing wire, which was shipped on board the *Himalaya*, an iron vessel belonging to the defendants, to be carried from London to Wellington in New Zealand. The *Himalaya* sailed from London on the 7th Oct. 1876, and arrived at Wellington towards the end of Jan. 1877. She went alongside a wharf to discharge her cargo, which consisted of about 1400 tons.

On the 16th Feb., early in the morning, a fire broke out in the hold. All the cargo had then been discharged except between 50 and 100 tons. The plaintiffs' wire was still on board. The ship being in danger, the captain ordered water to be poured down the hold, and by these means the fire was extinguished. The plaintiffs' wire was injured by the water which was poured upon it.

At the time of the fire the *Himalaya* drew about eleven feet of water, and the depth at the wharf where she was lying was about twenty-two feet at high water. It would, therefore, have been possible to extinguish the fire by scuttling her, and afterwards to raise her again.

Pollock, B. held that the defendants were liable to a claim for general average contribution in respect of the loss sustained by the plaintiffs through pouring water on the wire, and gave judgment for the plaintiffs.

The defendants appealed.

Sir *H. S. Gifford*, Q.C. and *Pollard*, for the defendants.—What was done by the captain of the *Himalaya* was not a general average act, and cannot give rise to a general average contribution. Judgment was given in favour of the plaintiffs on the authority of the two cases of *Stewart* v. *The West India and Pacific Steamship Company* (1 Asp. Mar. Law Cas. 528; 2 Id. 32; 27 L. T. Rep. N. S. 820; 28 L. T. Rep. N. S 742; L. Rep. 8 Q. B. 88, 362), and *Achard* v. *Ring* (2 Asp. Mar. Law Cas. 34; 31 L. T. Rep. N. S. 647), but the point now in question was not directly decided in either of those cases, and what was said on the subject is not binding on the Court of Appeal. The practice in England has been not to treat such a loss as this as a general average loss (2 Arnould on Marine Insurance, part 3, cap. 4, page 817, 5th edit.), and American decisions to the contrary are not binding here. The case of *Schmidt* v. *The Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 45 L. J. 646, Q. B.) is distinguishable, because there, if the ship had been scuttled, she would have been totally lost, whereas here the ship could have been scuttled, and sunk in comparatively shallow water, which would have extinguished the fire, and could afterwards have been raised. In order to give rise to a claim for general average contribution there must be an intentional sacrifice of part in order to save the whole adventure, and here there has not been such a sacrifice as is required to bring the case within that rule;

Shepherd v. *Kottgen*, 3 Asp. Mar. Law Cas. 544; 37 L. T. Rep. N. S. 618; 2 C. P. Div. 585.

There was not such imminent peril of destruction to the whole adventure as is necessary in order to support this claim:

Harrison v. *The Bank of Australasia*, 1 Asp. Mar. Law Cas. 198; 25 L. T. Rep. N. S. 944; L. Rep. 7 Ex. 39.

Danger of damage is not sufficient. The captain only did his ordinary duty, and adopted the usual means of extinguishing fire; this cannot occasion a general average loss. The vessel had arrived at her port of destination before the fire broke out; the common adventure was at an end, and the law as to general average had ceased to be applicable. At all events the claim cannot extend to any part of the wire which had become unmerchantable through damage by fire before the water was poured on it.

Cohen, Q.C. (*Hollams* with him) for the plaintiffs.—The practice of average adjusters professes, and is intended, to follow the law, and if the practice is wrong it cannot control the law:

Atwood v. *Sellar*, 4 Asp. Mar. Law Cas. 233; 42 L. T. Rep. N. S. 644; 5 Q. B. Div. 286.

The cases which have been already cited show that the practice of average adjusters not to allow damage done to cargo by water is contrary to law, and it is mentioned with disapproval in 2 Arnould on Marine Insurance, page 914, 2nd edit., and in Bailey on General Average, pages 81, 82, 2nd edit. The law in America is clearly contrary to this practice:

2 Parsons on Marine Insurance, 288;
Nelson v. *Belmont*, 5 Duer, 310;
Nimick v. *Holmes*, 25 Pennsylv. Rep. 366.

[He was stopped by the Court.]

Pollard replied.

Lord Coleridge, C.J.—I am of opinion that our judgment ought to be for the respondents. The question for decision is one which comes, as it is said, before a Court of Appeal for the first time; in one sense that is true, for certain well-known principles have now to be applied to this particular set of circumstances for the first time, but the

facts bring the case within the well-understood principles of general average. The master, for the interest of the owners of the ship and cargo, deliberately sacrifices part of the cargo in order to preserve the rest and the ship. To give rise to a claim for general average this must be done where there is a peril, and it must be done for the preservation of the adventure. Here the ship had reached the port, and so in a certain sense the voyage was over; she was in port, and was moored alongside the quay; part of the cargo was unloaded, but a considerable part,—from 50 to 100 tons out of a cargo of about 1400 tons,—was left in the ship. A fire broke out in the hold; the fire was burning in that part of the hold where the remainder of the cargo which had not yet been unloaded was stowed. In order to save the ship and the rest of the cargo the captain caused water to be poured down the hold, by which the fire in the cargo was put out; by that the fire was extinguished, and the ship, and what was left on board of the cargo, were saved. A part of the cargo was damaged by the water which was poured down the hold, and the question is whether this gives rise to a claim for general average contribution by the owners of the cargo against the shipowners. Except in the case of there being authority to the contrary, I could not see why this should not be general average, or indeed, how could it be disputed that it is so, for in my opinion it comes clearly within any definition of a general average loss that is to be found in any of the books on the subject, either English or American. But it is said that up to the year 1873 the practice of average adjusters would exclude this loss from general average, and that Baily has laid down the principle that the definition of general average contribution does not apply to a case of this kind. But Bailey lays down this as the rule, giving his opinion at the same time that it is difficult to reconcile it with common sense; he says, "The damage done to cargo by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is by rule 10 excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in cases of fire, and the degree existing when a vessel is on her beam-ends, or on the point of foundering, a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense": (Baily on General Average, 2nd edit. pp. 81, 82.) The author could not help laying down the practice as it existed, but at the same time he gives his own opinion that it cannot be justified. Although this was the English practice it was not the American. I cannot say for certain what the American practice may have been in former times, but whether this practice ever existed there or not, it certainly has not been the American practice for a long time past. Parsons lays down that this is general average (2 Parsons on Marine Insurance, 288), and there is nothing opposed to this view, but the practice of average adjusters, and against that there is the protest of an eminent writer, which I have read.

Then how does authority stand on this question? There is none in conflict with us if we adopt the view which I have expressed. On the contrary, the case of *Stewart* v. *The West India and Pacific Steamship Company* (1 Asp. Mar. Law Cas. 528; L. Rep. 8 Q. B. 88, 362) as far as it goes, is very like this case. The circumstances of that case were like the circumstances of this, but the case was decided for the defendants because these words occurred in the bills of lading under which the plaintiffs' goods were shipped: "Average, if any, to be adjusted according to British custom." Both in the course of the argument and in the judgment the judges who decided that case in the Court of Queen's Bench point out that in ordinary cases this practice is not correct, but they held that they were bound by the contract, whatever the law was. In the judgment of the court, delivered by Quain, J., he says: "On these facts we are clearly of opinion that the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the barque made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our courts, but we have been referred to an American case in which the question was considered and decided." He then cites the case of *Nimick* v. *Holmes* (25 Pennsylv. Rep. 366), which has been referred to in the argument of the present case, and assents to the conclusion arrived at by the American court, which he conceives to be in accordance with the law of England. The case of *Stewart* v. *The West India and Pacific Steamship Company* went to appeal, and was affirmed in the Exchequer Chamber (2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 362). It is true that, in delivering the judgment of the court, Brett, J. there uses words which, I agree with Mr. Pollard, are guarded and leave the point open; but he decides the case on the clear ground that the contract was made subject to the custom by the express words of the bill of lading. He does not intimate any opinion as to how the other point ought to be decided, for it was not necessary to do so. Then there is another decision in the Queen's Bench; the same kind of case came before the court in the year 1876: *Schmidt* v. *The Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 44 L. J. 646, Q B.). The question there was not exactly the same as what has to be decided here; the question was whether the bill of lading could override the general law and whether, in spite of the bill of lading, the damage done entitled the owners of the goods to claim a general average contribution, and the shipowners were liable, and Blackburn and Lush, JJ. expressly held that they were so liable in spite of the terms of the bill of lading. In that case Blackburn, J. refers to a case that is not reported, *Aspinwall* v. *The Merchant Shipping Company*, as having decided this point. Therefore, there is further authority in favour of the view which I adopt. It is true that all the cases are in the Queen's Bench, but *Schmidt* v. *The Royal Mail Steamship Company* was decided by other judges than those who had constituted the court in *Stewart* v. *The West India and Pacific Steamship Company*. In the earlier case the judges were Cockburn, C.J. and Mellor and Quain, JJ., and in the later case Blackburn and

Lush, JJ. Therefore, there are five judges of the Queen's Bench, who, without hesitation, hold this view to be correct, and there are three cases all like the present case in their circumstances, and all laying down the law as the respondents here contend it should be laid down. That is the state of the law on the first point; there is no authority to the contrary, but only the practice of average adjusters. The case of *Atwood* v *Sellar* (4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286) was cited for the expression that average adjusters profess to follow the law. In that case, in delivering the judgment of the Court of Appeal, Thesiger, L.J. said: "It was not, however, and could not reasonably be, contended for the defendants that the practice could not be put so high as a custom impliedly incorporated in the contract between the parties, and during the course of the argument we intimated our opinion . . . . that the question between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow." This shows that it was clearly his opinion that the average adjusters might differ from the authorities, and if so the authorities ought to be preferred, and so the court held. The principle is stated in the same terms in all the books, and the question, the moment it arises in an English court, is decided in favour of the respondents' contention here, the courts saying that the custom could not be maintained, and an eminent average adjuster says so as well. This case, therefore, in my opinion, ought to be decided in accordance with the general law, which is contrary to the practice of average adjusters in England.

A second subordinate question was raised, and at first I thought there might be something in it. The contention was that these principles of mercantile law do not apply to a land adventure, and that here the voyage was at an end when the loss took place, and therefore a different rule was applicable. I should think Mr. Pollard is probably right in his contention that the voyage was at an end. I should suppose that if there was a voyage policy the liability of the underwriters would have ceased. But the mercantile adventure had not ceased; the bills of lading were in operation, and the parties to the adventure were still subject to their rights and liabilities under them. This I think is very plain, but if authority is wanted there is the case of *Achard* v. *Ring* (2 Asp. Mar. Law Cas. 34; 31 L. T. Rep. N. S. 647). There the circumstances were the same as here; the voyage was at an end and the ship was in port; but, because the loss occurred during the currency of the bill of lading, it was held that the liability attached. Therefore both on principle and on authority we must decide the second point for the respondents. There is one other point to be dealt with. According to my own judgment this rule which we have laid down ought to be applied only to so much of the cargo as was damaged by water. I agree that in law a distinction ought to be made between the different parts of the cargo, and the rule ought only to apply to so much of the cargo as was not damaged by fire, but was sacrificed by pouring water on it. But it is not open here to raise the question whether all the cargo in respect of which the claim is made is subject to the principle which I have laid down, for the point was not taken at the trial. For these reasons I am of opinion that our judgment ought to be for the respondents.

Brett, L.J.—In this case an action is brought by the owners or consignees of cargo against the shipowners to recover a general average contribution. The action was tried before Pollock, B. without a jury, and the appeal is from his judgment. There is, therefore, an appeal both on questions of fact and on questions of law. It seems that the ship was used in the ordinary way to carry goods from port to port. On this occasion she had arrived and had been in port some days before the damage in question occurred, and she was partly unloaded, but a portion of the cargo remained on board. A fire broke out in the hold. We do not know how it was caused. The fire got so far that, in my judgment, if nothing had been done, there would have been a practical destruction of the ship and cargo. It is true that the ship was in such a position that if she had been scuttled she probably would not have been totally destroyed, but there would have been great damage done to the ship, and the cargo would have been injured in the same way as it was in fact injured. The captain poured water down into the hold, and by so doing damaged that portion of the cargo which remained on board. I think the facts existing did cause such danger as to make it reasonable for him to do what he did. The result was that the fire was subdued, but injury was done to the plaintiffs' goods by the water, and the question is whether the plaintiffs can recover a general average contribution. I do not think the general rule as to what causes a general average contribution is much disputed. The question raised here is subject to all the ordinary rules of general average. There must be danger; if there is danger by fire, I think it follows that the use of water to extinguish the fire is not unreasonable. There must also be an intent to sacrifice the goods; which intent must either be inferred or proved. If there is an intent to sacrifice goods (which may or may not perish if not so sacrificed) in order to save the adventure, this would give rise to a claim for general average contribution. It was argued by Sir Hardinge Giffard and Mr. Pollard that there must be danger of an immediate total loss, and that if there was not such danger there was no claim to a general average contribution. I know there are some phrases in Arnould on Marine Insurance which are favourable to that view, but I cannot find that in the authorities there cited the law is so stated. Mere *bonâ fides* on the part of the captain is not sufficient, for it must be shown that there was danger in fact, not only that there was danger in the captain's mind. The rule is this: if it is shown that circumstances exist in fact which make it reasonable to sacrifice part of the whole, and if part is intentionally sacrificed, then that is a general average sacrifice and a general average loss. You cannot do away with the liability for general average by showing that perhaps there would not have been an immediate total loss. But it is said that such circumstances did not exist here as to make it a general average loss, because the ship was not in danger; first, because she was an iron ship, and, secondly, because she could have been scuttled in comparatively shallow water, and afterwards raised again. It is true that

the iron of the vessel could not have been destroyed by fire, but where the fire had got well hold of the ship there would have been such a loss as a reasonable captain ought to prevent if possible; the ship would not be all iron, and the fire would burn any wood there was in her, so that, if there would not have been an absolute annihilation of her as a ship, still there would have been such a loss as to make it reasonable for the captain to pour water in as he did. It is said there was the choice of scuttling the ship, but if so, I cannot conceive how, if the ship had been scuttled, she would not have been entitled to a general average contribution; while as regards the cargo there would have been the same question as arises here. Because there was the alternative of scuttling the ship I cannot say that the captain acted unreasonably in what he did. It seems, therefore, that there was sufficient danger to justify what was done. There must be an intent to sacrifice the goods, and it is argued that pouring water in shows no intent to sacrifice. This argument is contrary to the judgment in the American case which has been referred to (*Nimick* v. *Holmes*, 25 Pennsylv. Rep. 369). It is said that what was done here cannot give rise to a claim for general average contribution, because it was the captain's duty. There is a fallacy in that argument, for if there are extraordinary circumstances the captain is bound to do his best for all concerned. If he sacrificed part of the cargo, and there were no reason for doing it, there would be no general average claim against the shipowner, but a claim for the value of the goods improperly sacrificed. Then can it be said that the captain sacrificed a part for the sake of the adventure? We may take it that some of the goods were on fire, but there was danger to the whole adventure; then what is the consequence? The captain intentionally damages the whole of the cargo that remains on board, and not only that part of it which has been already damaged by the fire. It is no answer to the plaintiff's claim to say that it was the captain's duty to act as he did. It is like the case of jettison; if a captain were to jettison goods without any reason for so doing, there would not be a claim for general average, but an action for the whole value of the goods. I think, therefore, that in the present case the goods were sacrificed by the shipowners, by the hand of the captain acting as the shipowners' agent, for the benefit of all concerned in the adventure. Therefore, all the circumstances exist here which make a general average sacrifice, a general average loss, and a general average contribution.

Then it is said the voyage was at an end. It is true the sailing voyage was at an end, but the maritime adventure was not at an end; the carriage was not finished, and therefore the maritime adventure was not concluded. It would not be ended until the goods were delivered, and therefore the maritime law applies. I agree with the Lord Chief Justice that *Achard* v. *Ring* (2 Asp. Mar. Law Cas. 34; 31 L. T. Rep. N. S. 647) is an authority on this point, and the ruling in that case was right. There is only one other point to which I need refer. It is argued that the wire was damaged by the fire and made unmerchantable, and therefore cannot be said to have been sacrificed by pouring water on it; but that point was not raised at the trial, where there was an opportunity for giving evidence, and it might have been met, and therefore it is not now open. Therefore, agreeing with the opinion of the Court of Queen's Bench in *Stewart* v. *The West India and Pacific Steamship Company* (1 Asp. Mar. Law Cas. 528, 2 Id. 32; L. Rep. 8 Q. B. 88), and with the decisions in *Aspinwall* v. *The Merchant Shipping Company*, and *Schmidt* v. *The Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 45 L. J. 646, Q. B.). I think that in the Court of Appeal we ought to declare that these facts give rise to a general average contribution. As to the decision of the Court of Exchequer Chamber in *Stewart* v. *The West India and Pacific Steamship Company* (2 Asp. Mar. Law Cas. 32; L. Rep. 8 Q. B. 362), I may say that it is only limited by caution, because probably the judges knew of this practice of average adjusters, and would not decide the question. I have a clear opinion that the views of average adjusters, whether expressed separately or together in consultation, cannot and do not make the law of England.

Holker, L.J.—I am of the same opinion.

Judgment affirmed.

Solicitors for the plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for the defendants, *Ingledew* and *Ince.*

Tuesday, April 4, 1882.

(Before Lord Coleridge, C J., Brett and Holker, L.JJ.)

The Rory.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Practice — Pleadings — Particulars — Damage to cargo—Defective condition—Reasonable fitness—Negligence.

In an action for damage to cargo in the Admiralty Division the defendants are entitled to particulars from the plaintiffs of an alleged "defective condition" of the ship by reason of which she is asserted to have been not "reasonably fit" to carry the cargo in question and also of an alleged act of negligence or breach of duty or contract on the part of the defendants causing the said damage.

The rule as to giving particulars of general allegations in pleadings is the same in the Admiralty as in the other divisions of the High Court of Justice.

This was an appeal from a decision of Sir Robert Phillimore, by which on Feb. 28th he had, in an action of damage to cargo, rejected an application of the defendants for particulars of certain defects in the *Rory*, the vessel in which the cargo was laden.

The statement of claim in the action contained, *inter alia*, the following averments:

1. The plaintiffs are merchants carrying on business in the city of London, the defendant is the owner of the steamship *Rory*.

And after alleging a shipment of a cargo of peas at Montreal to be carried to London on the terms contained in certain bills of lading, and the transfer of the bills of lading to the plaintiffs, and that the cargo arrived in a damaged condition such

damage not being occasioned by any of the perils excepted in the bills of lading, continued:

8. The said damage and deterioration were, amongst other causes, occasioned by the defective condition of the said vessel by reason that the said vessel was not reasonably fit to carry the said cargo on the said voyage or by other the negligence or breach of duty or contract on the part of the defendant, his servants, or agents.

The defendant took out a summons before the registrar for particulars of the defective condition of the *Rory* alleged in the 8th paragraph, on which summons the registrar made an order on the 25th Feb. for the particulars to be given; from this order the plaintiff appealed to the judge, who on the 28th Feb. allowed the appeal and rejected the defendant's application for particulars, giving leave to appeal to the Court of Appeal.

On April 4th the appeal came on for hearing.

Cohen, Q.C. and *G. Bruce* for the appellants (defendants).

Butt, Q.C. and *Gray* for the respondents (plaintiffs) referred to *The Freedom* (3 Mar. Law Cas. O. S. 219; L. Rep. 2 Ad. & Ecc. 346; 20 L. T. Rep. N. S. 229).

Lord Coleridge, C.J.—I am of opinion that this appeal should be allowed. The action is in the Admiralty Division, and is brought by the indorsees of bills of lading of cargo shipped on board a steamship against the ship owners, for the delivery of such cargo in a damaged condition, such damage being alleged in the statement of claim not to have been occasioned by any of the excepted perils in the bills of lading, but by reason of the vessel not being reasonably fit to carry the said cargo, or by the negligence of the defendants or their servants. I think that such a mode of pleading as this general allegation in the plaintiffs' statement of claim may be allowed in order to avoid prolixity; but then, to prevent the defendants from being taken by surprise, this should be supplemented by particulars; and if defendants ask for it, the plaintiffs should be required to say on what defects in the vessel they rely as making it unfit for the carriage of the cargo. If it be only an inference they draw from the state in which the cargo was when it arrived, let them say so, but they are bound to communicate what they know; and if at any other time before the trial they should obtain any other knowledge of any matter occasioning the damage on which they should wish to rely, they should give it to the defendants by amending the particulars, which they might do from time to time as they should obtain fresh information on the subject. I do not think that the general principles laid down by Sir R. Phillimore in *The Freedom* (L. Rep. 2 Ad. & Ecc. 346; 20 L. T. Rep. N. S. 229) conflict with this. The object of the rules of pleading is, he says, to prevent either party being taken by surprise at the hearing; and if during the trial it should appear that one of them relied on any act of which he had knowledge which took the other by surprise, Sir R. Phillimore would, it appears, adjourn the trial in order to enable such other to produce evidence in contradiction. That may have been very proper in the Admiralty, but it would not do to pursue that course in the Queen's Bench Division. In this case I think that the particulars asked for should be given.

Brett L.J.—It would be strange if a different rule as to giving particulars to the opposite party should prevail in the Admiralty Division from that which exists in the Queen's Bench Division, for this is really a common law action, which might have been brought in the Queen's Bench Division, but which has been given to the Admiralty Division by enabling the plaintiffs to enforce their claim against the ship. The rule, however, as to the delivery of particulars is founded on a consideration of matters which are applicable to all courts. In order to prevent the necessity of a minute statement of all the facts in pleading, a general allegation is often allowed, as for instance, in the case of fraud; but then, in order to have a fair trial, the party who makes such general allegation is always bound to give particulars of it to the opposite party, so that he should not be taken by surprise, and should also be able to defend himself against that with which he is charged. Now, how are the defendants to meet the case contained in the 8th paragraph of the statement of claim? Do the plaintiffs mean by what is there stated that there was a defect in the construction of the ship, or that there was not a proper crew, or that the master was drunk, or that he did not put the hatches on when there was bad weather. If the plaintiffs were to state in these particulars that they rely on one only of these matters, then there would be no necessity for the defendants to search all over the world to meet a case founded on the others, as they might otherwise have to do. I can see no reason why the procedure in this respect should be different in the Admiralty Division from what it is in the Queen's Bench Division. In *The Freedom* (3 Mar. Law Cas. O. S. 219; L. Rep. 2 Ad. & Ecc. 346; 20 L. T. Rep. N. S. 229) the reason given by Sir Robert Phillimore for not allowing particulars in the Admiralty Division is that, if the parties are taken by surprise, the Court of Admiralty can postpone the inquiry. That is not a reason to be adopted; in such a case as the present, the trial might have to be postponed on that account until a commission had been sent to the other side of the globe, and I cannot agree to there being a different process in such a matter between different divisions of the High Court.

Holker, L.J. concurred.

Solicitor for appellants, *J. Cooper* and *Co.*
Solicitors for respondents, *James Neal.*

May 11, 12, *and* 26, 1882.

(Before Lord Coleridge, C.J., Brett, and Cotton, L.JJ.)

The Gaetano and Maria.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY.)

Bottomry—General maritime law—Law of flag—Lex fori—Lex loci contractûs—Lex loci solutionis.

A contract of bottomry, covering the cargo as well as the ship, is governed by the law of the flag, i.e., by the law of the country to which the ship on which the bond is given belongs.

When cargo is shipped on board a foreign vessel it becomes subject to the law of the flag of the ship in which it is shipped in incidents arising out of the contract of shipment and with regard to which the contract is silent. "He who ships goods on board a foreign ship puts them on board to be

dealt with by the law of the country of the ship, unless there is a stipulation to the contrary."
The Hamburg (*Br. & Lush.* 253) *explained.*

This was an appeal by the plaintiffs from a decision of Sir Robert Phillimore, by which, on the 11th Nov., he had allowed a demurrer to the plaintiffs' reply, and held that communication with the owners of cargo, where possible, was necessary for the validity of a respondentia bond on cargo, when sued upon in England, as part of the general maritime law, notwithstanding that such communication was not necessary by the law of the state to which the ship belonged whose master had given the bond.

The case is fully reported in the court below, where the pleading demurred to is set out (4 Asp. Mar. Law Cas. 470; 7 P. Div. 1; 45 L. T. Rep. N. S. 511).

The case was argued on the 11th and 12th May.

C. Hall, Q.C. and *Phillimore* for the appellants. —Where the law of the flag is clear, and the question of fact clearly raised by the pleadings, that law must govern a contract of bottomry. *The Hamburg* (Br & Lush. 253; 2 Mar. Law Cas. O. S. 1), when properly considered, is no authority to the contrary, as any statement of the sort in the head-note is not borne out by the report itself; the question there was whether, in the absence of proof of any particular law governing the bond, communication with the owners of the cargo was necessary by the general maritime law. Dr. Lushington says, at p. 259, and the judgment is affirmed by the Judicial Committee of the Privy Council, "I think it expedient to state that I shall govern my judgment by reference to the ordinary maritime law;" and then, after stating that questions of bottomry had in former cases, citing *The Gratitudine* (3 C. Rob. 240) and *The Bonaparte* (8 Moore P.C. 459), been decided by that law, he proceeds to say: "The state of the pleading is so vague, and the evidence so loose and unsatisfactory, that I can take no other course. Whenever any specific law is averred to be the governing law, with sufficient distinctness and proper evidence produced, I shall be ready to consider the question." In this case the law is distinctly averred, and therefore the time has arrived for considering the question, and the question is, so far as *The Hamburg* (*ubi sup.*) and previous cases are concerned, perfectly open. [Brett, L.J.—The question is not one of the construction of a contract, but of the nature and degree of the authority which a foreign master possesses to bind the English owner of cargo laden on board his ship.] I shall show that that authority is governed by the law of the flag. *Lloyd* v. *Guibert* (10 L. T. Rep. N. S 570; 35 L. J. 241, O. B.; 2 Mar. Law Cas. O. S. 26; and on appeal, L. Rep. 1 Q. B. 115; 13 L. T. Rep. N. S. 602; 2 Mar. Law Cas. O. S. 283) turned upon the extent of the master's authority, and decided that its extent was governed by the law of the flag, The judgment in both courts was unanimous. In the court below Lord Blackburn, then Blackburn, J., says: "We think the power of the master to bind his owners personally is but a branch of the general law of agency;" and the Exchequer Chamber did not consider themselves bound by *The Hamburg*, as Willes, J., in delivering the judgment of the court, says: "The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions equally entitled to respect. We must therefore deal with it as a new question." The supposed difference between *Lloyd* v. *Guibert* and this case on the ground that that was a question of the contract of affreightment cannot be sustained; both were really questions on the law of agency. That the law of the flag governs questions of hypothecation, whether of ship or cargo, is shown by *The Karnak* (L. Rep. 2 P. C. 505; 21 L. T. Rep. N. S. 159; 3 Mar. Law Cas. O. S. 103, 276); and the more recent case of *Kleinwort, Cohen, and Co.* v. *The Cassa Maritima of Genoa* (3 Asp. Mar. Law Cas. 358; 2 App Cas. 156; 36 L. T. Rep. N. S. 118) is no authority to the contrary; it merely followed *The Bonaparte* and *The Hamburg* on the question of fact, without reference to the applicability of foreign law. The law of the flag is applicable to cases when the agency of the master in case of necessity to sell the ship is in question (*The Segredo* or *The Eliza Cornish*, 1 Spinks, 36), and that was a question arising out of the act of the master at this port of Fayal. [Cotton, L.J.—But that was a case of the authority of the master as agent of the owner of the ship; his authority as agent of the owner of the cargo may be different.] In *Lloyd* v. *Guibert* (*ubi sup.*) the action was not on the original contract of affreightment, but on the relations of the owner of ship and owner of cargo; that is, on an implied contract by the owner of ship to pay the owner of cargo money which he had paid on a bottomry bond given, as in this case, on ship and cargo at Fayal. There, the ship being French, the incidents arising out of the contract of hypothecation were held to be governed by French law; and here we say, in like manner, the ship being Italian they should be governed by Italian law. [Brett, L.J.—The question at the root of the whole matter is, out of what arises the power of the master to hypothecate the cargo.] The power of the master to borrow on the cargo arises out of the fact of the cargo being on board the ship, and it being necessary to obtain money to carry it on, but it is an incident of the shipment on board the particular ship, and must therefore be governed by the law of the ship which the shipper is taken to have adopted when he put the goods on board. By Italian law the consul is established as the judge of the necessity, and therefore his decision is, in the case of an Italian ship, substituted for the communication, when possible, with the owner that is required in an English ship. It is, besides, exceedingly desirable that the power of borrowing money on bottomry should be preserved, and if doubts are cast on the validity of the bonds, lenders will not advance money on so precarious a security, or will do so at a ruinous rate of interest; therefore, on grounds of public policy, the law of the flag, which the people who lend can ascertain, should prevail, otherwise the validity of a bond may depend on the port where the vessel ultimately discharges the cargo. This bond, for instance, is no doubt valid by the law of France and Belgium, they having in this matter the same regulations as Italy; and if a ship is bound to Falmouth or Cork for orders, and thence to a port of discharge in Great Britain or on the continent of Europe, between, say, Havre and Hamburg, the consignee of cargo may defeat the bondholders' claim by ordering the vessel to Great Britain. This suggested anomaly shows that the *lex fori* cannot govern the question the bond must be either

valid or invalid from the moment of its execution. It was executed in accordance with the law of the ship, and was therefore valid then, and so remains valid, and the demurrer must be dismissed.

Butt, Q.C. and *Myburgh*, Q.C. in support of the demurrer.—It is a perfectly new and unheard-of thing, and contrary to the well-established practice, to apply foreign law of any sort to a bottomry bond the subject of a suit in this country: (Maude and Pollock, Mer. Ship. 4th ed. p. 570.) Here the parties to the suit are both English, and the action is in England. One party, it is true, is the assignee of a foreigner, not of an Italian, but of a resident at Fayal, which is Portuguese territory. How can it be possible that the formalities of Italian law can govern such a contract? The real question is, was the master of the ship the agent of the owners of the cargo for making this bond; had he their authority? We say no, and his authority must be proved by evidence. Now, the master's authority only exists in consequence of necessity, and the law of England says that necessity is only proved by the fact of communication of the circumstances to the owners having been made where possible. That communication has not been made, and therefore there is no evidence of the necessity, nor consequently of the authority. Evidence is always a matter of the *lex fori*, and the court cannot be satisfied here of that necessity, and hence the bond is invalid *ab initio*. In fact, it is not proved that the bond is the cargo owners' bond at all. This is different altogether from a question on the contract of affreightment, as in *Lloyd* v. *Guibert* (*ubi sup.*); it is an incident of the fate of bailment; the master being in charge of goods cannot use his own judgment as to borrowing money on them without the consent of the owner of the goods where such consent can be obtained. [Lord Coleridge, C.J.—The agency does not arise from the necessity, but from the shipment; the exercise of the agency from the necessity to deliver in some way what forms the shipment.] That is consistent with the proposition of English law that the agency to do this particular thing, hypothecate the cargo, is only constituted when the necessity arises, and proof of necessity is therefore requisite. [Lord Coleridge, C.J.—In the case of *The Gratitudine* (3 C. Rob. at pp. 262, 263), Lord Stowell recognises the difficulty of the master communicating in all cases with the owners of cargo, instancing the case of a general ship with a cargo owned by or consigned to perhaps one hundred different persons, who when applied to might give conflicting directions as to what was to be done with the cargo, and seems to think that in such a case it might be necessary to hypothecate without communication.] Even supposing that to be so, it is altogether different from this case where the whole cargo belongs to one person who has chartered the vessel. Questions of general average, another special maritime contract arising from necessity, are always interpreted by the law of the port of discharge, which is, as a rule, that of the country in which the suit is brought, and never by that of the flag. *The Hamburg* (*ubi sup.*) is approved and specially distinguished in *Lloyd* v. *Guibert* (*ubi sup.*). In cases where a conflict of law exists in such a matter, the *lex fori* is to prevail (*The Halley* (L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879; 2 Mar. Law Cas. O. S. 556). There is also a reason for applying the *lex fori*, when, as here, it is also the *lex loci solutionis*, from the analogy to the case of a bill of exchange. [Cotton, L.J.—The *lex loci solutionis* is only applicable to a bill of exchange when accepted, and the acceptance is a necessary admission of the authority to draw; that is, there is no question of agency in that case.] That is so, but this branch of the argument assumes against ourselves that the master has authority to bind the owner of cargo in certain cases. Apart altogether from the question of agency, the assignee of a bottomry bond can only exercise his lien on the thing hypothecated by the assistance of the Admiralty Court, and that court would be wrong to lend its process for a purpose of enforcing a lien, unless the requisites of English law are satisfied. Moreover, the contract of affreightment here was an English one. [The Court.—That fact does not appear in the pleadings. *Phillimore*.—I do not object to an amendment of the pleadings which will allow it to appear. The Court.—The pleadings may be amended, by inserting the words "was chartered in London" in the defence.] The goods were on board in pursuance of an English contract, and the giving of this bond is a consequence of that contract, and its validity must therefore be determined by the same laws: (Story's Conflict of Laws, s. 242.) Besides, the Admiralty Court has not jurisdiction to enforce the bond, because it is not properly considered a bottomry bond at all. A bond purporting to be a bottomry bond, but payable in any event, *i.e.*, not dependant on "maritime risk," is no bottomry bond, and gives no lien (Williams & Bruce, Ad. Pr. 46), because by English law "maritime risk" is an essential of the contract of bottomry; another essential is communication where possible, and in its absence the bond is by parity of reasoning no bottomry bond.

Phillimore in reply.—It is admitted that, where there is a contract to carry in a ship, certain consequences of that contract are to be governed by the law of the flag of that ship (*Lloyd* v. *Guibert*, *ubi sup.* and *Nugent* v. *Smith* 3 Asp. Mar. Law Cas. 87, 198; 1 C. P. Div. 19, 423), the decision of the court below in the latter case not being overruled on this point; why then should one series of consequences of that contract be governed by one law, and another series by another law? The question in *The Gratitudine* (*ubi sup.*) was not what law was to govern a contract of bottomry, but whether a master had power to hypothecate cargoes at all under any circumstances, and it was held by the analogy of ransom bonds and jettison that he had such a power in cases of necessity. In *The Bonaparte* (*ubi sup.*) the question was whether it was in all cases necessary to communicate, and the decision shows that it was not. The addition of the words in the amended pleading makes no difference, for it merely asserts that the contract of affreightment was made in England, that England was for that contract the *locus contractus* as well as the *locus solutionis*, but the non-applicability of either of these laws to the contract of affreightment and its incidents is directly decided in *Lloyd* v. *Guibert* (*ubi sup.*).

Cur. adv. vult.

May 26.—The following judgments were delivered, in which Lord Coleridge, C.J. formally announced his concurrence.

Brett, L.J.—This case arises on demurrer to the reply. I think we must take the facts to be that the goods were shipped abroad by the defendants, who, whether British subjects or not, are domiciled in England, for the purpose of being brought to England, and that they were shipped on board an Italian ship in fulfilment of a charter-party made in London. The ship met with misfortunes and was taken into Fayal, a Portuguese port, and whilst there the master entered into a contract of bottomry by which he hypothecated the ship and cargo, but without previously communicating with the cargo owner. The ship, with the cargo on board, afterwards arrived in England, when both ship and cargo were arrested in the English Admiralty Court. It was asserted in the statement of defence that the master might have communicated with the cargo owner before hypothecating the cargo. That is not denied in the reply, but it is stated that by the Italian law, even though he might have so communicated, yet he was entitled under the circumstances to hypothecate the cargo or cover it by a bottomry bond, if he did so before his consul, without any such communication with the cargo owners, and that he executed this bond before his consul. In another paragraph it is stated that by the Italian law the master of a vessel may execute a bottomry bond without any previous communication with the owners of the cargo under certain conditions, which in the present case were fulfilled. The point of demurrer, therefore, is whether, although there were the means of communication before the bottomry bond was executed, yet, nevertheless, the defendants' goods are bound in the English Court of Admiralty by the bottomry bond so entered into.

The first point raised before us was the question as to the law which is administered in the English Admiralty Court, whether it is the English municipal law or that which was called the general maritime law, which is not the law of England in particular, but the law of all maritime countries. On that point I have no doubt. The English Admiralty Court is an English court authorised to act by English law, and acting for the English Sovereign, and every Admiralty Court is the court of the country in which it sits and to which it belongs. The law administered in the English Court of Admiralty is the English maritime law, and the law administered in any other Admiralty Court is the maritime law of the country to which the court belongs. To my mind there is no law which is not the law of any country in particular, but is the law of all countries. But with regard to the meaning of the proposition that maritime law is the same law in all countries, and in that sense that there is a common maritime law, the law administered in the English Admiralty Court is not the ordinary internal municipal law of the country, but is the maritime law of England, and is the law which either by Act of Parliament or by reiterated decisions, and traditions, and principles, has been adopted by the English Admiralty Court as the English maritime law. About that I have no doubt, and it seems to me that is what has been promulgated by every judge in the Court of Admiralty in England—by Dr. Lushington and Lord Stowell, and by the judges before them. Nor do I understand that the present learned judge of the Admiralty Court differs in this, for he says the case must be determined by the general maritime law as administered in England, that is, by the English maritime law.

Now, if this ship had been an English ship, if her captain and her cargo owners had been English subjects, there would be no doubt as to the law to be applied. In that case the master would have no authority to bind the cargo owners unless certain necessities had arisen. He is only empowered generally to act on the part of the shipowner, where the ship is in distress and the owner has no means of finding money, and has no credit, and to entitle him at all to hypothecate the cargo the value of the ship must be insufficient. But even when all these circumstances exist, yet the master is not authorised to charge the cargo if he has the means of communicating with the owner of it within a reasonable time, so that upon receiving notice the cargo owner may determine whether he will bottomry the cargo, or take other means, either to sell the cargo where it stands or to forward it. If therefore this had been an English ship no doubt upon the facts here pleaded the defendants would not have been liable, for it is admitted that the captain might have communicated with the cargo owners. But it was alleged that this rule must bind the plaintiffs, although the ship is an Italian ship, because the matter to be proved was whether there was such necessity as to give the captain a right to hypothecate the cargo in this way, and that inasmuch as such necessity was matter of evidence, therefore, it was matter of procedure, and that procedure must be governed by the *lex fori*. The question thus arises whether this is a matter of procedure. Now, the manner of proving facts is matter of evidence and to my mind matter of procedure; but the facts to be proved are not matters of procedure, but they are the matter with which procedure has to deal. The facts to be proved in order to give the captain authority are a different thing from the evidence by which the facts are to be proved. The thing to be proved cannot be evidence of the thing to be proved. Therefore it is not a question of procedure to be governed by the *lex fori*. Then arises this consideration, what is the nature of that which is to be proved? It is the authority of the master. This is not a contract. There is no contract between the master and the owner of a cargo which enables the master to deal with the cargo, although there is a contract between the owner of a ship and the owner of a cargo with which I will presently deal. I doubt, but it is not necessary to decide it here, whether the master is ever the agent of the cargo owner. He is the agent of the owner of the ship, and it may be that, as such agent, he has some right to act for him as regards the cargo. But, supposing he could be, in circumstances of necessity, the agent of the cargo, out of what does that authority arise? This authority of the master to hypothecate the ship or cargo is peculiar. It does not arise merely out of the contract of bailment; that contract gives no such right. It does not arise out of the contract of carriage on land, and I doubt whether it arises out of a contract for sea carriage to be wholly performed within the realm, though it is not necessary to decide that; but it does arise where goods are shipped on board a ship to be carried from one country to another. That is a proposition which is acknowledged by the mari-

time law of England and also of every maritime country. It arises out of the necessity of the thing that, from the obligation of the shipowner and master to carry goods from one country to another, and it being inevitable that the ship and cargo will at some time be in a strange country, where the captain is without means and the owner can have no credit, that, therefore, in certain circumstances, for the safety of all concerned, and for the carrying out of the object of the whole transaction, there should be a power on the part of the master to hypothecate not the ship alone, but also the cargo. That power does not arise out of the bill of lading nor out of the charter-party, because it may exist where there is neither one nor the other, but arises out of the contract of maritime carriage necessitated by the shipment of goods on board a ship to be carried from one country to another, and it exists from the moment the goods are put on board for such a purpose. That bare contract, standing on the shipment alone, is regulated and often limited by the terms of the charter-party or bill of lading. But, unless those terms specifically do away with the authority of the master, that authority exists by virtue of or under the contract which arises out of the shipment of the goods, and that contract between the shipowner and shipper gives the master authority to act in certain circumstances in respect of the cargo. It is not necessary to decide whether it gives that authority by way of contract, or by the law in respect of the contract between the shipowner and the owner of the cargo. It is an authority which is an incident of contract, but which is not the subject-matter of contract. It is not a term of a contract, but arises in consequence of a contract having been entered into. What, then, is the principle which ought to govern this case? The goods were put on board an Italian ship, and the person to exercise the authority is an Italian master; what authority ought to be inferred in these circumstances? Is the authority of an Italian master to be determined by the law of the country of each person who ships goods on board his ship? Why, if one law is to bind both parties, should it be the law of the shipper of the goods? Must the master be taken to know the law of the country of each shipper of goods put on board his ship? That would be very hard. If a man puts his goods into the power of an Italian master on board of his own ship, what is the meaning of the parties? Surely it is that the master shall deal with the goods as an Italian master. That is what must be in the mind of the parties, and therefore is what is binding on them. The principle is, that he who ships goods on board a foreign ship puts them on board to be dealt with by the master of that ship according to the law of the country of the ship, unless there is a stipulation to the contrary. Therefore, when the goods in question were put on board an Italian ship, it seems to me, by the contract of the parties arising out of the shipment, that it must be taken that the owner of this cargo intended them to be dealt with in circumstances which might arise, and which are considered as likely to arise by all the maritime countries, in the way in which that master would, in the circumstances, deal with the goods according to the law of Italy unless there was some stipulation to the contrary. That is on principle. How stands authority?

The case of *Lloyd* v. *Guibert* (L. Rep. 1 Q. B. 115; 13 L T. Rep. N. S. 602; 2 Mar. Law Cas. O, S. 26, 283) does not seem to me to govern this case absolutely. The question there was whether or not a certain stipulation was implied in a contract. The contract was a contract of affreightment, and the question was whether there was to be implied a stipulation that in the event of certain circumstances happening, and of the master in consequence giving up the ship and freight, he should not be liable beyond that amount. The master and the owner could only be relieved from further liability if there was such a stipulation in the contract of affreightment. There would have been no such stipulation if the case was to be decided according to the English law—the law of the *forum*—but there would be if the law of the ship was applicable. There it was held that, inasmuch as the contract was made abroad with the owner or master of a foreign ship, that contract was a contract of the country of the ship, and it was governed by the law of the flag: and inasmuch as in the country of that flag the contract of affreightment would have contained such a stipulation, the English municipal court would hold that it did contain it. It was a foreign contract because it was a foreign ship, and the court construed it according to the foreign law. Here the question is not the construction of a contract, but what authority arises out of the fact of the contract having been entered into; yet the principle of that case is applicable to this, inasmuch as the contract there was held to be a foreign contract, because it was for shipment of goods on board a foreign ship, and therefore a contract of the country of the ship, and not of the country where the contract was made. That principle governs this case, and leads me to say that the authority here arising out of the contract of shipment is an authority which the law of the country of the ship would give the master; and in accordance with that principle I think this case should be decided. The judge in the court below considered this case was governed by *The Hamburg* (Br. & Lush. 253; 2 Mar. Law Cas. O. S. 1); but with great deference I think he need not have considered himself bound by that case. There Dr. Lushington, and on appeal the Privy Council, treated the ship as if she were English, and said he was administering the maritime law of England in the absence of evidence of the applicability of any other law, but he said that, "Whenever any specific law is averred to be the governing law, with sufficient distinctness and proper evidence produced, he would be ready to consider it." I cannot, therefore, consider that *The Hamburg* is in conflict with the case of *Lloyd* v. *Guibert*.

Therefore I am of opinion that, both in accordance with the principle of *Lloyd* v. *Guibert* and that which arises from the transaction itself and the necessity of the case, the proper view is that which I have already stated, that whoever puts his goods on board of a foreign ship puts them on board to be dealt with by the master according to the law of the country to which the ship belongs, unless his authority is limited by express stipulation between the parties at the time of the shipment. There was a minor point taken, that even if English law as the law of the forum did not

govern the case, yet that English law should as *lex loci solutionis* and also as the *lex loci contractus*, on the ground that the contract of affreightment—the charter-party—was made in England, and the cargo to be delivered there; but that cannot, in my opinion, affect the case, as the matter for our consideration is an incident of the shipment on board a foreign vessel, and is not the subject of any stipulation in the charter party or bill of lading. I therefore think that the demurrer must be allowed, and the rights of the parties decided in accordance with the law of the flag.

Cotton, L.J.,—The question in this case is as to the validity of a bottomry bond against the owners of the cargo on board the ship. Undoubtedly by the law of England, on the facts stated in the pleadings, notice ought to have been given to the cargo owner before giving the bond on his cargo; but it is stated in the reply that by the law of Italy no such notice was necessary for the validity of the bond, and that the vessel was an Italian ship, and the question comes before us on demurrer to this statement. And the question we have to consider is, whether the validity of the bond is determined by English or by Italian law. The answer depends, not on the express terms of any contract, but on an implied authority arising out of the contract between the shipowner and the owner of the cargo when the goods were put on board for the purpose of being carried. And, like all other implied terms, it must be governed by the law applicable in the country where the contract is made, and this implied term introduced into the contract, where the contract is silent, by the law applicable as to the duty or authority of the parties who have entered into the contract. It was argued that the authority to hypothecate arose from necessity. In my opinion, that is not correct. Necessity is a condition precedent to the exercise of the authority, but the authority itself arises out of the contract and is implied in the contract, and cannot properly be said to be given by necessity. If this view of the case is correct, what law must govern the exercise of the authority? It was argued that it must be governed by the *lex fori*, and that on two grounds. First that the remedy depended on the *lex fori*. That is no doubt true; but we are not here considering what is the proper remedy on a bottomry bond, but whether the bottomry is valid or not. Secondly, it was argued that the necessity which was a condition precedent to the exercise of the authority was a matter of evidence and hence of procedure, and on this account must be governed by the *lex fori*. But as pointed out by Brett, L.J., though no doubt the abstract proposition of law is correct, yet the facts necessary to establish the right of the party are not the same thing as the evidence by which those facts are proved, and the facts necessary to prove the right as distinguished from the way in which those facts are to be proved is no part of the *lex fori*. Then it was argued that the validity of the bond must depend on the place where the original contract was made; that the law of the place where the contract is made is to be implied wherever the contract is silent, subject to this, that where a contract is made in one place to be performed in another, the law of the place of performance is to be implied. It was then said that the place of performance of this contract was England, because the goods were to be landed there. But this view is fallacious; the original contract is not merely to land the goods in England. The goods are taken on board, no doubt, for the purpose of being ultimately landed in England, but it may be to be taken to many different countries *en route*.

What law, then, is to govern the contract in those various stages of its performance? In my opinion, and in the absence of authority on the point, the rule is that stated by Brett, L.J., that whoever puts his goods on board a vessel must be taken to authorise the owner of the vessel and his agent—the master—to deal with those goods according to the authority given him by the law of the country of the ship on board which they are placed, that is, if as in this case the ship is an Italian vessel, by the law of Italy. That this rule is applicable is shown by the fact that whilst no shipper can be ignorant of the flag, that is of the country, to which the ship belongs, the master of the ship would be in a very difficult position if he had to ascertain the laws of the country of each shipper or consignee, because in case of necessity arising to deal with the cargo the laws of those various countries required different courses to be pursued before dealing with it, and also that different measures would have to be pursued with the cargo of one shipper from those adopted in the case of another. The rule then appears to be sensible and just if there is no authority on the point; but I think that the express decision of *Lloyd* v. *Guibert* (*ubi sup.*) leads to the same conclusion. That case, it is true, was a question of the relationship existing between the master and the owner of a ship, and of the extent to which the former could bind the latter, but it decides that that, when affecting the right of other parties, is governed by the law of the flag, and hence leads to the result at which I, agreeing with Brett, L.J., have arrived in the present case. The court below considered itself bound by a decision of Dr. Lushington, *The Hamburg* (*ubi sup.*), but I do not think that Dr. Lushington intended to decide the question at all. He says (p. 260): "The state of the pleading is so vague, and the evidence so loose and unsatisfactory, that I can take no other course. Whenever any specific law is averred to be governing law, with sufficient distinction and proper evidence produced, I shall be ready to consider the question." That shows that he was not even considering the question we have now to decide; certainly that he was not deciding it in a way inconsistent with the decision at which we have arrived.

Appeal allowed and demurrer dismissed with costs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Thomas Cooper* and *Co.*

Monday, June 19, 1882.

(Before Lord Coleridge, C.J., and Brett and Cotton, L.JJ., assisted by Nautical Assessors).

The Elysia.

Appeal from Probate, Divorce, and Admiralty Division (Admiralty).

Collision—Fog—Moderate speed—Sailing ship—Regulations for Preventing Collisions at Sea—Art. 13—36 & 37 *Vict. c.* 85, *s.* 17.

What is a "moderate speed" for a sailing ship in

a fog, in accordance with Art. 13 of the Regulations for Preventing Collisions at Sea 1879, depends on the place where the ship happens to be, and semble, per Cotton, L.J, her handiness, and is not necessarily proportioned to or less than the maximum speed she can make under the circumstances.

A speed of about five knots, in the case of a sailing ship out in the Atlantic Ocean, is a "moderate speed," and in compliance with this rule, the sailing ship being at the time under all plain sail, and going as fast as she can with the wind on her quarter.

Per Brett, L.J.: What is a moderate speed for a sailing ship is not necessarily the same as a moderate speed for a steamer in the same position.

This was an appeal from a decision of Sir R. Phillimore, by which, on the 20th Dec. 1881, he had found the s.s. *Elysia* alone to blame for a collision which took place a little after 4 a.m. on the 12th Aug. 1881 between that vessel and the sailing brig *Emily*.

The appellants limited the appeal to the question of the speed at which the *Emily* was proceeding being a sufficient compliance with Art. 13 of "The Regulations for Preventing Collisions at sea.

The *Emily*, a brig of 278 tons register, and manned by a crew of nine hands, was bound on a voyage from St. John's, Newfoundland, to Queenstown with a cargo of seal oil.

The *Elysia*, a screw steamer of 1778 tons net register, and engines of 600 horse power, manned by a crew of seventy hands, and having on board 101 passengers and a general cargo, was bound from London to New York.

The *Emily* stated the wind to be south-westerly, a nice breeze, the weather foggy, her course S.E. by E., speed about five knots an hour, and that the collision took place about 49° N. and 30° W. by dead reckoning.

The *Elysia* stated that just before the collision she had run into a fog, and that when the *Emily* was sighted the officer in charge of the *Elysia* was in the act of signalling to his engines to reduce speed, but that the *Elysia's* speed was in fact eight and a half knots, and her course W. by N ¼ N.

Each vessel saw the other about 200 or 300 yards off, and nearly ahead, and at once ported their helms, and each alleged that they had been making the proper fog signals on board their own ship, and had not heard those of the other ship.

There was a great conflict of testimony as to the condition of the fog horn on board the *Emily*, the owners of the *Elysia* calling as a witness one of the crew of the *Emily* to prove that it was not used.

After hearing the evidence, and Dr. *Phillimore* (with him Dr. *Raikes*) for the plaintiffs, and *Myburgh*, Q.C. (with him *Aspinall*) for the defendants, and conferring with the Trinity Masters,

Sir R. Phillimore said:—This is a case of collision which happened after four o'clock in the morning on the 12th Aug., in this year, between a screw steamship called the *Elysia*, of Glasgow, and a brig called the *Emily*, of Swansea. The bluff of the *Elysia's* bow and the port side of the *Emily*, about her foretopmast backstays, were the parts of the vessels which came into contact. The *Emily* ultimately sank. There are two questions which arise in this case, viz.; Whether one vessel was to blame, or whether both were to blame. Now this is a collision in the open sea, and it was most clearly the steamer's duty to keep out of the way of the sailing vessel, and it was also the duty of the sailing vessel to keep her course. The first inquiry is, At what speed was the steamer going? The defendants admit her to have been going eight and a half knots an hour. That probably is less than her actual speed, but it may be taken (to give her all the advantage that may be derived from the statement of defence) that she was going eight and a half knots an hour at a time when the atmosphere was dense, and there were continual patches of fog, and sometimes what are called banks of fog. We have no hesitation in saying that eight and a half knots was an undue speed on the part of the steamer. We think also she must have had an inefficient look-out, because (again giving the defendants the benefit of their preliminary act) those on board the *Elysia* saw the sailing ship only 200 or 300 yards right ahead. The sailing ship ported a little, and if the steamer had ported at the same time, and if she had been sufficiently prompt in putting her helm hard-a-port, the collision would have been avoided. The brig seems to have done all that it was in her power to do to avoid the collision, which, in our judgment, ought to have been averted. The next question I have had to ask the Elder Brethren is, whether, in the circumstances of this case, the sailing vessel was going at too great a speed; that is to say, whether her speed constituted an offence against the 13th Article of the Regulations for Preventing Collisions at sea, which provides that "every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." The speed at which we think the sailing vessel was going was somewhere about five knots an hour, probably less, certainly not more, taking the whole of the evidence together. The Elder Brethren are of opinion that this was not an undue speed, and that the brig was not to blame on this account. I may observe, before I leave this part of the case, that as it is in evidence that a rowing boat communicated from one vessel to another with only one man sculling, the wind and sea could not have been excessive. It remains to consider a question which has been much discussed, and which I may say has been treated almost as if it was the main question in the case, namely, whether this brig had an efficient fog horn on board when the collision occurred, because it has been rightly contended if she had not had a proper fog horn on board her she cannot, under the provisions of the Merchant Shipping Act 1873, recover any damages, though she may otherwise not be to blame. This is a question of evidence, but I am very glad to have the assistance of the Elder Brethren upon this point, as well as upon the other parts of the case; and we have no hesitation in arriving at the conclusion that the story told by the brig's crew, with the exception of one man, is a true story, viz., that the fog horn on board the *Emily* was a proper fog horn, and was duly sounded before the collision. It has been, I think, observed with

truth that this conclusion does not necessarily—when the matter is carefully considered—imply that the crew of the steamer are perjured in the evidence which they have given. What they say is that they did not hear any fog horn, and that may have been consistent, according to the state of the atmosphere, with the fact to which the crew of the brig have sworn, viz., that there was a fog horn blown some time before the collision. As we believe that story to be true, it becomes unnecessary to consider what I may term the future history of this fog horn. Certainly it was a very strange one to rely upon. According to the defendant's witnesses, it was picked up on deck, taken away from the people to whom it belonged, carried on a voyage across the Atlantic, and was tossing about in a locker; and I should consider a long while, if it was necessary, before I found upon such evidence, that the brig did not carry a proper fog horn on the occasion of this collision. But, as I am satisfied, and as the Elder Brethren are satisfied, that the fog horn was blown on board this sailing vessel before the collision, it becomes unnecessary to consider what consequences would attach to what I have called the future history of this horn. I pronounce that the steamer is alone to blame for this collision.

From this judgment the owners of the *Elysia* appealed, limiting their appeal, however, to the question of the speed of the *Emily*, as shown by the following extract from a letter from their solicitor to the solicitor of the defendants:

> We beg to give you notice that on the appeal our clients will admit that the *Elysia* is to blame for the collision, and will not take exception to the sufficiency of the fog horn of the *Emily*, but will contend that the *Emily* is also to blame for the collision by reason of the rate of speed at which she was proceeding at the time.
>
> Please inform us whether you will accept this as a sufficient notice of the course the appellants will take in this appeal, to save the necessity of more formal notice and proof thereof . . .

To this letter the respondents replied, accepting the letter of the appellant's solicitors as notice.

The log of the *Emily* had been left on board that vessel after the collision, her crew having been taken off by the *Elysia*, and had subsequently been found on board by the crew of a vessel which had fallen in with the *Emily* derelict, and attempted unsuccessfully to salve her, and had by them been handed to the receiver of wreck. The log was produced at the trial, and appeared to have been written up to twelve o'clock on the 11th Aug., the day preceding the collision, but whether twelve noon or twelve midnight—that is, to within four or sixteen hours of the collision—appeared doubtful, but on the advice of the nautical assessors it was held to be till twelve noon.

The entries in it, to which reference was made, were that during the last eight hours the speed was seven knots, and for the previous sixteen hours eight knots, the wind being S.W., and the course E.S.E., and the weather was described as "strong breeze, and thick weather throughout." Lat. by acc. 50° 35′ N., Long. by acc. 33° 01′ W.

The argument on the law turned on the proper construction of Art. 13 of the Regulations for Preventing Collisions at Sea, made under the provisions of Order in Council, 14th Aug. 1879. That article is:

> Art. 13. *Speed to be moderate in fog, &c.*—Every ship whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

The corresponding rule under the regulations previously in force is contained in the latter part of Art. 16 of the regulations of 1862, and being as follows—"Every steamship shall, when in a fog, go at a moderate speed"—does not expressly apply to a sailing ship.

June 19.—The appeal came on for hearing.

Webster, Q.C. and *Aspinall* (with them *Myburgh*, Q.C.) for the appellants.—The only matter for the court is the speed of the *Emily*. That involves (1) a question of fact whether the speed was not really much more than the learned judge has found it to be; whether the court will not be satisfied on the evidence that it was nearer eight knots than five; and (2) a question of law whether, even assuming it to be only five knots, such a speed is, on a proper construction of Art. 13, a compliance with that article. As to the actual speed of the *Emily*, there is no reason why she could not be going as fast at the time of the collision as she was during the twenty-four hours to which the last entries in the log refer. She had the same sail set, all plain sail, all sail possible to be set, and was going as fast as ever she could. The force of the wind was a fresh breeze, and it was free on her quarter. Moreover, the distance from the position given in the log at the previous noon to that at which, according to the plaintiff's preliminary act, the collision happened, will give, if measured, 120 miles, or close on eight knots an hour. The only witness who speaks to five knots an hour is the officer in charge of the watch, who, being responsible, has an interest in making it appear small. On the evidence the court will be satisfied that the judgment of the court below is wrong in finding five knots as the maximum speed of the brig. But on the law, how can it be said that a speed is moderate which is admittedly the greatest possible? There is no direct precedent as to the speed of sailing ships in fogs, the new rule having not yet been discussed, but under the corresponding rule of the former regulations applicable to steamers, four knots was held as too high a speed for a steamer in foggy weather in the open sea; that is, it was held not to be a "moderate speed" in compliance with the rule then in force for steamers, (*The Magna Charta*, 25 L. T. Rep. N. S. 512; 1 Asp. Mar. L. C. 154) If four knots is not moderate for a steamer which probably goes at full speed ten, how can five be moderate for a sailing ship which cannot, under any circumstances, go more than eight or nine, and under the actual circumstances could go no faster than she was going? The case is *à fortiori* against the sailing ship, because a steamer can in an emergency stop and reverse and manœuvre in a manner not open to a sailing ship, dependent on a constant external force for her means of propulsion. Had the speed of the brig been a knot less, or bearing, the same proportion to her full speed that our actual speed did to our full speed, the collision would probably have been saved altogether, as the vessels only grazed as it was, and were by operation of the port helm parting from each other; but if the speed was not moderate it is sufficient to show, under sect. 17 of the Merchant Shipping Act 1873, and the cases decided on that section, that it might by possibility have caused or contributed to the collision, and not that it in fact did so.

Dr. *W. G. F. Phillimore* and Dr. *Raikes*, for the respondents, were not called on.

Lord Coleridge, C.J.—We need not trouble you, Dr. Phillimore. I am of opinion that in this case the judgment must be affirmed. It is a clear and simple point that is now before us. In the court below there were divers points raised on which the learned judge, Sir Robert Phillimore, had to express his opinion, but there is now no dispute on most of those points. The only point raised here is whether the *Elysia* alone, a steamship, or the *Emily* as well, a sailing ship, is to blame for the collision which took place, and liable for the damages that resulted from the collision. The question first, then, is, did the *Emily* comply with Article 13 of the Order in Council of the 14th Aug. 1879? By the 13th Article of that Order it was laid down that "every ship, whether a sailing ship or a steamship, shall, when in a fog, mist, or snow, go at a moderate speed." The *Emily*, the sailing ship, was, it has been admitted, in a fog when the accident occurred, and I see no reason to differ from the court below, which found that she was going at a speed of "somewhere about five knots an hour, probably less, certainly not more, taking the whole of the evidence together." So far as I can see, everything leads me to think that she was going steadily at not more than five knots an hour. Now, a sailing vessel in a fog, in the middle of the Atlantic, is going somewhere about five knots, and the question is whether, according to the 13th Article of the Order in Council, she was going at a moderate speed? I am of opinion that she was going at a moderate speed; and the court below, as well as the Elder Brethren who assisted them, and the gentlemen who give us such great assistance here, believe that the *Emily* was not going at an undue rate of speed when the collision took place. There are constructions of this 13th Rule which have been suggested for our consideration, but I think the rule means what it says. It says that a ship, whether a sailing vessel or a steamship, must go at a speed which is perfectly moderate. It says nothing whatever about the capacity of a vessel for speed. If a ship be a slow ship, it does not follow that, because she is going at her greatest speed, which is a slow speed, she is to reduce her speed in proportion to a faster vessel. It is not, if her best speed is moderate, that she must reduce it; but if her speed is more than moderate, she must bring it down to what is moderate. It would, indeed, be very dangerous to lay down any rule as to what is moderate and what is immoderate speed. A moderate speed in the Atlantic Ocean may be immoderate elsewhere. Under the circumstances of this case, then, I am of the same opinion as the court below and the Elder Brethren; and I am corroborated in that opinion by the gentlemen who assist us, that the sailing vessel *Emily*, going at the rate of five knots an hour, was not going at an immoderate speed when the collision with the *Elysia* took place. That being the only point which was to be raised before us—and it is not made out before us that there was immoderate speed on the part of the *Emily*—I am of opinion that the court below was right in its decision.

Brett, L.J.—Questions were raised in the court below in respect of some defects in the navigation of the *Emily*, but it is not for us to go into those matters. The point to which we have to confine our attention is the speed of the *Emily* at the time of the collision, and that is the only question we have to determine. With regard to the two questions which have arisen in connection with this case, one is a question of fact and the other is a question of law, viz., the construction of the 13th rule. Now, with regard to the question of fact, we are put into this position, whether we can undertake to say that the question of fact was wrongly decided, the question being whether the sailing vessel, the *Emily*, was going at a speed of five to five and a half knots an hour or considerably more. The only thing which seems to me to solve that question is the evidence of the witnesses, and whether they can be believed or not. The argument of Mr. Aspinall, deduced from the distance traversed from the previous noon, as shown by the log, was very ingenious with regard to the accuracy, and the strict accuracy, of the speed of these two vessels on the ocean. But we are not affected by the accuracy of that part of the case. What we have to decide is, what was imposed on the vessels by the 13th Rule of the Order in Council. The learned judge and the Trinity Brethren had first mainly to depend upon the evidence of the witnesses, but they had also the entries in the log of what had happened previously, and their decision would no doubt be affected by the evidence contained in the log. I think that if the log of the *Emily* had shown the state of the weather for, say, within four hours of the collision, I should have doubted the evidence; but when you take the entries which were made sixteen hours before, and the fact that the wind was gradually diminishing, it is not improbable that the *Emily* was going at the slow speed stated by the witnesses. As to whether they were credible witnesses or not was for the court below to determine; but I can see nothing in their testimony which enables this court to doubt, from the evidence given, that the *Emily* was only going at the rate of five knots an hour. It has been argued that the *Emily* was to go at a moderate speed in proportion to her own capacity for speed. The rules for guidance of vessels at sea are divided into two classes. One states what ships are to do when they are approaching each other, and what each is to do when there is danger of a collision. The other the precautions to be observed independently of the neighbourhood of any other ship. The rule under discussion is of the latter class, and it lays down an absolute rule without regard to any other ship. It does not say that when a vessel is approaching another vessel in a fog a certain thing shall be done; but it says that when a vessel is in a fog she must go at a moderate speed, whether there is a vessel approaching or not, and there is a statute (Merchant Shipping Act 1873, 36 & 37 Vict. c. 85, s. 17), which say, that if she infringes the regulations, that is, in the present case, if she does not go at a moderate speed in a fog, and she comes into collision with another vessel, she is deemed to be in the wrong. There is no question about that; and the rule may be regarded as an absolute Act of Parliament rule.

The question then is, what is the meaning of that rule? It is that she shall go at a speed such that, if she approaches another vessel, she may have time to perform the proper evolutions to avoid a collision.

This question of speed has reference to the time it would take a vessel to go from one point to another point in the water, and that must depend upon the locality and upon a variety of circumstances. It cannot be that moderate speed can be the same with regard to a steamer absolutely as to a sailing vessel. If you were to say that three knots were a moderate speed for a steamer in which to turn from one point to another when out in the ocean, that does not presume that that would be a moderate speed for a sailing vessel, because a steamer can reduce her speed to a knot and a half. It would, however, be very dangerous for a sailing vessel under all circumstances to reduce her speed to anything like three knots, because such a speed would in certain circumstances place her entirely out of command. In a narrow channel again crowded with vessels in a fog it would be necessary that there should be modifications of any rule laid down. In the Thames at Gravesend, for instance, the moderate speed could not safely be the same as in mid-ocean. Then, if the construction of law and nautical science depend upon circumstances, we have to deal with each case separately. Then, supposing a vessel to be in mid-Atlantic in a fog, and going at a speed of five knots an hour, is that a moderate pace, not for the *Emily*, but for any other sailing vessel to be going? We are advised that the speed the *Emily* was going in mid-Atlantic was a moderate speed, and, that being so, it seems to me that the decision in the court below was right.

Cotton, L.J.—It appears to me that there are two questions involved in this case, the principal one being the construction of rule 13 of the Order in Council. The Court below held that the speed of the *Emily* at the time of the collision was but five knots an hour. On the question of fact there could be no better judge of that than the court below, where the witnesses were seen and heard; and I cannot say that the court below has been wrong in the consideration of the question of fact. The judge below had before him the log, which has been referred to, and the witnesses as to what the speed was at the time of the collision. I think that the witnesses of the *Emily* stated accurately that the speed of their vessel was less than when it was recorded in their log some sixteen hours before; and according to the log there was certainly some evidence tending to show that the wind was less at the time of the collision than before it. The latest entry in the log I see is sixteen hours before the collision, and, therefore, it is important as showing what the state of the weather had been when the entry was made. The witnesses, however, on the other side would think that the wind they were meeting was stronger than those thought who were going before it, and that would account for their estimating the speed of the *Emily* before the collision at nine knots instead of five knots an hour. In my opinion this court cannot go against the evidence of the defendants' witnesses called in the case.

Now, as to the consideration of the 13th rule, I have little to add to what has already been said by my learned brothers. In my opinion the rule does not require that the speed is to be slackened by a naturally slow vessel. If the vessel was going at a moderate speed, it is not bound to go at a less speed. But what is a moderate speed? One cannot exactly define what is a moderate speed. That must depend, not upon the speed of the vessel herself, but upon the position in which she is, whether in a crowded channel or on the open seas, where vessels are not very frequently met; and in my opinion it is not necessary to decide that point in the present case. It might depend upon whether a vessel is rapid in answering her helm or not; but the moderation of the speed must depend upon the circumstances, not upon what is the speed of a vessel naturally, but where she is sailing when there is a fog on. Both position and other matters have to be taken into consideration, and the assessors tell us that the speed at which the *Emily* was going was moderate, and that being so the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for appellants, owners of *Elysia*, *Pritchard* and *Sons*.

Solicitors for respondents, owners of *Emily*, *H. C. Coote*, agent for *M. A. Jenkins*.

Dec. 9, 10, 1881; *April* 24, 25, *and June* 6, 1882.

(Before Jessel, M.R., Brett, and Cotton, L.JJ.)

Pitman and another *v.* The Universal Marine Insurance Company.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Partial loss—Sale of damaged ship—Loss on sale—Cost of repairs not executed—Measure of insurer's liability.

Plaintiffs' vessel was insured by a time policy, valued. During the continuance of the risk she went ashore and was damaged, but was got off and towed into port. Her value immediately before she went ashore was the same as at the commencement of the risk. The cost of the repairs necessary to restore her to the same condition as she was in before she was damaged would have greatly exceeded her value when repaired. Plaintiffs did not do these repairs, but only did some slight repairs that were immediately necessary, sold the ship before the expiration of the policy for a sum exceeding her estimated value, and claimed for an average loss.

Held, by Jessel, M.R. and Cotton, L.J. (Brett, L.J. dissentiente), that the measure of the insurers' liability was the difference between the value of the vessel when undamaged and the balance which remained after deducting from the proceeds of the sale the cost of the repairs executed.

Per Jessel, M.R.: The value to be regarded was the value of the vessel at the commencement of the risk.

Per Brett, L.J.: The measure of the insurers' liability was the estimated cost of the repairs which would have been necessary to restore the vessel to the same condition as she was in before she was damaged, deducting one-third new for old.

Judgment of Lindley, J. (4 Asp. Mar. Law Cas. 444; 45 *L. T. Rep. N. S.* 46) *affirmed.*

Appeal by the plaintiffs from the judgment of Lindley, J., on further consideration, which is reported *ante*, p. 444, and 45 L. T. Rep. N. S. 46, where the facts are fully stated.

The appeal was first argued on the 9th and 10th Dec. 1881, when the court took time to consider

and was re-argued by order of the court on the 24th and 25th April 1882.

Butt, Q.C. and *Pollard* for the plaintiffs.

Cohen, Q.C. and *Hollams* for the defendants.

The arguments were sufficiently noticed in the judgments.

The following cases were cited:

Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616.
Stewart v. *Steele*, 5 Scott N. R. 927; 11 L. J. 155, C. P.;
Aitchison v. *Lohre*, 4 Asp. Mar. Law Cas. 168; 41 L. T. Rep. N. S. 323; 4 App. Cas. 755;
Wilson v. *The Bank of Victoria*, 2 Mar. Law Cas. O. S. 449; 16 L. T. Rep. N. S. 9; L. Rep. 2 Q. B. 203;
Knight v. *Faith*, 15 Q. B. 649; 19 L. J. 509, Q. B.;
Hamilton v. *Mendes*, 2 Bur. 1198;
Allwood v. *Henckell*, 1 Park on Insurance, 399.

Cur. adv. vult.

June 6. — The following judgments were delivered.

Cotton, L.J.—This is an action by the owners of a vessel insured by the defendants, and the only question on the appeal is the amount which the plaintiffs are entitled to recover on their policy. The vessel during the subsistence of the insurance was materially injured by perils of the sea. The repairs necessary to make good the injuries were estimated at a large sum, and the owners at first claimed to treat the case as one of constructive total loss, but this was objected to by the insurers, and the owners abandoned this contention. They then began to repair the vessel at Moulmein, but instead of executing the repairs necessary to restore the vessel to as good a condition as before the injury was sustained, they had some of the most necessary repairs done at a comparatively trifling expense, and then during the continuance of the risk covered by the policy sold the vessel at that port. It realised a large sum, and the judgment of the court below has given the plaintiffs only the difference between the value of the ship in its uninjured state, and the sum realised by its sale after deducting from this latter sum the cost of the repairs which were in fact done. The plaintiffs claim to be entitled to recover the estimated cost of the repairs necessary entirely to make good the injury sustained by the vessel, less the usual allowance of one-third of the cost, which would give the plaintiffs a very much larger sum than they can recover under the judgment appealed from. As a general rule, where there is a partial loss in consequence of injury to a vessel by reason of perils insured against, the insured is entitled to recover the sum properly expended in executing the necessary repairs, or, if the work has not been done, the estimated expense of the necessary repairs, less, in each case where the vessel was not at the time of the injury a new one, the usual allowance of one-third new for old. But in the present case the insured, before the determination of the risk, by their voluntary act showed that they did not desire to restore the ship to the same condition as before the injury, and rendered it impossible that the repairs of which they seek to recover the expense should ever be executed by them. No doubt both judges and text-writers have spoken of the insured in a case of partial loss being entitled to recover the amount above mentioned. But they do so without special reference to cases like the present, on which there is no express authority. It therefore becomes necessary to consider the principle on which an insured shipowner is entitled to recover the above-mentioned proportion of the costs, actual or estimated, of repairs. A policy of marine insurance is a contract of indemnity. In case of partial loss, when repairs are in fact executed, the sums expended in repairing the ship in a reasonable and proper way are damages sustained by the insured by reason of the perils insured against, and a natural consequence of such perils; and the insured is entitled by way of indemnity to the cost so incurred, after deducting in the case of a vessel not new at the time of the injury one third of the expenditure, this deduction being made to prevent the insured getting a benefit by reason of his ship being repaired with new materials in place of old. Mr. Cohen argued that, where the cost of repairing an injured vessel would exceed the value of the vessel when repaired, the expenditure could not be recovered from the underwriters. But it must not be supposed that, by using the term "properly expended in repairs," I in any way accede to this argument. By "properly expended in repairs" I mean expended in executing the necessary repairs in a reasonable and proper manner. Where in the case of a partial loss the owner has not repaired the vessel he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against. This is the present case, and we have to determine on what principle this deterioration is to be ascertained. As a general rule, the estimated cost of the repairs is the measure of deterioration, but, to use the language of Maule, J. in *Stewart* v. *Steele* (5 Scott N. R. 948): "The assured must recover the repairs not *eo nomine* as expenses, but as the measure of the loss." But it is urged by the appellants that the estimated cost of repair, with the deduction of one-third new for old in the case of ships not new, is the established and settled measure of damages to be recovered by an insured shipowner where there is a partial loss and the ship has not been repaired. The judgment of Lord Campbell, in *Knight* v. *Faith* (15 Q. B. 649), and the decision in *Lidgett* v. *Secretan* (1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942; L. Rep. 3 C. P. 616) have been relied on in support of this contention. In the former case the policy was a time policy for a year, and the ship sustained injury during the year by perils insured against, and after the expiration of the year was found to be in such a state as to be a constructive total loss, and was sold for a very small sum. The court held the defendants not liable for the total loss, and undoubtedly Lord Campbell speaks of the sum to be recovered by the plaintiffs for the partial loss as that which they could prove it would have cost to repair the injury sustained during the time covered by the policy. But there the plaintiffs had not before the expiration of the risk elected not to repair, but to sell the ship, and the sum which the repairs would have cost was the only available measure of the deterioration at the expiration of the risk.

In *Lidgett* v. *Secretan* (*ubi sup.*) the vessel was insured by two policies. A partial loss was incurred during the period covered by one of the policies, and, after that had expired

and while the ship was being repaired, a total loss occurred by the ship being burnt during the period covered by the second policy. The Court decided that under the first policy the estimated cost of the repairs, which had not been done when the total loss occurred, was to be taken into account in ascertaining the amount recoverable under the first policy. Here again, this was the only measure of the depreciation of the vessel by the injury sustained during the first policy. But the judges who decided that case do not say that the estimated cost of repairs not executed is necessarily in all cases to be taken as the measure; what they say is in principle against the appellants. Smith, J. said: "The cost of the repairs would be a mode" (not the mode) "of estimating the amount by which the vessel was depreciated by striking on the reef;" and Willes, J. said: "The only question we are asked to decide is, what are the true principles upon which the loss is to be assessed? The true principle I apprehend to be this: "The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk, the difference between the then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of value at the expiration of the risk." These cases, in my opinion, do not help the appellant's contention; and the decision in *Stewart* v. *Steele* (5 Scott N. R. 927) is against them. There the ship had been injured, and had, in consequence of defects not caused by the perils insured against, been sold for breaking up. The wales had been removed to ascertain the injury which the vessel had sustained, and were not replaced before the sale. The jury had given the shipowner the sum which it would have cost to replace the wales. But the Court held that on the evidence, as the ship was sold for breaking up, the plaintiffs were not damnified by the wales not having been replaced, and were not entitled to recover the sum which it would have cost to replace them. The authorities, therefore, in my opinion, do not support the contention of the plaintiffs, that the estimated cost of repairs, less one-third new for old, is necessarily the measure of the sum to be recovered by the insured, and the reasoning and expressions used by the judges in the cases tend strongly to show that the estimated cost of repairs which have not been executed is a method, but not under all circumstances the only method, of estimating the deterioration of the vessel. To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases, that the policy is a contract of indemnity, or, to adopt the words of Willes, J. in *Lidgett* v. *Secretan* (*ubi sup.*), the insured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy.

In this state of the authorities, I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not, under all circumstances, the sum which the insured is to recover. Where, as in the present case, there is not a constructive total loss, he is not, as against the insurers, entitled to sell so as to bind them by the loss resulting therefrom; but, when he elects to take this course, as in the present case, he, as against himself, fixes his loss; that is, he cannot, as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably the most accurate way of stating the measure of what, under such circumstances, he is to recover is, that it will be the estimated cost of repairs, less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale. It was urged that the judge in the court below had no sufficient evidence of what was the value of the vessel at Moulmein in its undamaged state. But this objection cannot, I think, be sustained; and, as he found that this value was the same as that of the vessel at the commencement of the risk, the question as to the proper mode of estimating from the sale the depreciation of the vessel does not, I think, arise. It must be observed that in the present case some repairs had been done to the vessel before it was sold, and these have been allowed to the plaintiffs; for notwithstanding criticisms on the wording of the judgment, I think that it directs the cost of these repairs to be subtracted from the proceeds of the sale before these proceeds are deducted from the value of the ship when uninjured, so as to fix the amount of deterioration. In my opinion, the judgment appealed from is right, and the appeal must be dismissed.

Cotton, L.J. then read the judgment of Jessel, M.R.—The question in this case is, Upon what principle ought the liability of underwriters to be determined, when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk, without being repaired, in a case where the amount, required to restore her to the same condition she was in before the injury, would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her? In this instance the value of the ship in her damaged state was large, and to have repaired her would, according to the surveyor's report, have caused a loss of 41,000 rupees, viz., 25,000 rupees, the estimated amount of her value unrepaired, and the sum of 16,000 rupees, being the difference between 45,000 rupees, her estimated value when repaired, and 61,000 rupees, the estimated cost of the repairs. It is plain that, there being no special circumstances in this case, no reasonable uninsured owner would have repaired the ship so as to restore her to her former condition. The owners took this view, and therefore determined to sell her, and, having made some slight repairs with a view to a sale, they sold the ship for much more than the estimated value in her damaged state, viz., for 38,000 rupees, or thereabouts. The underwriters are willing to pay the whole of the loss actually incurred by the owners, viz., the difference between the value of the ship at the port of departure for the voyage—*i.e.*, 4000*l.*—and the amount of the net proceeds of the sale, after deducting therefrom the amount actually expended for repairs; and this, as I read the judgment, is what they are to pay. If there

is any doubt as to the meaning of the words on this point, I am willing that it should be removed by altering the wording of the judgment. On the other hand the owners claim two-thirds of the estimated cost of the repairs required to put the ship in the same condition as she was in before the injury; this proportion of the amount expended for repairs being the sum ordinarily payable by underwriters on the occurrence of a partial loss where the ship is an old one, as this is, and is not repaired. The precise question we have to determine does not appear to have been decided, nor can I find any case in which it has been even discussed. It remains, therefore, to be decided upon principle.

The contract of insurance is, as I understand, a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea. It follows from this that, as a general rule, in no case can the insured become richer by reason of these perils, or, in other words, that the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss than if the ship was wholly lost. Treating this as in effect a constructive total loss, or rather, taking the amount recoverable to be an amount not exceeding, and therefore in a case like this equal to, what would be recovered as on a total loss, I think the value to be regarded is the value of the ship at the port of departure; but in this case it is not material, because I think the value at Moulmein before the injury was about the same. The estimated value was 45,000 rupees when the vessel was restored to its class, which at the exchange of 1*s.* 9⅝*d.* would be a little over 4000*l.*; but the vessel would after repair have been in all probability rather better than she was before the injury. This being so, it appears to me that the decision of the learned judge in the court below, which was in favour of the underwriters, was substantially right; but I do not wish to be understood as concurring in all the reasons given by him for that decision. It seems to me, both on principle and authority, that the rights of a shipowner, who actually repairs his vessel when damaged by the perils of the sea, to recover the amount, or a portion of the amount, expended in repairs from the underwriters, are not in all cases the same as those of a shipowner who declines to repair because the ship is not worth repairing, and who therefore sells the ship during the risk; and I wish to confine my judgment to the latter case, which is the case before us. I am therefore of opinion that the decision appealed from should be affirmed.

Brett, L J.—The facts of the case are not in dispute. The case was at my request argued a second time before us. Neither before Lindley, J., nor before us, was it argued that there was a total loss of this ship. Both parties have advisedly admitted that the case must be decided upon the assumption that there was only a partial or average loss of the ship. If they had not done so, I am not at all prepared to say that the finding of Lindley, J., in which he says, "I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling the ship in her damaged state," would not, if the insured had elected so to treat it, have justified the sale as against the underwriters, and have made a total loss of this ship. But I think that the court cannot decide this case upon such a view of it after the plaintiffs have elected to treat the loss as an average loss, and after the advised persistent argument on both sides. It appears to me absolutely necessary throughout the consideration of this case to remember that it is to be decided on the assumption that there was only an average loss on ship. The decision of this case upon the facts of it might have been easy and of little importance, if it had been treated as a total loss; but the doctrines suggested in argument, and, as I think, countenanced by the judgment of Lindley, J., upon the assumption that this was a partial loss, have made the case to my mind one of the highest mercantile and legal importance.

On the first hearing before us it was contended on behalf of the defendants, first, that if a ship damaged by sea-peril is repaired by her owner, so as to be as good as she was before, but a jury find that it was unreasonable so to repair her, the liability of the underwriters must not be ascertained by a comparison with the cost of such repairs, but by ascertaining the difference between what the ship would have sold for damaged and unrepaired, and what she would sell for repaired, and by comparing that difference with the value of the ship in the policy. The same argument was put in the following form: secondly, if it is unreasonable to repair the ship so as to make her as good as she was before, the assured, though he may of course in fact repair her, cannot so repair her as against the underwriters so as to charge them, and it is unreasonable so to repair her, if the cost of such repairs exceed the value of the ship when repaired. And again in this form: thirdly, where it would be so extravagant as to be unreasonable to repair an injured ship so as to make her as good as she was before, the shipowner ought not to repair her, and if he does you must in such case ascertain the depreciation in value of the ship caused by the accident by ascertaining the difference between what the ship would sell for damaged and undamaged at the same place. And it was urged in each and every of these forms that it was a question for the jury whether a prudent uninsured owner would have undertaken the repairs. It seems to me that the judgment of Lindley, J., countenances if it does not adopt these arguments. It must be admitted that they are absolutely new. In a case where the repairs were actually done, they were the arguments brought forward and overruled—the case of *Aitchison* v. *Lohre* (4 Asp. Mar. Law Cas. 168; 41 L. T. Rep. N. S. 323; 4 App. Cas. 755)—in all the courts, and in the House of Lords. It need hardly be observed that, if the counsel for the defendants could have maintained any of these propositions as true in the case of repairs effected, they would have enforced them easily in a case where no such repairs had been done. It was further argued fourthly, on the first hearing before us, that whenever the damaged ship is sold, and without being repaired, the loss is to be ascertained by the same process as a loss on damaged marketable goods is ascertained. This formula would be so damaging to underwriters, if the estimate of repairs were low, that, stated in these terms, I think it was at once abandoned. On the second hearing before us none of these arguments were again brought forward. The arguments for the defendants on the

second occasion were, that the object of marine insurance is that the assured is to be put in the same position with regard to the subject insured as if he had not embarked on the adventure, and if a ship has been injured and not repaired, and a comparison with the estimated cost of repairs would produce a sum greater than the sum which would be due on a constructive total loss, the object is not attained except by paying the same sum as would be payable on a constructive total loss. It was pointed out that, if this principal were correct as a principle, it would be equally applicable to a case in which the repairs had been done, and that it would in such case break the rule that there is no salvage on an average loss; to which it was answered that there is a custom where repairs have been done, but that there is no custom where repairs have not been done. It was further argued that repairs must be *bonâ fide* done, and that they cannot be done *bonâ fide* if the cost of them when done would exceed the value of the ship when repaired, and therefore that no such possible or contemplated repairs could be considered in estimating an average loss on a ship. But it was pointed out and admitted that such repairs might be *bonâ fide* incurred in order to earn a valuable amount of freight. The main argument in the end was, that the law which affirms that a contract of insurance is a contract of indemnity obliges us to say that the assured cannot recover for a partial or average loss more than for a total loss, and that, if the comparison with the estimated cost of repairs produces a sum equal to 100 per cent. of the sum insured, and the ship be allowed to be sold without the amount of the proceeds of sale being brought into the account, the assured will in such case, by recovering a full 100 per cent. without deduction of salvage, recover more than he would recover for a constructive total loss. This is the argument on behalf of the defendants which has given me so much trouble. As to all the others I confess that I feel no doubt that they are all untenable. The following propositions are all, I think, recognised as true in insurance law: The assured is not under any circumstances bound to sell his ship. He is entitled under any circumstances to repair his ship. The assured may under any circumstances sell his ship. He is not bound under any circumstances to repair his ship. In none of these respects does any question arise as to whether a prudent owner uninsured would act in the like manner. All this is so because there is nothing in the contract of insurance which takes away from the assured the absolute power and right to do with his own property what he will. The assured, therefore, can always, whatever be the amount of damage done to his ship, repair her. If he does repair and keep the ship, there cannot be a total loss; the loss then must be a partial or average loss, leaving open the question of how much loss is to be adjusted. But in the case of a partial or average loss there is no salvage. Therefore in such case, if the cost of repairs, actually done in a reasonable way at a reasonable cost, so as to make the ship equal to what she was before the accident, equals or exceeds 100 per cent. of the sum insured, the assured in respect of such average loss on ship recovers 100 per cent. of the sum insured without any deduction. That was the decision in *Aitchison* v. *Lohre* (*ubi sup.*). The assured need not repair the ship. If he does not, but leaves her unrepaired till the end of the risk, no subsequent total loss intervening, then he is to be compensated as if he had repaired, except that the cost of the repairs he might have made must be determined by estimate instead of by actual expenditure. This proposition is undoubtedly supported in terms by high authorities. If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one-third from the whole expense, both of labour and material, which the repairs have cost, and to assess the damage at the remaining two-thirds: (Arnould on Marine Insurance, c. 5, s. 3, article 2.) Arnould points out the mode of arriving at the amount of damage in either case, namely, where the ship has and has not been repaired. Then he applies one common mode of adjusting the loss: "The rule for adjusting a particular average loss on the ship is very simple, viz., that in open policies the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage or the expense of repairing it is to the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the valuation in the policy:" (Arnould on Marine Insurance, c. 5, s. 10, article 2.) "The partial loss," says Lord Campbell in *Knight* v. *Faith* (15 Q. B. 669, 670, in which case the ship had not been repaired), "must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired soon after the policy expired." He admits the difficulty of proof in such cases of the amount of the damage, but says that it can be overcome. Willes, J., in *Lidgett* v. *Secretan* (*ubi sup.*), seems to me to say elaborately the same thing. In none of the authorities, such as Stevens, Benecke, Park, Phillipps, or Parsons, is any different rule suggested for fixing the amount of damage, and adjusting the loss, in the cases of the ship having been repaired or left unrepaired. If this proposition as to there being no different rule for ascertaining the amount of damage in the cases of actual repairs done and an estimate of repairs not done, is true, it seems to me to follow that, if the assured does not repair, and does not sell, and the accepted estimate for repairs equals or exceeds 100 per cent. of the sum insured, the principle adopted and approved in *Aitchison* v. *Lohre* (*ubi sup.*) is equally applicable in such a case as to the case in which repairs have actually been done. The only difference between the two cases is the mode of proving the amount of damage. But mode of proof does not alter liability. In such a case then the assured would recover 100 per cent. of the sum insured, and the value of the unrepaired ship would not be taken into the account. It seems to me to follow that, if the assured keeps the ship unrepaired until the expiration of the time fixed in the policy, or at all events until the day of trial, he may sell the ship the day after, and the proceeds of such sale cannot be brought into the account.

The question in this case is whether, if the sale takes place on the day before the one or the other event, the proceeds of the sale are to be taken into account. All the other propositions advanced in argument are answered by the preceding considerations. And as to this, the first observation

which strikes me is, that a distinction between a day before and a day after is too minute to have been treated as a distinction by business men; and the second, which seems to me, following the other, to be of immense force, is that none of the great masters who have dealt with the subject of the adjustment of an average loss on ship have in any way glanced at a different mode of adjusting such a loss if the ship should be sold before the adjustment or after it. Not one of them has ever alluded to such a rule as has been acted upon by Lindley, J. in the present case. It is said that the circumstances of this case were never present to their minds. But it is inconceivable to me that Stevens, Benecke, Park, Arnould, Phillipps, Parsons, writing exhaustive treatises on maritime insurance, should all have overlooked the possibility of such a case arising. The more natural, the more just conclusion seems to me to be, that they knew but of one rule of adjusting a partial or average loss on ship. It is said further, that the case has never been present to the minds of the great judges who have enunciated the rule of adjusting an average loss on ship. Is that possible? The circumstance has actually been before them in every case in which the shipowner or master has considered that the damage done to the ship amounted to a constructive total loss, and has thereupon sold her unrepaired, but where the owner has failed at the trial to prove that there was a constructive total loss. In every such case the owner has recovered as for a partial loss, and no different mode of calculating the loss from the ordinary mode has been suggested. The point was surely distinctly before Lord Campbell in *Knight* v. *Faith* (15 Q. B. 649), where the ship had been sold. And he thus in such a case lays down the rule (at page 669): "However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon the assured to show the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it; and from this there would be the usual deduction of one-third new for old." It is not possible to my mind that so great a judge should not have added this caution if the supposed rule existed: "Provided that the proceeds of the sale of the ship must be deducted, as she has been, in fact, sold by the master." But I will endeavour further to consider this matter. It seems to me that it can be solved by considering what it is against which the underwriter insures. It is true that the contract of insurance is a contract of indemnity, and that the insured must not be paid more than is sufficient to indemnify him against the loss which the underwriter by the contract of insurance has agreed to indemnify. But the question is what is the loss against which the contract indemnifies? Whatever the assured may gain or lose by the accident by reason of matter outside the contract of indemnity, is not matter to be considered between the assured and the underwriter in settling the loss which is within the contract. As, for instance, if the matter insured is marketable goods—suppose them bought for 100*l.* and insured for 100*l.*, and suppose the market to which they were to be carried is so gone down that if the goods arrived there they would sell for 50*l.*—and if the goods are totally lost in the voyage, the underwriter must pay 100*l.*, although the assured, by reason of the accident, is 50*l.* the better than he would have been if the accident had not happened. The fall of the market being a matter outside the contract of insurance is not a matter to be considered in adjusting the loss, and therefore the assured recovers the 100*l.* So, if such goods upon such markets were in the voyage damaged to the extent of 75 per cent., the assured would be entitled to receive 75*l.*, and so would be the better by 25*l.* than if the accident had not happened. The question then is, what is the loss against which the underwriter agrees to indemnify? It is the loss which the assured intends to cover, and which the underwriter knows that the assured intends to cover. In the case of an insurance on marketable goods, it is known to both that the object of the assured in conveying such goods from one place to another is that they may be sold at a profit. In order that such a result may ensue, they should arrive and arrive undamaged. If they do not arrive at all, the assured is put in the same position as he was at the beginning of the adventure if he is paid the price at which he originally bought the goods. If the goods are damaged, he is put into that position by being paid a percentage of such price. The identity of the goods is immaterial to him. Goods for purchase and sale are exactly represented by money. But a ship is not in commerce treated by its owner as a subject of purchase and sale in either one market or another. It is used in commerce, as Arnould notices, by its owner as a machine for carrying cargo backwards and forwards for prices determined by successive contracts of affreightment. If the ship be totally lost, the only method of indemnifying the shipowner, that is, of placing him in the position he was in at the commencement of the risk, is to pay him the then value of the ship. But, if the ship is damaged, the immediate business inconvenience and loss to the owner is, not that a sale of the ship is thereby prevented or injured, but that he is prevented, by reason of the damage, from using the ship as a carrying machine to earn freight. That inconvenience is not to be cured by buying another ship or by selling the damaged ship. A ship damaged in some distant port, though she can there be repaired, cannot be replaced by the purchase of another ship at home; the business inconvenience to the shipowner, *i.e.*, the loss in his business, can only be met by repairing the ship so as to make her as good a carrying machine as she was before. That is the object he desires to attain by the insurance. The loss he desires to cover, and which the underwriter knows he desires to cover, is therefore the cost of repairs, not the diminution in value of the ship to sell. The cost of repairs is therefore the matter to be indemnified. The loss in value to sell is not the loss against which the shipowner insured. The injury to or loss by a sale is no more within the purview of the contract of insurance on ship than is the loss of market in the case of an insurance on goods. Loss or gain by a sale of the ship is therefore not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship. This seems to me the reasoning by which all writers on insurance, and all judges who have dealt with insurance, have laid down the one and sole rule which they have laid down for the adjustment for a partial or

average loss on ship. And as was said in *Aitchison* v. *Lohre* (*ubi sup*), if this has been accepted as a sole and only rule by merchants and underwriters for many years, it is now a rule which is part of the contract of insurance on ship. According to that rule, no evidence that the ship had been sold, or of what were the proceeds of the sale of the ship, is properly admissible in evidence in an action brought simply to recover a partial or average loss on ship. As to the case of *Stewart* v. *Steele* it seems to me, I confess, to be the most unsatisfactory case, as reported, with which I have ever had to deal; every observation made by the judges during the argument seems to show that their minds were bent on the consideration of a case in which, after a partial damage, the ship is totally lost. In such case it is settled that partial damage actually repaired is to be paid for, but that repairs not done are not to be taken into account. Different reasons are given in the final judgments why the cost which would have been incurred if the wales had been replaced was not to be allowed. In simple truth, I do not gather the reason why such cost was disallowed. No writer has ever deduced any rule from that case. The case was cited before Lindley, J., and before us, from 5 Scott N. R., for the purpose of relying on a supposed dictum of Maule, J., at page 950, that "as to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy, and the frequent statement of the proposition will not make it the less fallacious; the law casts no such duty on them." The proposition so stated startled me exceedingly. Underwriters have for years paid for repairs. I felt certain it was not correct. And it is not true that Maule, J. stated such a proposition. What he did state is shown in the report in the Law Journal (11 L. J. 155, C. P.). He, in answer to an argument to the contrary, stated that the underwriters had no duty to do the repairs to the ship. That proposition has no effect on the solution of the present case, though it is most undoubtedly true. I would add that none of the terms on the face of the policy can help us to a solution of the present question, because, as is stated by Arnould, a policy of insurance in its present form is mainly construed according to long settled and admitted usage of merchants and underwriters. The defect in the judgment under review seems to me, with deference, to be, that it has misapplied the doctrine that a contract of insurance is only a contract of indemnity. It is true that it must not more than indemnify against the loss which it covers; but it is also true that it has nothing to do with gains or losses which are outside the contract by which it undertakes to indemnify against the losses which it does cover. One is naturally startled at the facts of the present case; but they are wholly abnormal, and it is in my opinion, most dangerous to mercantile business to tamper with a settled rule of adjustment of liability and claim in order to meet a case which will in all probability never happen again. I therefore am of opinion that this appeal and the plaintiffs' claim ought to be allowed.

Judgment affirmed.

Solicitors for plaintiffs, *Lyne* and *Holman*.

Solicitors for defendants, *Hollams, Son,* and *Coward*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Reported by H. D. Bonsey, Esq., Barrister-at-Law.

Wednesday, June 7, 1882.

Before Grove and Mathew, JJ.)

Svendson *v.* Wallace and others.

Marine insurance—General average—Practice of average adjusters—Not evidence of custom of trade.

A long-continued practice of average adjusters who prepare their statements according to the law as laid down by the courts is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner and owner of cargo.

The defendants who were the owners of cargo in an action against them by the shipowner to recover a general average contribution in respect of expenses caused by the ship putting into a port of refuge, landing, storing, and reshipping the cargo, and leaving the port, alleged a custom of trade that in such a case the expenses incurred in and about warehousing the cargo were apportioned among the owners of the cargo alone, and the expenses of reshipping the cargo, port dues, &c., were borne by the owners of the ship and freight.

Several witnesses were called who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by the defendants, but that, in consequence of the decision in Atwood *v.* Sellar (4 *Asp. Mar. L. C.* 153; *L. Rep.* 5 *Q.B. Div.* 286; 42 *L. T. Rep. N. S.* 644) *some average adjusters had altered their mode of adjustment in such a case.*

Held (affirming the decision of the learned judge at the trial), that this was not evidence of a custom of trade which could be left to the jury.

This was an action brought by the owners of a ship against the owners of the cargo to recover a general average contribution amounting to 770*l.* 2*s.* 4*d.*

During the voyage from Rangoon to Liverpool the ship met with heavy weather and sprang a dangerous leak, in consequence of which the master took refuge in the port of St. Louis, Mauritius. At St. Louis the vessel was repaired, in order to enable her to prosecute her voyage to Liverpool, and certain expenses were incurred which the plaintiffs alleged were a proper subject of general average.

The expenses consisted among other things of charges for pumping the ship, for landing, storing, and re-shipping the cargo, and for port dues in respect of entering and leaving the port.

The defendants denied that the expenses were the subject of general average, and alleged that at Rangoon and at Liverpool, and elsewhere in England and in the British empire, there had been and was a well-known and approved usage and custom of trade amongst shippers, shipowners, merchants, underwriters, and average staters, that expenses incurred in and about the warehousing, storing, and reshipping of cargoes rendered necessary for the purpose of repairing damage occasioned to the ships on board of which they were laden by perils of the seas, and also expenses incurred for and in and about defraying

port charges, pilotages, and other outward bound dues to enable the ships to proceed on their voyages with their cargoes, were not contributed for by any general average or payment in the nature of general average among all the owners of the ship, freight, and cargo on board any ship, but that the expenses of warehousing and storing the cargo were apportioned among the owners of the cargo alone, and the expenses of reloading the cargo, the port charges, pilotage, and other outward dues, are apportioned amongst and borne by the owners of the ship and freight.

The defendants paid into court the sum of 681*l.* 13*s.* 1*d.* for storing and warehousing the cargo, but denied that they were liable in respect of any expense incurred in reshipping the cargo, port dues, or any expenses subsequent to reloading.

When the case came on to be tried several witnesses were called on behalf of the defendant in support of the custom, and they gave evidence to the effect that for sixty or seventy years it had been the uniform practice of average adjusters, to charge expenses of this kind in the manner contended by the defendant, but that, in consequence of the decision in *Atwood* v. *Sellar* (4 Asp. Mar. L. C. 153), some average adjusters had changed their mode of adjustment in such cases; and that it was the duty of average adjusters to prepare their statement in accordance with the law, and to adapt their practice to the law as laid down by the courts from time to time. The learned judge refused to leave this evidence to the jury, on the ground that it was merely evidence of the practice of average adjusters, and no evidence of a usage or custom of trade. The defendants obtained a rule *nisi* for a new trial on the ground that the learned judge was wrong in holding that there was no evidence of a usage or custom of trade to go to the jury.

Cohen, Q.C. and *H. D. Warr* (C. *Russell*, Q.C. with them) for the plaintiff showed cause against the rule.—The learned judge at the trial held that it was for the defendants to prove the custom alleged in the statement of defence. Several witnesses were called, and the judge held that the evidence did not amount to any evidence of a custom of trade, but that it was merely evidence of the practice of average adjusters, who regulated their mode of adjustment by the law. There are two questions: First, whether there was any evidence of a custom, and secondly, whether it has any of the legal incidents of a custom. It is important to see what the custom is at Liverpool, the port of destination; and since the case of *Atwood* v. *Sellar* (4 Asp. Mar. L. C. 153; 42 L. T. Rep. N. S. 644; 5 Q. B. Div. 342) the practice there has not been uniform, where the putting into port was not in consequence of a general average sacrifice. At any rate, after the decision in *Atwood* v. *Sellar* there has not been a uniform custom at Liverpool. Secondly, we say that this so-called custom or usage of trade has not the legal incidents of a custom. The characteristic of a custom is that it differs from the law or what the law would imply; but the evidence here is that the average adjusters altered their practice when any alteration was made in the law, and, in fact, merely adjusted according to the law. A custom could not be incorporated into the contract unless it was a legal custom generally existing at Liverpool. The evidence was properly rejected by the learned judge at the trial.

Butt, Q.C. (*Webster*, Q.C. and *Myburgh*, Q.C. with him) for the defendant in support of the rule.—There has never been a different mode of adjusting. Our witnesses do not go so far as to say that a different practice prevails in Liverpool. All that the evidence amounts to is that since the decision in *Atwood* v. *Sellar* some average adjusters have taken a different view in one or two cases, but that will not prevent the custom existing, and we say that the evidence called for the defendant showed that for a great many years it had been the practice of average adjusters to treat these expenses as particular average. A similar sort of question arose in the case of *The Copenhagen* (1 C. Rob. 159). [GROVE, J.—What do you say is the difference between this case and *Atwood* v. *Sellar*?] We say that the custom in the case of *Atwood* v. *Sellar* is not properly stated. The evidence in the present case goes further. The learned judge at the trial ought to have left the evidence to the jury.

GROVE, J.—This was an action brought by the shipowner against the owner of goods claiming for a general average contribution in respect of certain charges for loading, storing, and re-shipping the cargo and for port dues in respect of entering and leaving the port. The case was tried before Lopes, J., and the rule for a new trial was granted on one point only, viz., on the ground that the learned judge ought to have left to the jury certain evidence that was given on behalf of the defendant of a usage of trade. Certain witnesses, who were average adjusters, were called for the defendant, and they stated that, for sixty or seventy years, it had been the practice of average adjusters to charge some of these charges as particular average, and it was said that this was evidence to be laid before the jury of a custom by which the parties were bound, and of the mode of average adjustment in mercantile law. The learned judge held that this evidence did not prove a custom or usage of trade, and withheld it from the jury, and on that point, only the rule was granted by the court.

Now, I am of opinion, having heard the case argued, and having looked into the case, that the learned judge was right in refusing to leave the evidence to the jury. The practice stated by the witnesses was alleged to have been uniform up to a certain time, but in consequence of the decision in *Atwood* v. *Sellar* (*ubi sup.*) several average adjusters changed their practice, and several of the witnesses said that they adopted the practice because it was the law, and when the law changed they altered their mode of adjustment. The question, therefore, is, whether this could be said to be such a mercantile custom as must be read into the contract and bind the parties. It has not the general characteristics of a custom, and appears only to be the practice of skilled men who adopted the practice because it was the law. That, to my mind, is not a custom. If there was no authority on the point, it is possible that I should have taken more time to consider the matter, but to my mind the case of *Atwood* v. *Sellar* (*ubi sup.*) is an authority directly in point. Two distinctions between that case and the present one were put forward by Mr Butt. The first was that, in the case of *Atwood* v. *Sellar*

the injury to the vessel was a subject of general average, and that being the cause of putting into port, the subsequent loss might follow the general character of the injury to the vessel. No doubt that is a distinction, but upon the one point on which it is necessary to decide this case it does not apply. Another distinction pointed out by Mr. Butt was that in *Atwood* v. *Sellar* all that was found was that this had been the practice of average adjusters for seventy or eighty years, but it was not found as a matter of fact that persons paid upon the computation so found, whereas in the present case it is proved that merchants paid upon these computations. This is merely a distinction in words. If it was found in *Atwood* v. *Sellar* that this was a mere theory, the court would not have arrived at the decision they did. Now *Atwood* v. *Sellar* was this: A ship on her voyage to Liverpool encountering severe weather, the fore topmast had to be cut away, and in its fall caused other damage to the ship, which was thereby compelled to put into port. In order to effect the repairs and to enable the ship to proceed on her voyage, it was necessary to discharge a portion of the cargo, and expense was incurred in landing and warehousing it. The repairs having been effected, expense was incurred in reshipping such portion of the cargo. It was found that for seventy or eighty years it had been the practice of English average adjusters in adjusting losses where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, but the expense of warehousing it as particular average on the cargo, and the expense of re-shipment of the cargo and pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. The owners of the ship claimed to have the expenses of warehousing and re-shipment of cargo, and the pilotage and other expenses of leaving port, as matter of general average, and sued the owners of the cargo for contribution in respect thereof. It was held by Cockburn, C.J. and Mellor, J. that the plaintiffs were entitled to recover on the ground that the expenses were all incurred in furtherance of the common purpose of prosecuting the adventure and for the benefit of the cargo as well as the ship; and by Manisty, J. that the practice of average adjusters having existed for so long a period must be deemed to be the general mercantile usage of the country, and as such to have the force of law. The Court of Appeal upheld the decision of the majority of the court. Now, I say nothing upon this decision on the general question whether certain charges should be treated as general or particular average. The only point in that decision which is directly in point here is that the majority of the court below and the Court of Appeal discarded the practice of average adjusters. All we have to say is whether the evidence given of the practice of average adjusters is evidence of a custom or usage of trade, and I am of opinion that it is not, and that this rule should be discharged.

MATHEW, J.—The sole question for our determination in this case is whether or not the evidence ought to have been left to the jury. The action was brought by the owners of ship against the owners of goods to recover a general average contribution, and the defendants set up as a defence "that the said cargo of rice was laden on board the said ship or vessel *Olaf Feygrason* at Rangoon, a port in the East Indian possessions of Her Majesty the Queen of England and Empress of India, to be carried to Liverpool in pursuance of the terms of a certain contract, and before and at the time of the making of the said contract there had been and was at Rangoon, and at Liverpool, and elsewhere in England, and in the British Empire, a well-known and approved usage and custom of trade amongst shippers, shipowners, merchants, underwriters, and average staters that expenses incurred in and about the warehousing, storing, and re-shipping of cargoes rendered necessary for the purpose of repairing damage occasioned to the ships on board which they were laden by perils of the seas, and also expenses incurred for and in and about defraying port charges, pilotage, and other outward dues to enable the said ships to proceed on their voyages with the said cargoes are not contributed for by any general average or payment in the nature of general average among all the owners of the ship, freight, and cargo on board any such ship; but that the expenses of warehousing and storing such cargo are apportioned amongst the owners of the said cargo alone, and the expenses of reloading such cargo, the port charges, pilotage, and other outward dues are apportioned amongst and borne by the owners of the ship and freight, of which said usage and custom the plaintiffs and defendants at the time of the making of the said contract for the carriage of the said cargo of rice had notice, and the plaintiffs and the defendants made the said contract with reference thereto, and that by reason of the said usage and custom the defendants were not liable to pay the said sum of 770*l.* 2*s.* 11*d.*, or any part thereof, save the sum of 68*l.* 13*s.* 1*d.* so paid as aforesaid." A similar question had been raised in *Atwood* v. *Sellar*, and the Court of Appeal in that case had pronounced against the alleged usage. The evidence in that case had been taken before an arbitrator, and he stated the conclusions at which he arrived in the form of a special case. The evidence for the defendants in that case, as in the present, was of this nature. It was shown that for a long period of time mercantile men had made payments upon the footing of the supposed usage, and it was said that each payment was a recognition of the usage, and that its existence as a usage of trade was therefore demonstrated. On the other hand, it was sought to be shown for the plaintiffs that the uniformity of practice relied upon by the defendants was not due to a common understanding among mercantile men that the law should not be followed, but was referable to mere mistake as to what the law really was. It was said that the alleged custom was unreasonable, because it had the effect of transferring the liability of one person to another, and that there was no sensible explanation of its origin or use. The true reason, it was said, why payment on the footing of the supposed usage was made was this, viz., that average adjusters had been in the habit of distributing the expenses in question in a particular way in ignorance of their real legal character, and that merchants had paid upon the supposition that the adjustments were correct in point of law. In support of this view, evidence was laid before the arbitrator to show what the

business of English adjusters really was, and the extent of the authority conferred upon them by mercantile men when employed to make a statement of average. Upon the evidence before him, the arbitrator found that "It is, and for from seventy to eighty years past has been, the practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on the cargo, and the expense of the re-shipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. Cases of putting into port in consequence of general average sacrifice only, and where there is no particular average loss at all, are not of frequent occurrence; but such cases, and cases where the substantial cause of the putting into port is a general average sacrifice, are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters, which holds meetings from time to time, at which the rules of practice are discussed and altered or modified with reference to legal decisions," and upon this the court pronounced the following opinion: "The special case states a long-continued practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expenses of discharging the cargo as general average; and the expenses of warehousing it as particular average on the cargo, and the expense of the re-shipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average upon the freight. It was not, however, and could not reasonably be contented for the defendants that the practice could be put so high as a custom impliedly incorporated in the contract between the parties and during the course of the argument we intimated our opinion, founded on the language of the special case with regard to this practice, and especially the language of the fifth paragraph, that the question between the parties must be decided in accordance with legal principles and authority, which the practice of the average adjusters professes to follow." With the conclusion of the arbitrator in *Atwood* v. *Sellar*, and the opinion expressed upon it by the Court of Appeal, as we were informed in the course of the argument, there has been some dissatisfaction, principally, as it would seem, among average adjusters, and it was determined that evidence as to an analogous practice of average adjusters should be given in another case for the purpose of showing that the arbitrator had been mistaken in the inference drawn by him, and that the practice ought to be treated as part of the law merchant. Accordingly this action has been brought, and several witnesses, average adjusters, and mercantile men were called by the defendant at the trial, and we have to say whether their testimony ought to have been submitted to the jury as evidence of the alleged mercantile usage.

I am of opinion that the evidence justifies a clearer and more conclusive inference against the existence of any usage of trade, founded on the practice of average adjusters, than that embodied in the findings of the arbitrator in *Atwood* v. *Sellar*. All the witnesses agree, as it seems to me, in this case that it is the duty of English average adjusters to prepare their statements in accordance with the law, and that they are employed by mercantile men for this purpose, and that it is their custom to adapt their practice to the law as laid down by the courts, and to correct their practice from time to time when it is shown not to be in conformity to legal principles. I think the learned judge was right in his decision. I will add that I think it would be matter for regret if English average adjusters were embarressed in their efforts to emancipate themselves from the mistakes of their predecessors by a suggestion that their mistakes were now embodied in the mercantile law, and could be set right by no easier method than by an act of the Legislature. I desire further to guard myself from being supposed to pronounce an opinion on the law.

Solicitors for plaintiff, *Field, Roscoe,* and *Co.*, agents for *Bateson* and *Son*, Liverpool.

Solicitors for defendants, *Waltons, Bubb,* and *Walton.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by J. P. ASPINALL, F. W. RAIKES, P. B. HUTCHINS, and A. H. BITTLESTON, Esqrs., Barristers-at-Law.

Tuesday, July 4, 1882.

(Before Lord COLERIDGE, C.J., BRETT and COTTON, L.JJ.)

THE GUY MANNERING.

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Damage — Collision — Suez Canal — Compulsory pilotage—Duties of pilot—Regulations—Concession.

The employment of a pilot in the Suez Canal, though compulsory, is not of such a nature as to exempt the owners of a ship from liability for damage done to another ship by the negligence or want of skill of such pilot.

By the Regulations of the Suez Canal a pilot is to advise the master of the ship; but the master remains responsible for the navigation of the ship.

Such regulations are not ultra vires.

Per Brett, L.J.: Observations on the general duties of a pilot as understood in England.

THIS was an appeal from a decision of Sir Robert Phillimore, by which, on the 21st Feb., he had decided, in a judgment on a special case, that the owners of a British ship were not exempted from liability for damage done to another British ship in a collision which took place in the Suez Canal

by reason of the employment of a pilot by compulsion of law.

The case is fully reported *ante*, p. 485, where the facts of the case, the special case, and enactments referred to are set out.

July 4.—The appeal came on for hearing.

Butt, Q.C. and *Nelson* for the appellants.

Cohen, Q.C. and Dr *W. G. F. Phillimore* for the respondents.

The arguments used were the same as in the court below, and, in addition to the cases therein cited, reference was made by the respondents to the case of *The Maria* (1 W. Rob. 95).

Lord Coleridge, C.J.—This case has been very ably argued by Mr Butt, for the defendants; but, except that it had been so well argued by him, I should have said it was not arguable. However, I am of opinion that the judgment of the court below was correct.

Brett, L.J.—I am of the same opinion, and for the same reasons. I agree with the reasons given by the judge of the Admiralty Court. The case is certainly a new one. Two objections have been taken, as I understand them (1) That assuming the law to be within the power of those who made it, inasmuch as the pilot and the captain are the agents of the owners, the defendants, the owners of this ship, are liable. (2) That the persons who made these articles had not authority to make them, as if they compel shipowners to pay for a pilot, and so far impose a pilot upon the ship, any limit of such pilot's usual authority was *ultra vires*. As to the facts on which a question as to whether it was *ultra vires* can be raised: Upon the regulations made for the management of the Suez Canal, we are all of opinion that, if it is a regulation of the canal in that country, there seem to be no facts stated on which it can be properly averred that the authorities of the canal had not power to make the regulation. Then it is said that the regulation does impose upon the captain of a vessel the necessity of taking a pilot, and it is said that, the moment you have a pilot compulsory on board, the meaning is you are to give up the navigation of the ship, and if you do give up the navigation from the fact of its being compulsory, then you know the consequences. There are statutes applicable to different parts of the United Kingdom which put upon a shipowner whilst in those parts a compulsory pilot. As to the English statutes, none of them state what is the duty of the pilot when he is so on board. The duty of a pilot in England is too well known and too universally applied to require any enactment with regard to it at all. It is to regulate the navigation of the ship, and to conduct it so far as the course of the ship is concerned. He has no other power on board the ship; he has no power over the discipline of the ship; he has no power over the cargo on board; and he has no power with regard to the various matters which are necessary to enable him to perform his duty; he cannot place a man on the look-out, or regulate the place at which the look-out man shall be on board the ship. He has nothing to do but to control the navigation. If a ship be a sailing ship, it is known that she cannot steer in a particular way without her sails being regulated as to quantity and as to position; and, therefore, for the purpose of steering the ship the pilot is the person on board an English sailing ship who gives the orders with regard to the sailing. It is obvious, therefore, that, in order to steer a ship on her course, he gives the orders as to the time of tacking and as to the mode of progressing. All the orders which an English pilot has to give are the orders for regulating the course of the ship upon the waters. He knows the course she has to take, and must take.

Well, upon the English law, applying the principles of law to such an employment, I should say, if you are compelled to put a man in that position where he is to exercise those powers, then he is not a person who, in the exercise of those powers, is to act according to your directions. With regard to them he is to exercise the power himself—at all events, you are not bound to give him orders. He is put there for a special purpose; therefore, so far as the exercise of those known powers are concerned, if, in the course of the ship upon the waters, damage arises by reason of his regulating the course of the ship, the owners are not liable. But if the ship, in consequence of the want of a look-out man, goes wrong, then, although the pilot has given the orders as to the course, yet, inasmuch as the course goes wrong, because he has not the proper information given him by the master and the crew, it is not the fault of the pilot, it is the fault of the master and crew, and therefore the owner is liable. So, if the pilot gives an order to the man at the wheel to steer a course which would be the right course, and he does not obey it, or obeys it too late, then, though the course of the ship is wrong, it is not solely the fault of the pilot, and therefore the owner is liable. There have been some cases referred to with regard to the English law, where it has been enacted that you must take a pilot, and if you do not take him you must nevertheless pay for his services. That is the case of *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company* (3 Mar. Law Cas. O. S. 168; *Id.* 237; L. Rep. 3 Ex. 330; L. Rep. 4 Ex. 238; 19 L. T. Rep. N. S. 357; 20 L. T. Rep. N. S. 581). There the master was bound to take a pilot at Dungeness, and to pay for services to be rendered all the way to Gravesend. It is true that, for the purpose of the decision, it was assumed that the pilot might cease to exercise authority—at all events the captain was not bound to employ him—after passing Yantlet Creek; but if he was coming into the Thames from Dungeness he was bound to take him and pay him all the way to Gravesend; and it was held that, though from Yantlet Creek to Gravesend might be within the port of London, where pilotage was not compulsory for the ship in question, London being her port of registry, yet the obligation to pay a pilot all the way to Gravesend was a compulsion on the captain, in a sense. With regard to the case of *Lucy* v. *Ingram* (6 M. & W. 302), that does not apply, because it was decided on an interpretation of a section of an Act of Parliament (6 Geo. 4, c. 125) which relieved the shipowner though the pilot was not compulsory, if the pilot was acting under the provisions of the statute; and it was held that he was acting under the provisions of the statute. Now, the foundation of the English law is, that where a person has another put on him compulsorily, on certain conditions, and he cannot enforce the performance of that which that other

has to do, then he is not in the same situation as he would otherwise have been, because the relation of master and servant implies that the master may have directions at any time. The Dutch law and the Belgian law make the employment of a pilot in certain places compulsory. But by the law of those countries the taking of a compulsory pilot on board does not relieve the owners of responsibility. But it was held in this country, nevertheless, that by taking a pilot compulsorily in the waters of those states, the English owners were relieved from responsibility for an accident happening to the ship on the theory of the English law: (*The Halley*, 3 Mar. Law Cas. O. S. 131; L. Rep. 2 P. C. 193; 18 L. T. Rep. N. S. 879.)

But all the theory on which the English law is founded seems to fail in this particular case; because, here, the duty of the pilot is not the same as the duty of an English pilot, and by this somewhat curious enactment it seems to me that the pilot does not take, in this canal, the control or management of the course of the ship. He is on board of her. The captain is bound to take him and bound to pay him; and he is bound to pay him, though the man is not bound to perform the duties of an English pilot. Part of the obligation which is assumed by a pilot in British waters is by this regulation thrown upon the captain of the ship. The Suez Canal pilot is placed at the disposal of the captain of the vessel because of his practical knowledge of the navigation of the canal. But the captain is supposed to acquire the knowledge and to steer the ship so as to avoid danger in the navigation of the canal. But as to the peculiarities of the steamers and the machinery for stopping and going on, &c., the control and management in these respects devolve solely upon the captain. The only phrase in which I can accurately describe the position of the pilot is, that he is a live chart; therefore, the whole duty of steering the ship remaining with the captain, he must consequently do it so as to avoid injury; and, therefore, any defect in the steerage is his fault. With regard to the captain, in this case, though the owners are liable if he has been in fault, he was in fault in this way, that he misconstrued the powers that devolved upon him. He thought he was in the same relation in regard to the pilot as he would be in regard to an English pilot. Whether the regulation was in English or not, he did not understand it, and though bound by it in law is not morally to blame.

Cotton, L J. concurred.—The principle of English law is, that where a pilot is compulsorily taken on board and put in charge of the vessel, he is not to be deemed the owner's servant. Here, however, the rules under which the pilot was taken expressly stated that the master was to remain responsible for the steering of the vessel, and that the services rendered by the pilot were to be only by way of advice, and were not to extend to orders as to the steering and manœuvring or the speed of the ship—an error which actually caused the collision. It follows that the owners, the defendants, are liable for the default of their servant, the master.

Appeal dismissed with costs.

Solicitors: For the appellants, *Lowless* and *Co.*; for the respondents, *Pritchard* and *Sons*.

June 30 and July 3, 1882.

(Before Lord Coleridge, C.J., Brett and Cotton, L.JJ.)

The Mac.

APPEAL FROM PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

Salvage—Jurisdiction of justices — Mudhopper—Ship or boat—Definition of ship—Navigation—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 460.

A mudhopper barge used for carrying mud out from a river, and having no internal means of propulsion, is a "description of vessel used in navigation," and not being "propelled by oars," is a ship within the meaning of the word as defined by the Merchant Shipping Act 1854 *s.* 2, *and as such the justices have jurisdiction to award salvage for services rendered to her when "stranded or otherwise in distress on the shore of any sea or tidal water situated within the limits of the United Kingdom."*

A vessel may be in "distress on the shore" without being actually aground or in contact with the shore.

The Leda (*Swabey*, 40), *approved.*

Semble, a vessel such as a mudhopper used to transport men and mud, and capable of being guided, though not of motion, by internal means, is a vessel actually used in navigation.

This was an appeal from a decision of Sir Robert Phillimore, by which, on the 1st Feb. 1882, he had held that a mudhopper barge used for dredging a river and not propelled by oars was not used in navigation, and was therefore not a ship within the meaning of the Merchant Shipping Act 1854, ss. 2, 458, unless she habitually went to sea, and that on that account the magistrates had no jurisdiction in salvage proceedings against such a vessel under sect. 460 of the Merchant Shipping Act 1854.

The case is fully reported in the court below *ante*, p. 507, where the facts sufficiently appear and the sections on which the arguments were based are set out.

The appeal came on for hearing on the 30th June, and was heard on that day and the 3rd July.

Bucknill for the appellants.—The learned judge gave too narrow a signification to the expression "used in navigation;" there was evidence that the vessel had been brought over from Holland in tow. Her habitual employment was to carry mud from the harbour works at Boston out to sea. She had a rudder, and was directed as to her course by men in charge of her, and she was found actually at sea:

Ex parte Ferguson, 1 Asp. Mar. Law Cas. 8; 24 L. T. Rep. N. S. 96; L. Rep. 6 Q. B. 280;
The Andalusian, 4 Asp. Mar. Law Cas. 22; 39 L. T. Rep. N. S. 204; L. Rep. 9 P. Div. 182.

But it is not necessary for the purpose of giving the magistrates jurisdiction that she should be "used in navigation," for they have by the terms of the section jurisdiction in cases of salvage not only of ships, but of *boats*; and this vessel, even if not a "ship" within the definition of the Merchant Shipping Act, s. 2,

is clearly a "boat," of which there is no definition in the Act.

Dr. *W. G. F. Phillimore* for respondents.—*The Andalusian* (*ubi sup.*), only decides that a vessel before registration is not a "duly recognised British ship," and is not, therefore, capable of limiting her liability; it does not decide that a vessel which is not used or to be used in navigating the sea is a ship. That the distinction between a vessel navigating the sea and one only used in the river is recognised by the courts, is shown by the case of *The C. S. Butler* (L. Rep. 4 Ad. & Ecc. 238), where it is laid down "that the criterion as to whether a vessel falls under the category of 'ship' mentioned in the Act, is whether the vessel be one whose real habit and business is to go to sea; if so, though propelled by oars as well as sails, it is a ship within the meaning of the Act;" as in that case it appeared that the barge in question did not go to sea, it was held not to be a "ship." [Brett, L.J.—In that case the decision was on the use of the word "sea" in the Regulations for Preventing Collisions; the barge was not a "sea"-going vessel. The question in the case at present before us when before the court below was, what was the meaning of "navigation?" May it not be that anything which carries men and materials on the water is a vessel used in navigation?] A "ship" requires something more than capacity for motion; lighters on the Thames and elsewhere are not ships, they are not registered. It has been decided that the Admiralty Court have no original jurisdiction to award salvage in the case of a raft of timber adrift in tidal waters: (*A Raft of Timber*. 2 W. Rob. 251.) Prior to 1840, the only jurisdiction in salvage existing was that of the High Court of Admiralty and that jurisdiction was confined to services rendered on the high seas; in that year it was enacted by 3 & 4 Vict. c. 65, s. 6: "That the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to . . . . any ship or seagoing vessel . . . . and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time the services were rendered . . . . in respect of which such claim is made;" and it was under that section that *A Raft of Timber* (*ubi sup.*) was decided, and in 1844 the magistrates first obtained jurisdiction in salvage claimed under 200*l.* by 9 & 10 Vict. c. 99 (the Wreck and Salvage Act). By sect. 21 of that Act it is enacted that: "Where any person shall have rendered any service except ordinary pilotage in the saving or preserving of any ship or vessel in distress, or of the cargo thereof, or of the life of any person on board the same" the justices should, if the amount claimed did not exceed 200*l.* have jurisdiction. Sect. 40 of the same Act extended the jurisdiction of the High Court of Admiralty, which under the Act already cited was confined to services rendered to ships and seagoing vessels, to "any goods or articles found either at sea or cast upon shore," and therefore under the Wreck and Salvage Act the distinction is clearly drawn between the jurisdiction of the magistrates and that of the High Court, that of the former excluding and that of the latter including such a case as the present. This Act (the Wreck and Salvage Act 1844) was repealed by the Merchant Shipping Repeal Act 1854 (17 & 18 Vict. c. 120), sched. But the jurisdiction of the High Court had already been re-enacted by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 476, and extended over "wreck," which within the definition clause (sect. 2) would include "derelict," and therefore would give jurisdiction over this mudhopper if it were in contemplation of law derelict, which it was not, and possibly in any case under the more general provisions of sect. 476. It is also probable that a like jurisdiction is given to the County Courts by the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3, but the jurisdiction of the magistrates is given by sects. 458 and 460, and is practically a re-enactment of that which they had under the Wreck and Salvage Act, and does not include this article, which is neither "ship" nor "boat" nor "wreck," and certainly is not "cargo" or "apparel." The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 49, extends the jurisdiction as to amount, but does not affect it in any other way. That it is not "wreck" within the meaning of the Act is shown by the case of *Palmer* v. *Rouse and others* (3 Hurl. & Nor. 505), which decides that property not intended to be at sea at all, as a raft of timber washed away from its moorings in a river, is not "wreck" within the meaning of the Act, and that the justices have no jurisdiction in such a case. I have, therefore, only to satisfy the court that this mudhopper is not a ship or boat. *Ex parte Ferguson* (*ubi sup.*) is no authority that it is a ship, even if it be taken to decide that a fishing coble habitually taken to sea was a ship, as this mudhopper was not so taken to sea; she was only, in any event, taken just out of the harbour of Boston and back again, her employment being essentially in the harbour. But the main question in *Ex parte Ferguson* was, whether "by reason of a casualty happening to or on board of any ship on or near" the coast, a loss of life had ensued; and Lord Blackburn, in the course of the argument expressed a strong opinion that a casualty might be said to happen to a ship if it ran down a boat although no injury was caused to the ship itself, or anyone on board; and therefore it was not necessary for the decision that the coble should be a ship at all, though she was the craft run down, and on board which the loss of life occurred. [Cotton, L.J.—The judgment finds, however, that what goes to sea is a ship, and it does not confine a ship to what goes to sea.] The definition given of a "ship" in Dr. Johnson's Dictionary is a "large hollow building made to pass over the *sea* with sails." Of course, to adopt that definition to the present time, steam would have to be included as a means of propulsion; but it does not include a vessel like this, which is not made to pass over the sea at all, and has no means of propulsion. [Cotton, L.J.—Sect, 19 of Merchant Shipping Act 1854, dealing with the question of registration, speaks of "ships . . . . employed solely in navigation on the rivers or coasts of the United Kingdom," &c.] That section refers to steamers or sailing vessels which might be used at sea, but which in fact are not so used, not to a barge or craft like this that could not be so used. [Lord Coleridge.—The word most frequently used in the New Testament for the fishing vessels in the Lake of Gennesareth is "ship."] In the New Version the word is more correctly

rendered as "boat." But this vessel is not a boat in ordinary parlance. Dr. Johnson defines a "boat" as a "ship of a small size." Therefore, if this vessel is not a ship, neither is she a boat, and though there is no definition in the Merchant Shipping Acts of 'boat," the word is universally used there as a thing appurtenant to a ship, in fact as a ship's boat. But, apart altogether from this mudhopper being a ship or boat, the justices have no jurisdiction, because it was not "stranded or otherwise in distress on the shore": (Merchant Shipping Act 1854, s. 458.)

Bucknill.—This point cannot be raised. The defendants have not joined in the appeal, and, that being so, are bound to accept the judgment for the reason assigned therein.

Phillimore.—I am entitled to support a judgment which is in my favour on any grounds. The Act of Parliament only gives jurisdiction to the local justices in cases where a vessel is actually in contact with the shore. Stranded has a well-known meaning in mercantile instruments, such as policies of insurance, and a vessel may well be in distress on the shore from other causes than stranding: *e.g.*, if the getting on shore was voluntary, as for the purpose of discharging a cargo on the beach, or to stay a tide, and whilst so on shore bad weather comes on, or the vessel caught fire or fell over. *The Leda* (Swabey, 40) was wrongly decided, and does not bind this court, though the judge below was justified in considering himself bound by it, as he states during the argument, but was not bound to mention it in his judgment. If *The Leda* is correct, then "on the shore" means "off the shore," or at least "within three miles of the shore." [Brett, L.J.—Dr. Lushington, in referring to the three-miles limit, is only bringing home the well-known proposition that if beyond three miles it could not be "situate within the limits of the United Kingdom."] Even if that be so, according to the ordinary rule of interpretation of statutes, there is no authority for interpreting a clear, definite, and well-known word "on" to mean "on or near."

Lord Coleridge, C.J.—Two points have been made in this case, one against the judgment, and another against the reasons for the judgment on which it is suggested that the judgment cannot be supported. The judgment proceeded on a wrong ground, and I think it cannot be supported. I think that which was salved, the *Mac*, undoubtedly was a ship. I think the definition in the Merchant Shipping Act is not exclusive but inclusive, and that it may include a good deal more than a vessel used in navigation. The definition is, "ship shall include every description of vessel used in navigation not propelled by oars." It may be that this is a ship within the definition, and, in my judgment, it is a ship. As to a dumb barge getting out to sea, I agree that it is a strong thing, at first sight, to say that it is a ship. The definition might not, on a fair construction, include all vessels of that description. In this case the thing is steered by a rudder and towed out, and the mud is loaded and discharged by men who remain on board. There are various cases which have been cited, but it seems to me unnecessary to adduce any other authority than the definition that is given in Dr. Johnson's Dictionary. It is plain that this vessel was treated as a ship, as explained by the interpretation clause of the Act of Parliament, and I should have great difficulty in arriving at the conclusion that this large barge was not a ship. That would, in the first instance, decide the question, because the learned judge in the court below seems to have gone upon a view of the definition that it was exclusive and not inclusive, and bases his decision on the ground that it was not used in navigation. He fails to deal with the question whether it was a ship. I decide this case on the ground that it undoubtedly was a ship.

Then Dr. Phillimore does that which he is entitled to do. He says that the judgment may be supported by decided cases on other grounds which the learned judge of the court below did not take advantage of. The point is that, upon the facts of this case, this vessel, which is now assumed to be a ship, was not "stranded or otherwise in distress upon the shore" in a tidal water within the limits of the United Kingdom. It is unnecessary to be so in order to give the magistrates jurisdiction to decide, as they did decide in this case. Sir Robert Phillimore was of opinion that he was bound by the decision of Dr. Lushington in the case of *The Leda* (Swabey, 40), in which he held that "stranded or otherwise in distress on the shore of any sea or tidal water" meant to include otherwise in distress than by stranding. I should have thought, if he was put to decide the section without those words, it might be said "actually physically stranded on the shore, and otherwise in distress," distinguishing it from stranding ships or some other danger which contemplated the taking the ground. That is the strict physical meaning. He would not extend it further than three miles. But in the case before him it was within the three miles of the shore, and within the meaning of the section. I am of opinion that the judgment of Dr. Lushington was properly decided, and that Sir Robert Phillimore was bound by the authority of that case, and that his judgment cannot be supported on the ground that *The Leda* was wrongly decided, and that the jurisdiction of the magistrates only includes cases where a vessel is physically in contact with the ground.

Brett, L.J.—I am of opinion that this case comes within the words of sect. 458 of the Merchant Shipping Act 1854, without the assistance of the interpretation clause, and I think it is also within the interpretation clause. The 458th section is: "Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom," and she is rescued, there shall be salvage reward. The first question is, whether this vessel or this thing, or whatever it may be called, came within the words of the section as "any ship or boat?" I cannot help thinking that the word "ship" there cannot be confined to its most technical meaning. It is not confined to a ship of a peculiar rig, which, in strictly nautical language, is styled a ship. We must go further. There are many vessels, such as ship, barque, brig, cutter, and barge. Barges are vessels in a sea language. But you do not confine these words to the strict interpretation. I can see no reason why they might not include all those vessels known amongst sailors. The term includes, therefore, all things which are built in a particular form for the purpose of being used on the water This thing is being used for

that purpose. How is it built? It is built like any other barge, with iron plates instead of wood, but on precisely the same frame. What is she built for? For the purpose of doing something on the water. She happens to be built for carrying mud, but is built in the form of a barge. She has means of guidance—that is, she has a rudder. It is said she has no means within herself of motive power. Well, that is true. She is towed; but towing alone would not conduct her. She would be a most unwieldy thing on the water without a rudder. Therefore she is used for the purpose of carrying something on the water; and she must carry men on board to guide and conduct her. She is called a barge. One may often see barges going out in a string behind a tug for the purpose of the work they have to do outside docks; and you speak of a string of barges. They are like any other barges, and they are vessels in the ordinary sense—in the sea sense; and, unless you can confine "ship" to the strict definition, it must include all things built in the ordinary way; and if vessels are to bear the nomenclature of known vessels, I should say the word "ship" in this section includes barges as well as any other kind of vessel. It may be a barge is propelled by oars, in which case she is not within the definition; but in this case she is found not to be so; therefore she seems to be within the section. But, supposing she were not? Let us see what is the interpretation clause. It is not a limited clause. It is for the purpose of enlarging the term "ship" in the section, and that is shown by Lord Blackburn in a case that is decided. Therefore, it is something more than that which would be ordinarily known as a ship. I think the intention of the clause is that, as things are invented which were never before known, if such a thing be invented and is used for navigation it shall be within the section. Then it is certainly a vessel. And what is it used for? It is used for carrying men, and mud or gravel got out from the bottom of the river, and carrying them to a certain distance on the water. There is nothing in the interpretation clause which says how it is to be used for navigation, and it comes within the ordinary meaning of the term. I should say it is for the purpose of navigation, and would be within the term "a vessel used for the purpose of navigation." Would anybody say, where there are large steamers lying off the mouth of the Mersey, that, supposing you were to build a large saloon barge to carry 200 people, but which should be towed out to a steamer at the mouth of the Mersey by a tug—would anyone say that that would not be a thing used for the purpose of navigation? Therefore the principle applies, and this barge is within the section and within the interpretation clause.

Then the other point is, assuming it is within the interpretation clause, she was not in distress "on the shore." I think that these words have the nautical meaning. They are terms used in the Merchant Shipping Act. I take it that they do not mean hard and fast on the shore, but in the vicinity of the shore. I doubt whether Dr. Lushington intended to lay down the limit of three miles. What he said was, "in the vicinity of the shore," and that would come within the three miles. It was only for the purpose of deciding that it was within the limit of the United Kingdom that he referred to the distance of three miles. Therefore, whatever limit you put on these words, it is obvious to me that, looking at the place where this thing was, it was close to the shore. Therefore on both points the argument of Dr. Phillimore fails. Notwithstanding that argument, I cannot agree with the learned judge in the construction he put on the word "ship."

Cotton, L.J.—This is an appeal from a decision of Sir Robert Phillimore, holding that the justices of the peace had no jurisdiction to make an award of salvage in this case on the ground that the *Mac*, a hopper barge, was not a vessel used in navigation. I am of opinion that the judgment cannot be supported. The interpretation clause of the Merchant Shipping Act 1854 (sect. 2) does not confine the ordinary meaning of the word "ship" to a certain class of vessel or a certain method of use, but extends it so as "to include" not only every vessel, but "every description of vessel used in navigation not propelled by oars." I think that this vessel would come within the stricter definition as being actually used in navigation were it necessary so to hold; but she certainly is included in the broader one as being a description of vessel used in navigation. "Ship" in its ordinary acceptance is a generic term for anything formed for the purpose of going on the water. According to the definition quoted in Johnson's Dictionary, a "boat" is also a "ship of a small size," and a ship is *formatum aliquid* for the purpose of conveying merchandise, &c. by water, in contradistinction to a raft, which is not in this sense *formatum*. Now the only precedent which has been cited against the jurisdiction is a case of *A Raft of Timber* (*ubi sup*), and therefore a case not applicable to what is a ship in the ordinary acceptation of the term, or as defined in the Merchant Shipping Act. It was indeed attempted to show that this vessel did not come within the definition of a ship, and was not therefore a proper subject for the magistrates to award salvage in respect of, by reference to the case of *Ex parte Ferguson and Hutchinson* (*ubi sup.*), but that case only shows that a fishing vessel which goes to sea and is used in navigation does not cease to be a ship within the meaning of the Act of Parliament by reason of its being sometimes propelled by oars. That a "ship" cannot under the Act be confined to vessels going to sea or used in sea navigation is shown by sect. 19 of the same Act (17 & 18 Vict. c. 104), which in giving the exceptions allowed in the law of registration, speaks (*inter alia*) of "ships not exceeding 15 tons burden employed solely in navigation on the rivers and coasts of the United Kingdom, or on the rivers or coasts of some British possession." But apart altogether from these considerations this vessel was, in my opinion, herself used in navigation; her use was to carry mud, and to carry it by water, and it is not necessary that she should have any means of propulsion within herself.

As to the second point raised by the respondents, I am of opinion that it is clearly competent to them to support the judgment of the court below on grounds other than those given for the judgment in the court below, without themselves appealing from a judgment which was in their favour; but I do not think the judgment can be supported on the grounds urged. The learned judge, though he did not refer to it in his judgment, had the case of *The Leda* (*ubi sup.*) before him, and considered himself bound by it. We think that

that case was correctly decided, and that "stranded or otherwise in distress on the shore of any sea or tidal water situated within the limits of the United Kingdom" includes the case of a vessel not actually stranded, but otherwise in distress, near the shore within the limits prescribed.

Appeal allowed.

Bucknill.—This being an appeal from an inferior court, I had to get leave to appeal to the court, and as a condition of getting leave I had to give security for costs; I have therefore to apply for my costs, and the discharge of the security.

By the Court.—Order as prayed.

Solicitors for the appellants, owners, master, and crew of the *Saucy Polly*, *Tompson*, *Pickering*, and *Co.*

Solicitors for the respondents, the owners of the *Mac*, *Whyte*, *Collinson*, and *Prichard.*

June 8, 9, *and July* 1, 1882.

Before Lord Coleridge, C.J., Brett and Cotton, L.JJ.)

Cory and others *v.* Burr.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — Barratry — Smuggling — Seizure by Revenue officers — Warranty free from seizure.

A time policy of marine insurance enumerated, amongst the perils insured against, "men of war, enemies, pirates, rovers, thieves, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners," but there was a warranty "free from capture and seizure and the consequences of any attempts thereat."

The officers of the plaintiffs' ship, which was insured by this policy were arrested by Spanish revenue officers for smuggling, and proceedings were taken to procure sentence of condemnation and confiscation of the ship at a Spanish port, and the plaintiffs incurred expenses in resisting these proceedings, and were obliged to pay money to procure the restoration of the ship.

In an action on the policy to recover these expenses and payments:

Held (affirming the judgment of Field and Cave, JJ.), that the underwriters were exempted from liability by the warranty, and the plaintiffs were not entitled to recover as for a loss by barratry.

The plaintiffs' steamship *Rosslyn* was insured by a policy which was underwritten by the defendant.

One of the perils insured against was "barratry of the master and mariners."

The policy contained this clause, "warranted free from capture and seizure and the consequences of any attempts thereat."

The master took on board a cargo of tobacco for the purpose of assisting in smuggling it into Spain, and while the tobacco was on board, the vessel was seized by Spanish revenue officers, and taken into Cadiz.

The plaintiffs incurred expenses in resisting proceedings taken to procure sentence of condemnation and confiscation of the ship, and were compelled to pay a large sum of money to procure the restoration of the ship.

The question raised on this appeal was whether the plaintiffs were entitled to recover the amount of these payments and expenses as a loss caused by the barratrous act of the master in smuggling, or whether the underwriters were exempted from liability by the warranty against capture and seizure.

The special case stated for the opinion of the court is set out in the report in the court below (*ante*, p. 480; 45 L. T. Rep. N. S. 713).

Field and Cave, JJ. gave judgment for the defendant, and the plaintiffs appealed.

June 8 *and* 9.—*Webster* Q.C. and *Myburgh*, Q.C., for the plaintiffs in support of the appeal.—The judgment of the court below cannot be supported, and the plaintiffs are entitled to recover. The question is whether money paid to avoid sentence of condemnation amounts to a loss by seizure and capture, so as to exempt the underwriters from liability, or whether the loss is properly described as a loss by barratry, in which case the underriters are liable. The true view is that it is a loss by barratry. But for the barratry there would have been no loss. Barratry was the *causa proxima* of the loss; more than that, it was the *causa sola.* In order to bring the case within the warranty the defendants must show that there was a capture and seizure independent of the barratry. In 2 Arnould on Marine Insurance, part 3, chap. 2, pp. 773, 774, in the 5th edition the law is stated thus: "Loss by barratry seems to form an exception to the general rule of *Causa proxima non remota spectatur.* It is not necessary (it hardly ever is the case, in fact) that the barratrous act should be the proximate cause of the loss. If there has been barratrous conduct on the part of master and mariners, and a loss subsequently happens as a remote, though not a direct, consequence of the barratry, or if the barratrous acts have only been a co-operative cause of loss, in conjunction with some other peril, this is enough to entitle the assured to recover under a count for barratry. . . . . If, indeed the loss be merely barratrous it is not recoverable under an allegation of another description of peril." In 1 Parsons on Marine Insurance chap. 17, p. 570, the following statement occurs: "A deviation may not be barratrous, and generally is not; but if the deviation be barratrous, and the insurers insure against barratry, then the act operates, not as a deviation but as barratry. That is, the insurers would be liable for a loss caused by it, and would also be liable for a subsequent and independent loss; because this deviation, being an act of barratry and so insured against would not discharge them. A stipulation that the underwriters shall not be liable for seizure or detention on account of illicit or prohibited trade does not render them less responsible for a seizure occasioned by barratry." The law laid down by both authors is supported by the authorities. It is not admitted that barratry is a remote cause of the loss in such a case as the present:

Vallejo v. *Wheeler*, 1 Cowp. 143;
Goldschmidt v. *Whitmore*, 3 Taunton, 508.

If the capture and seizure is a mere incident of the peril insured against (*i.e.* barratry), the loss is a loss by barratry. The American decisions

bearing on this point are strongly in the plaintiffs' favour:

American Insurance Company v. *Dunham and Wadsworth*, 12 Wendell, 463; affirmed, 15 Wendell, 9;
Suckley v. *Delafeld*, 2 Caines, 222;
Wilcocks v. *The Union Insurance Company*, 2 Binney, 574.

The decision of the Court of King's Bench in *Havelock* v. *Hancill* (3 T. R. 277) is also a strong authority in the plaintiffs' favour. A barratrous act has always been held to cover all the consequences which come from the barratrous act, whereas capture and seizure do not extend beyond the act of seizing the ship. They also referred to

Kleinwort v. *Shepard*, 1 E. & E. 447; 28 L. J. 147, Q. B.;
Lozano v. *Janson*, 2 E. & E. 160;
Livie v. *Janson*, 12 East, 648;
Hahn v. *Corbett*, 2 Bing. 205.

Cohen, Q.C. and *Barnes* for the defendant.—Although the loss might be described as a loss by barratry, for which the underwriters would have been liable had it not been for the warranty, nevertheless there was a capture and seizure within the meaning of the warranty, and the defendant is therefore exempted from liability. The object of the warranty is to exclude a liability which would otherwise be incurred, that is, a liability for losses which might be described as occasioned by the enumerated perils, but at the same time are included in the words of the warranty:

Kleinwort v. *Shepard* (*ubi sup.*);
Arcangelo v. *Thompson*, 2 Camp. 620.

The loss here was entirely occasioned by the seizure. [Brett, L.J. referred to *Ionides* v. *The Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 353; 14 C. B. N. S. 259; 32 L. J. 170, C. P.] There is no case either in England or America which goes far enough to show that underwriters can be held liable for a loss such as this, which is clearly covered by the express words of the warranty. They also referred to and commented on the authorities cited on behalf of the plaintiffs, and cited in addition:

Heyman v. *Parish*, 2 Camp. 149;
Blyth v. *Shepherd*, 9 M. & W. 763;
Green v. *Elmslie*, 1 Peake, 278;
Powell v. *Hyde*, 5 E. & B. 607; 25 L. J. 15, Q. B.

Webster Q. C. replied.

Cur. adv. vult.

July 1.—The following judgments were delivered:

Brett, L. J.—In this case an action was brought upon a policy of insurance to recover a sum of money paid by the owners of a ship in order to release the ship which had been seized by the Spanish authorities on the ground that the master had been guilty of smuggling. It was admitted that the smuggling on the part of the master was an act of barratry. The policy contained a warranty "free from capture or seizure or the consequences of any attempt thereat;" and it was urged on behalf of the defendant (an underwriter) that although that seizure would otherwise have come within the perils insured against, yet by the warranty they were freed from liability. On the part of the plaintiffs it was contended that, inasmuch as the seizure of the vessel was the result of the barratrous act of the master, and barratry was one of the perils insured against, the warranty did not relieve the defendant from the consequences of a loss by barratry. Reliance was placed on behalf of the plaintiffs upon the peculiar doctrine which in insurance law is applicable to losses resulting from barratry. With regard to other losses in insurance law it is the proximate cause which alone can be looked at, but in cases of barratry that rule does not apply. If barratry be the effecting cause, what is commonly called the *causa causans*, although it is not the last or ultimate cause, yet that effecting cause may be relied upon. It was therefore urged on behalf of the plaintiffs that they could, without infringing upon the warranty, prove a loss by barratry which was a peril insured against by the policy, and that they would have to prove seizure as the means by which the loss by barratry affected the shipowner, that is to say the seizure would be the means of measuring the damage caused by the barratry. On the part of the defendants it was contended that the barratry alone would not have caused any damage to the shipowners except by seizure, and the terms of the warranty cannot be confined, but it is applicable to every seizure, whatever may be the provoking cause of the seizure. No doubt it is true that in cases of barratry the *causa causans* may be looked at. Here the *causa causans* was undoubtedly barratry. It seems to me that under these circumstances, if there had been no warranty the assured would have been entitled to bring an action stating the loss either as a loss by seizure or as a loss by barratry. They might have stated the whole cause as barratry and proved the barratrous act and the subsequent seizure, although the seizure was the proximate cause of the loss. But they might also have sued for the loss by seizure, leaving out the barratry. That is clear from the case of *Arcangelo* v. *Thompson* (2 Camp. 620) where the loss was by barratry. The loss claimed in the declaration in that case was a loss by capture, and it was contended on behalf of the defendants that, as the capture was the result of barratry, therefore the loss was a loss by barratry and not a loss by capture, and the declaration was not true. But it was held by Lord Ellenborough that, although the plaintiff might have sued upon the loss by barratry, yet, inasmuch as there was a capture he might in effect disregard the loss by barratry. That is an authority that in this case the shipowners might have claimed for a loss by seizure disregarding the barratry (supposing there had been no warranty), but that equally they might have sued for the barratry, disregarding the seizure. It would be strange if the result of the question of liability were to depend upon the form in which the loss was stated in the statement of claim—that if it were stated to be barratry there should be one result, but if it were stated to be seizure, another result. In these days forms of pleading do not affect rights. The right must be in existence before the pleading begins. It seems to me that the case resolves itself into this, whether this warranty against seizure is to be confined to some seizures or whether it includes all seizures. If the case had been one of first impression it would have been argued that this warranty against capture and seizure, or the consequence of any attempts at either, was only a warranty against war risks. I confess I should have been inclined

to think this warranty was originally intended to be only against war risks. But it was otherwise decided in the case of *Kleinwort* v. *Shepard* (1 E. & E. 447) where there was the same kind of warranty as in the present case. The loss there occurred by the rising of certain Chinese coolies on board the ship who took possession of her, and she was consequently lost. It was held that that was a loss by seizure. It was certainly a piratical act on the part of the coolies, and was therefore a loss by piracy, and was a loss by seizure. It was argued that the warranty was only against war risks, and the rising of the coolies was not a war risk. It was contended that the only seizure intended by the warranty was a seizure in course of war, but Lord Campbell held that the terms of the warranty could not be so confined, but must be read in their natural meaning, and that the warranty included such a seizure as had taken place. It is to be remarked therefore that the seizure within the terms of the warranty included a seizure which was a piratical act, that although piracy was one of the perils insured against, yet this warranty excepted from the policy a piratical act if that act was a seizure. Therefore in that case, although the action might have been brought as for a loss by piracy and also as for a loss by seizure, yet the underwriters could not be made liable as for a loss by piracy because the warranty could not be confined but must be read in its ordinary meaning, and Lord Campbell said it extended to all seizures. In *Powell* v. *Hyde* (5 E. & B. 607) there was a policy against all ordinary losses, but there was also a warranty free from capture or seizure or the consequences thereof. The ship was struck by a Russian battery, though there was no war between England and Russia. It was held first that the firing was an attempt to capture the ship, not with the intention of sinking her, but in order that she might be stopped and seized. It was not the act of any enemy, because there was no war, but it was an attempt to capture the ship. It was urged that the warranty extended only to war risks and the losses thereupon; but it was held that the terms of the warranty could not be confined, that it was an attempt to seize the vessel, that the seizing was not to be confined to seizure as a war seizure, but must be read according to ordinary interpretation as applying to all seizures. It seems to me, after some reflection and hesitation, that these cases are authorities to show that such a warranty as that in the case now before us, according to its ordinary signification in the English language, must not be confined to certain seizures, but includes all seizures; *i.e.*, it is a warranty against seizure which may be by an enemy, by the act of foreign governments, or the result of piracy, and, as it includes all seizures, there is nothing to prevent it applying to seizure resulting from barratry, and the peculiar doctrine of barratry does not interfere with the proper interpretation of the warranty. I am of opinion, therefore, that the plaintiffs are not entitled to recover.

It was argued that certain American cases would lead to a contrary conclusion. If I had thought that the American authorities were clear on this point, there being no specific authority to the contrary in England, I should have done everything to bring my mind to follow them, for I agree that it is most advisable that decisions on insurance law should be in conformity in all countries, if possible. It is a law which is applicable in all countries and to maritime business carried on between different countries; and, even if I were disinclined to agree with American decisions, yet if there were no authority to the contrary I should follow them. Although the American decisions are not binding upon us, yet I have always found on insurance law they are supported by careful reasoning. But I think the American cases do not govern the point now before us. The warranty in *American Insurance Company* v. *Dunham* (12 Wendell, 463; 15 Ib. 9) was free from the effects of illicit trading, and the court went rather more into a consideration of the history of that warranty than we should do in an English court in order to determine its construction. They concluded that the meaning of such warranty was that it was against illicit trading on the part of the owner. Of course barratrous trading was not within the terms of the warranty. They did not decide upon any particular views of the doctrine of barratry, but only upon the construction of the warranty itself—that it was a warranty against illicit trading which only applied to trading by the owner. It is true those decisions are very much like that of *Havelock* v *Hancill* (3 T. R. 277), where the policy was, although not in the form of a warranty, on a ship not in lawful trade. There also barratry was a peril named in the policy, but a policy in that form amounts really to a warranty against illicit trading by the owner, and therefore did not apply to illicit trading by the master. That was no doubt in conformity with the American decisions, but, for the same reason as I have mentioned in reference to the American decisions, I think it does not apply here. This case must be decided in accordance with the case of *Kleinwort* v. *Shepard* (1 E. & E. 477), which of course is not binding upon this court, but I think it would be wrong that we should as to the interpretation of a warranty in the policy, differ from the Court of Queen's Bench. I think, therefore, that the principle of that decision shows this to be a warranty against every seizure. Acts of the enemy and acts of barratry which would injure the shipowner, although they would not lead to the seizure of the ship, would be included among the risks insured against, and the warranty only takes away that barratry which results in seizure. Both parts can be construed together, and therefore they must be so construed. I am therefore of opinion that the judgment of the Divisional Court was right, and ought to be affirmed.

Cotton, L.J.—The question in this case depends on the true construction and effect of a policy of marine insurance on the ship *Rosslyn*, which amongst the perils insured against includes barratry. The policy also contains a warranty by the insured against capture and seizure. In consequence of the master having at Gibraltar taken a cargo for smuggling into Spain, the vessel was seized by the Spanish authorities. The action was to recover expenses incurred by the owners for the release of the vessel. The act of the master in taking the cargo was barratrous, and, as in cases of barratry, there is an exception to the general rule that the loss must be referred to its proximate cause, but for the warranty the insured might have recovered his loss as occasioned by barratry. But the immediate cause of the loss was the seizure, and the question is whether the warranty deprives

the insured of his right to recover. In my opinion it does. It has been decided that in such a policy capture and seizure is not confined to capture and seizure by an enemy; and as this is the case, I think that these words must be construed to include capture and seizure for breach of the revenue laws of a foreign state. I think that the warranty must be construed as a limitation of the liability, which would otherwise have been undertaken by the underwriters. Several of the perils insured against besides barratry, such as king's enemies and pirates, might have resulted in capture or seizure, and I think that the warranty protects the underwriters from loss in respect of the perils insured against where such loss is the immediate result of capture or seizure. It was attempted to limit the effect of the warranty by applying it to those perils only which would probably result in capture or seizure. But I can see no sufficient reason for thus limiting the operation of the warranty, and if several perils insured against may produce capture or seizure as well as other losses, the warranty must modify the liabillty of the underwriters in respect of all the perils which can produce the result mentioned in the warranty, which in terms applies to capture or seizure for whatever causes. But it was said that the case was decided by authority. *Vallejo* v. *Wheeler* (1 Cowper, 143) was referred to. There the insured owners recovered a loss the consequence of a barratrous deviation of the master, and it was argued that the implied condition only regulates what is not expressly provided for, and the implied condition against deviation would not modify the express provision as to barratry. *Havelock* v. *Hancill* (3 T. R. 277) was also relied on. There the vessel was insured in any lawful trade against (amongst other things) barratry. Loss was incurred by the master barratrously engaging in a prohibited trade. The owner recovered against the underwriters. But there "in lawful trade" was construed "during employment by the owner in lawful trade;" that is, by limiting the condition to acts of the owner. This was also the principle of the decisions in the cases in the United States to which we were referred, where warranty against seizure on account of prohibited trade was construed as a covenant against employment by the owner in unlawful trade. In my opinion none of these cases are authorities in favour of the plaintiffs, and in my opinion the decision appealed from is right, and must be affirmed. With regard to the American cases I cannot regard them as authorities, although the judgments are worthy of all respect as expressing the opinions of learned persons.

Brett, L.J.—We are requested by Lord Coleridge, C.J. to state that he agrees with the judgment of the court.

Judgment affirmed.

Solicitor for plaintiffs, *H. C. Coote*, for *Adamson*, North Shields.

Solicitors for defendants, *Waltons, Bubb*, and *Walton*.

May 20, 25, 26, *and July* 1, 1882.

(Before Brett and Cotton, L.JJ.)

Thompson *v.* Farrer.

Ship and shipping—Merchant Shipping Act, 1876, *ss.* 6, 10—*Detaining unsafe ship—Reasonable and probable cause.*

By sect. 6 *of the Merchant Shipping Act* 1876 *it is enacted: "Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed, and either finally detained or released." By sub-sect.* 1: *"The Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed." By sect.* 10: *"If it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey."*

In an action against the secretary of the Board of Trade to recover compensation under the above section, the verdict of the jury was taken upon the question whether it was reasonable in the Board of Trade to detain the ship for survey without a direct affirmation by the surveyors that in their opinion the ship was unsafe.

Held, that the proper question for the jury was whether a reasonable man with a competent knowledge of ships would have believed from the actual condition of the ship that she was unsafe, the question of reasonable and probable cause under this Act depending, not on what representations are made to the Board of Trade, but on what the actual condition of the vessel is:

Held, also, that the question of reasonable and probable cause was one for the jury:

Held, also, that evidence as to the history of the vessel is admissible upon that question:

Held, also, that where the contemplated employment of a vessel is for a purpose which involves more than the outward voyage, the employment after the end of the outward voyage is part of "the service for which she is intended," and must be taken into consideration in deciding whether there was reasonable and probable cause for believing the ship to be unsafe.

Judgment of Field and North JJ. reversed.

This was an action against the secretary of the Board of Trade to recover compensation, under sect. 10 of 39 & 40 Vict. c. 80, for the provisional detention of the plaintiff's ship, the *City of Limerick*.

The facts and arguments are sufficiently stated in the judgment.

Charles Russell, Q.C. and *Gainsford Bruce* for the plaintiff.

The *Attorney-General* (Sir Henry James) and

Gully, Q.C. (*R. S. Wright* with them) for the defendant.

July 1.—BRETT, L.J.—In this case the plaintiff was the owner of an iron steamship, the *City of Limerick*. In the autumn of 1880, the ship was at Sunderland, preparing to proceed with an ordinary cargo to America, and to return with a cargo partly consisting of cattle. Whilst the ship was thus preparing to carry out such purposes, the officials at Sunderland of the Board of Trade communicated with the Board in London. In the result the ship was provisionally detained under the Merchant Shipping Act Amendment Act 1876, by an order of the Board of Trade. Afterwards, under the same statute, a court of survey was held before Mr Rothery and others, who held and reported as follows: "The conclusion, then, to which we have come is, that whether we look to the outward or to the homeward voyage, this vessel is not unfit to proceed to sea without serious damage to human life, having regard to the nature of the service for which she is intended, and that consequently the Board of Trade officers had no right to detain her. Under these circumstances, we have no option but to order the vessel to be released forthwith." The vessel was accordingly released. The present action was then brought by the plaintiff in order to recover compensation for the loss to him by reason of the provisional detention. The case was tried before the Lord Chief Justice and a special jury at Liverpool. The jury found for the plaintiff. A motion was made in a divisional court for a new trial for misdirection, and as for a verdict against the weight of the evidence. Field and North, JJ. refused to grant a rule. A rule *nisi* was afterwards granted in this court; upon showing cause the case was exhaustively argued before my brother Cotton and myself. At the trial before Lord Coleridge, C.J., it was admitted, for the purpose of that trial, that the ship was in fact a safe ship for the proposed voyages both out and home. The following facts, amongst others, were given in evidence: First, as to the construction and former use of the ship, evidence in accordance with the statement of fact contained in the judgment or report of Mr. Rothery; then certain letters from officers of the Board of Trade at Sunderland to officers of the Board in London to the following effect: On the 21 April 1881 Mr. Mills, a surveyor of the board stationed at Sunderland, wrote to the assistant secretary in London, "*City of Limerick*. An application has been made for a passenger certificate. She has been until recently a vessel with two decks and a spar deck. Her present owners have now fitted her with an additional awning deck about four-fifths of her length. The ship presents a curious and abnormal appearance, and a question arises in the minds of the surveyors and with myself how far such a superstructure on a vessel of already great depth and small breadth detracts from her seaworthiness. I therefore beg to submit that it is a case wherein the opinion of the consultative staff should be taken. The case is urgent, as the vessel is soon to leave Sunderland for America." A minute was made on this report by Captain Sir Digby Murray, an official of the Board. "I should advise that we absolutely decline to grant this vessel a passenger certificate. There still remains the question whether we are to permit her to proceed to sea or whether we ought not to detain her as unsafe. We should send Mr. Wilmshurst, &c., to survey." On the 28th April, Messrs. Mills and Wilmshurst made a joint report: "We have now inspected this vessel, &c. Above the spar deck is now being added the frames, beams, planks, &c., for a further deck covering or platform, extending about four-fifths of the vessel's length, for the conveyance of cattle, &c. The following considerations arise, &c., as to whether from the great depth to breadth and the danger of the top structure getting partly filled with water, the ship is in such condition as that she may be allowed to sail on a sea voyage. We think it is possible with special loading and provisions that she may be made safe to leave the United Kingdom; but she will, without doubt, be dangerous when loaded in a usual method, or with cattle upon the upper deck. We therefore suggest the desirability of the board leaving the responsibility of such an altogether exceptional case upon a court of survey." Upon this the following minutes were made in London: "Our duty is clear. I instruct Mr. Mills that we have received his joint report, and we understand that he will detain this ship if she attempts to proceed to sea. That being so, he should take care that the steps he takes are effectual." And by the President of the Board: "I approve of what has been done. The owner may be told that the Board of Trade will not take the responsibility of allowing a ship of such unusual dimensions to go to sea without further inquiry. On the 2nd May Mr. Mills wrote: "May I respectfully suggest that others of the board's staff who have experience of the trade this vessel is intended for should be sent to see her at once? The case is a heavy one for me to be left with alone; besides the opinions of Mr. Wilmshurst and myself, as given in our report, might not be in accord with that of others." Evidence was given that the ship had formerly brought cattle on deck from America covered or protected by a movable wooden awning or shed, and that shortly before May 1881, the plaintiff had replaced this by a permanent structure said to be lighter, made partly of iron and partly of wood, to act as a shed or an awning for cattle, and that the ship was intended to bring cattle on deck in such shed from America to England on a homeward voyage. The ship was provisionally detained on the 14th May. By a report dated the 16th May, signed by Mr. Wilmshurst, principal surveyor of iron vessels, by Laslett, Brown, and Paxton, shipwright surveyors, and by Vyvyan, nautical surveyor, the grounds of the provisional detention were stated to be "improper construction, viz., unusual proportions," and after giving the length, breadth, and depth of the ship, there was a statement that these formed "a proportion unknown in the merchant service in any other vessel." The Lord Chief Justice left the following questions to the jury:—1. Had the Board of Trade, when the detention order was issued, reason to believe that the *City of Limerick* was unsafe for the outward voyage or for the homeward voyage?—A. No, to both branches of the question. 2. Was she unsafe in point of fact on the voyage to New York?—A. No. 3. Was the *City of Limerick* unsafe for the voyage from New York to England if loaded with an ordinary cargo of American produce, including, as part of the cargo, 500 head of cattle on the main or upper deck?—A. No. 4. Was there an absence of reasonable and probable

cause, by reason of the condition of the ship or the act or default of the owners, for the provisional detention of the ship by the Board of Trade?—A. Yes. 5. From what date was the ship in point of fact detained?—A. From the 14th May to the 11th June. The Lord Chief Justice, in summing up the case to the jury, thus explained the fourth question: "You would expect to find, as in my judgment you do find, that where there is a *bonâ fide* and honest action on the part of that great department of the State, if that action is wrong, and in a particular case inflicts hardship upon an individual, that individual, if the action of the Board of Trade is *bonâ fide*, and has been upon reasonable grounds, for the general benefit must suffer." And again: "The true question for you to consider is, had the Board of Trade at the time when the vessel was detained, reason to believe when they so acted, that the vessel was unsafe for her outward or her homeward voyage? The true question is what was present to their minds when they did detain." And still more clearly: "As I understand it, and I think rightly understand, therefore, Mr. Mills was wrongly informed, and Mr. Mills wrongly informed the Board of Trade, but, remember, in my view, the question is not whether he wrongly informed the Board of Trade, but whether he did inform the Board of Trade, and whether it was reasonable for the Board of Trade to believe what he informed them." "The Board can only go by the reports of their people, and so long as they have reason to trust those people, and those people do not give them reasons to doubt the trustworthiness of their report, or give them reason to doubt that they can be relied on, I do not see why they should be held blameworthy or responsible under this particular Act of Parliament." The learned judge then left it to the jury to say whether the letters and reports of Mr. Mills and Mr. Wilmshurst did give the board reasonable ground to detain the ship. And he further said that if the question of the absence of reasonable cause was for him, he was of opinion that there was an absence of reasonable cause. The ground of this view of the learned judge, and a ground which he left to the jury to consider in order to determine their verdict, was that the report and letters did not express a determined opinion of Mr. Mills and Mr. Wilmshurst that the ship was unsafe; but rather seemed to avoid, and in his view did avoid, giving such an opinion; and that it was not reasonable for the board to detain the ship without having at least a definite opinion that the ship was unsafe.

The same view is expressed by Field, J.: "I think there can be no doubt that if the statements of the surveyors had been direct and pointed statements of fact, even although mistaken, and although they had erroneously supposed that that was a deck which was not a deck, and that that which was merely a supplementary alteration was a new construction, or that that which they thought added seven feet to the depth of the ship was, with reference to the question whether she was stable or not, erroneous, still, if all that had been positively stated to the Board of Trade by their respective officers, whose competency was not at all doubted, and they had taken it all into consideration, however unfounded or erroneous the views or statements of facts might have been, we should have thought that there would have been very strong evidence indeed to show that there was no absence of reasonable and probable cause." But relying on the same point as the Lord Chief Justice, namely, that the surveyors declined to pledge their opinion that the ship was unsafe, he states that he cannot disagree from the finding that, even subject to the manner of leaving the question to the jury, there was an absence of reasonable and probable cause. Upon the argument before us many points were raised. In order the better to express my views on them, I think it well to state in the first place my opinion on the construction of the statute. The first section with which in this case we have to deal is sect. 6. That section gives power to the Board of Trade, a high executive State department, to interfere with the rights of private subjects over their private property. It would be anticipated that the exercise of such a power so as to be absolutely justified in the end would be expressly confined to certain limited cases: in other words, that such a power so to be justified would only be given on the existence of certain conditions. And so we find that it is not given in respect of every British ship, but only where certain conditions exist with regard to a British ship: "Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed and either finally detained or released." This is the part of the enactment which gives the power; the remainder of the section deals with the manner in which the power thus given is to be exercised. The power, then, is not given with regard to every British ship. The enactment is not that an absolutely justified power is given to provisionally detain every ship which the Board of Trade has reason to believe is unsafe. If that be the construction, then all this first part of the section has no effect, and therefore no practical meaning. The only ships which can justifiably in the end be provisionally detained, according to this preliminary part of the section are those which satisfy the condition that for one or other of the reasons mentioned they are unsafe. But by subsect. 1: "The Board of Trade, if they have reason to believe, on complaint or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed." Here a power is given to the board to order the provisional detention, if they have reason to believe, &c. This must, if possible, be read so as not to destroy the immediately preceding enactment. The only way to read the two enactments together, so as to give effect to both, is to say that the Board may detain a ship if they have reason to believe she is unsafe (they would, in my opinion, be bound by their duty to the State to detain a ship if they had reason to believe she was unsafe), but that the Board will be proved by the result to have detained the ship unjustifiably as against the owner, even provisionally, if in fact the ship was not by reason of one of the mentioned causes unsafe within the meaning of the section. I would remark here that it is perhaps possible that a ship may be unsafe within the meaning of the section for some cause other than

one of the causes mentioned in the section, and if so, such a ship, though unsafe, could not be provisionally detained.

A question was raised as to whether the consideration of safety, or want of it, must be confined to safety or want of it, on an outward voyage. It was urged that it must be, by reason of the words, "unfit to proceed to sea," and from "a port in the United Kingdom." But it seems to me that the words, "having regard to the nature of the service for which she is intended," enlarge the area of consideration. If for any part of the service for which the ship is intended when she is about to leave a port in the United Kingdom, such service to be fulfilled before her return to the United Kingdom, she would be unsafe, it seems to me she ought to be provisionally and finally detained. If a British ship were about to sail in ballast to the Chincha Islands to there load and bring back a cargo of guano, and she would be unsafe to human life to bring back such a cargo, it seems to me that she would be proceeding to sea for a service for which she was destined at the time of proceeding to sea, and for the performance of which service she would be an unsafe ship. Or if a British ship were under charter to leave a British port in ballast to proceed to Spain to load ore, and thence to proceed to some other country, it seems to me that it would be far too narrow a construction of the protection to human life intended by this statute, if such a ship might not be detained, if with a cargo of ore she would be unsafe to human life: she would be about to proceed to sea destined to perform a service for which she would be unsafe. Sub-sect. 3 gives power to the Board of Trade to order "the ship" to be finally detained, either absolutely or until the performance of certain conditions. But "the ship" which may be so detained is a ship satisfying the conditions mentioned in the first part of the section. The conditions in the first part of the section are therefore conditions precedent to a *perfect right* to detain a ship either provisionally or finally. But they are not conditions precedent to *a duty* on the part of the Board of Trade to provisionally detain. The Board is bound to perform a duty to the State which is hazardous to this extent, that the performance of it may be shown by a result which at the time the Board could not foresee to have been an unjustifiable act as against an individual, All the difficulty pressing upon the Board by reason of its duty to act on information which it cannot sift in time, and on its grave responsibility to the State if it allow an unsafe ship to go to sea, must be admitted. Nevertheless, in my opinion, the duty to act under such difficulties is imposed. Now although the action of the Board, unless justified by the result of inquiry, is an unjustifiable act as against the shipowner, yet if no particular remedy were given to him by this or some other statute, he would have no remedy. The wrongful act would be a wrongful act done by the members of a public department acting gratuitously, and in the performance of a public duty. Yet the injury done to a shipowner by the detention of his ship at the moment of her proceeding to sea is usually so enormous, that if it were allowed to be done with impunity against one whose ship was not in fact unsafe, and more than that, was not in truth liable, if the true facts were known, to a just suspicion of being unsafe, such legislation would seem to be legislation of the highest injustice. A perfectly innocent individual would by legislation be grievously injured without redress. The Legislature was placed in a position of great delicacy; it was anxious to protect certain subjects, it was bound not too arbitrarily to injure others. The result was sect. 10. By it "if it appears that there was not reasonable and probable cause, by reason of the condition of the ship, or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey." Several questions arise as to the meaning of this enactment. It clearly does not go so far as to say that the shipowner shall be compensated if in fact his ship was not unsafe; to so hold would strike out the words, "that there was not reasonable and probable cause." Does it say that he shall not be compensated, if there was reasonable and probable cause present to the minds of the Board from information before them, though there was not reasonable and probable cause if the true state of facts had been before them? It seems to me that so to hold would strike out the words, "by reason of the condition of the ship or the act or default of the owner." In order to justify the suggested interpretation the section should have been, "if it appears that there was not reasonable and probable cause for the provisional detention of the ship," &c. Then, although neither the apparent condition of the ship nor any apparent act or default of the owner would have given to any person of ordinary skill any reason to doubt the safety of the ship, yet if incorrect facts had been stated to the Board of Trade, either through want of skill to appreciate them, or through negligence, or even fraudulently—such facts if they had been true being sufficient to raise a reasonable doubt—the shipowner would be without remedy. A shipowner, so absolutely innocent that not even by misfortune could his ship be an object of suspicion to a person of ordinary skill, would have been deeply injured without remedy. Such legislation would have inflicted frightful injustice. It may be hard but it is not unjust to say that if by misfortune or otherwise a ship does fairly present a suspicious aspect, the shipowner must bear the consequences. It seems to me that the words of the enactment, if effect be given to all of them, carry out the intermediate view, the hard view but not the unjust one. The true interpretation seems to me to be that if upon the evidence given at the trial of what by all means of examination possible under the circumstances in which the ship then was, and all reasonable inquiries, might have been made known, though it was not, to the Board of Trade, a person of ordinary skill would have had reasonable and probable cause so far to suspect the safety of the ship, as to make it reasonable to detain her for the purpose of inquiry, the shipowner has no remedy given to him, though his ship was in fact a safe ship; but if upon such evidence a person of ordinary skill would have had no reasonable and probable cause to suspect the ship, then compensation is given to the shipowner, although the facts erroneously stated to the Board of Trade would, if correct, have given to a person of ordinary skill reasonable and probable cause to

suspect, and consequently detain the ship. This reading is, in my opinion, fortified by considering the next part of the section, which seems to be an enactment of reciprocal liability imposed on the shipowner, and which liability clearly depends upon the result in fact, and not upon any statements or appearances of facts. It seems to me to be also fortified by sect. 11. That section assumes that the Board of Trade may be liable to the shipowner, and may yet have a remedy over against a complainant; that would hardly have been enacted if upon the facts asserted to the board there would be an absence of reasonable and probable cause to detain the ship, and yet the board should detain her. It is clear that if the ship was in fact unsafe, no question can arise as to whether the information laid before the board was or was not sufficient to give reasonable and probable cause to detain the ship. In such case the shipowner can have no right to compensation. A question was raised as to whether the Board of Trade could rely upon any other deficiency than the one stated in their notice of detention, and of the reasons for it. As, for instance, if the reason given for the provisional detention were a leak in the bows of the ship, could evidence be given at the trial that, although there was no such leak, there would have been apparent to any ordinary skilful observer a defect in the engines, or in the rudder, or in the masts? Putting upon sect. 10 the interpretation stated above, which seems to me to be the right one, I think that the suggested evidence could be given, subject, no doubt, to fair notice being given of it to the shipowner before the hearing.

Another question raised was whether the question of reasonable and probable cause ought to be left to a jury, or be decided by the judge. In my opinion, the question of reasonable and probable cause, if material, is never a question for the judge, except in the cases of a charge of malicious prosecution or false imprisonment. It is not unnatural that in those cases it should be left to him, because the question in those cases is whether there was reasonable and probable cause to set the law in motion or to act personally on it. But however that may be, it seems clear to me that from the very nature of the case the meaning of this statute must be that it is a question for the jury, to the solution of which they may be assisted by expert evidence. To ask a judge whether upon certain measurements of length, depth, and breadth a ship would have sufficient stability, or whether with a cargo loaded in a given form she would be safe, is on the face of the proposition, to my mind, absurd. Another point raised was whether among the facts which might be proved in order to raise the question above stated as the question to be tried by the jury, the previous history of the ship as to antecedent behaviour might be proved. In my opinion, it might. No reasonably skilled and careful inquirer would, if anything struck him as amiss in a ship, fail, in my opinion, to ask whether what he had observed had existed in previous voyages, and whether it had affected the behaviour of the ship. The previous behaviour of the ship under the same conditions as would affect her on her proposed going to sea, would, in my mind, be an obvious and necessary fact to be considered in determining whether she would be safe or unsafe. An objection was taken to the view of the statute which I think is the right one, on the ground that the Legislature would be imposing a duty on the Board of Trade, and obliging them to pay damages in respect of the performance of that duty; but this objection seems to me to be more formal than accurate. If the members of the Board of Trade were made by the decision personally liable, this objection would be formidable indeed; but in fact the duty is imposed on the Board, the damages are paid by the State. Upon the view thus expressed of the true interpretation of this statute, it follows that, in my opinion, the right question was not left to the jury. The verdict of the jury was taken upon the question whether it was reasonable in the Board of Trade to detain the ship for survey without a direct affirmation by the surveyors that in their opinion the ship was unsafe. The attention of the jury was not drawn to this question, namely, whether the facts with regard to this ship as she lay at Sunderland, which would have been apparent to a person of ordinary skill, if he had had all means of examining her possible under the circumstances in which she lay at Sunderland, and of inquiring about her, and had used those means, would have in the opinion of the jury given to such person reasonable and probable cause so far to suspect the safety of the ship for her outward or homeward voyage as to give him reasonable and probable cause to detain the ship for survey and inquiry. I am sorry to say, under these circumstances, that in my opinion there must be a new trial, if the Board of Trade think it advisable. The appeal must, in my opinion, be allowed.

COTTON, L.J.—The construction of the 6th section of the Merchant Shipping Act 1876 is open to some difficulty. It has been contended that the vessel being in fact unsafe is a condition precedent to the exercise of all the powers given by the section. But this cannot, in my opinion, be the true meaning of the earlier part of the section which gives rise to this argument. For, if this is the true construction, a vessel could not lawfully be detained, even for the purpose of being surveyed, unless she is in fact unsafe. This is inconsistent with the first sub-section, which expressly gives power to detain provisionally if the Board of Trade have reason to believe the ship is unsafe, and the contention is inconsistent with the first part of the section itself, which assumes that a ship coming under the provisions of this part of the section may be released, which in the case of a ship in fact unsafe would not be right. The section is not very correctly framed, but I think its meaning is that a ship which the Board of Trade have reason to believe to be unsafe may be detained, and after such investigation or inquiry as by the section is binding on the owner, either released or finally detained. The first part of the section, in my opinion, sums up, though not very accurately, the subsequent detailed provisions of the section. But though as a matter of public policy it was thought right that a power should be given to the Board of Trade to detain provisionally ships reasonably believed by the Board to be unsafe, it was obvious that this might produce great hardships to owners of some vessels, and the 10th section gives in certain cases to owners of vessels which have been detained, and which in fact are not unsafe, compensation by way of damages for their detention, this compen-

sation being payable not by the officers of the Board, but by the State, out of the public purse. In this section the language used differs from that of the first sub-division of the 6th section. It is not "if the Board had not reasonable cause," but "if there was not reasonable and probable cause," that is, if in fact there was not such cause, and it must exist by reason of the condition of the ship, or the act or default of the owner. This, in my opinion, means that the existence of the cause is not to be decided on the representations made to the Board of Trade, on which they acted, but is to be decided on the actual condition of the vessel—on what, in fact, has been done by the owner—so as to prevent the owner being injured by reason of inaccurate representations made to the Board of Trade either by its officers or by strangers, even in cases where the Board has properly discharged the public duty which the Act enables and requires the Board to discharge, and this is supported by section 11.

Then comes the question by whom is the existence of reasonable cause to be decided, by the judge, or by the jury? This does not depend on matters of which a judge has any special knowledge, as is the case where the question is whether there was probable cause for a criminal prosecution. In my opinion, therefore, it must be decided by the jury, and I think the question for the jury (when a vessel is said to be unsafe by reason of her condition) is, whether a reasonable man with a competent knowledge of ships would have believed from the actual condition of the ship that she was unsafe. In some cases the construction of the vessel, without any reference to her previous history, may be sufficient to enable the jury to decide this question, and in my opinion it cannot be said that in all cases evidence ought to be given as to the history of the vessel, but I think that evidence as to the actual history of the vessel is admissible to show that she is or is not unsafe, or that there was or was not reasonable and probable cause for believing her to be unsafe. The only other question is, whether in deciding whether there was reasonable and probable cause for believing the ship to be unsafe, regard is to be had to the outward voyage only. In my opinion where the contemplated employment of the vessel is for a purpose which involves more than the outward voyage, as, in the present case, the bringing cattle home from the United States, or, in other words, employment in the foreign cattle trade, this employment after the end of the outward voyage is part of "the service for which she is intended" and must be taken into consideration. Full protection would not otherwise be secured to seamen employed in British ships, and having regard to the words quoted from sect. 6 it is within the fair interpretation of the Act. The result of my opinion is that in the present case the proper question was not left to the jury, and that the verdict cannot stand. The defendant desires to contend before a jury that the ship was not in fact safe, that is, to question the finding of the court of inquiry. This he did not on the previous trial do in consequence of an expression of opinion by the Lord Chief Justice that the question was whether the Board of Trade had reasonable ground on the statement submitted to them for believing that the vessel was unsafe, and the defendant ought, if he claims it, to have an opportunity of raising the question. There must therefore be a new trial.

Appeal allowed.

Solicitors for plaintiff, *Botterell* and *Roche*, for *William Pinkny*, Sunderland.

Solicitor for defendant, *Solicitor to the Board of Trade.*

HOUSE OF LORDS.

Reported by C. E. Malden, Esq., Barrister-at-Law.

June 2, 5, *and July* 26, 1882.

(Before the Lord Chancellor (Selborne), Lords Blackburn, Watson, and Bramwell.)

The Stoomvaart Maatschappy *v.* The Peninsular and Oriental Steam Navigation Company.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Collision—Limitation of liability of owner—Mode of ascertaining the amount when both ships to blame—Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

Where two ships have been injured by a collision for which both have been found to be in fault, and each has been condemned to pay the moiety of the other's damage, if either party applies to have his liability limited under the Merchant Shipping Act 1862, *s.* 54, *a set-off is allowed between the two amounts, and the other party is entitled to prove against the fund paid into court for a moiety of the loss sustained by him less a moiety of the loss sustained by the party making such application.*

Judgment of the court below reversed, Lord Bramwell dissenting.

Chapman *v.* The Royal Netherlands Steam Navigation Company (*ante, p.* 107; 4 *P. Div.* 157; 40 *L. T. Rep. N. S.* 433) *overruled.*

This was an appeal from a judgment of the Court of Appeal.

The action was brought by the respondent company, the owners of the steamship *Khedive*, to limit their liability in respect of the damage arising out of a collision between that vessel and the steamship *Voorwarts*, belonging to the appellant company, which took place in May 1878.

The House of Lords had decided that both vessels were to blame for the collision (*Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (*ante*, p. 360; 5 App. Cas. 876; 43 L. T. Rep. N. S. 610), and in accordance with the Admiralty rule each was condemned to pay the moiety of the other's damage. This action was brought by the owners of the *Khedive* to limit their liability under the provisions of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), s. 54.

The owners of the *Voorwarts*, which had sustained the greater amount of damage, contended that they were entitled to set off the moiety of the damage sustained by the *Khedive*, and to prove against the fund in court for the balance; but the contention on the other side was that they should prove for the whole moiety of the loss sustained by them, and be paid in respect of such moiety *pari passu* with the other claimants on the fund.

The same question arose in the case of *Chapman* v. *The Royal Netherlands Steam Navigation Company* (*ante*, p. 107; 4 P. Div. 147; 40 L. T. Rep. N. S. 433), in which Jessel, M.R. had decided in favour

of the contention of the present appellants, but his decision was reversed by the Court of Appeal (Baggallay and Cotton, L.JJ.), Brett, L.J. dissenting. The courts below held themselves bound by that case, and this appeal was accordingly brought to the House of Lords.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Webster*, Q.C., and *Phillimore* appeared for the appellants. and argued that the view taken by Jessel, M.R. and Brett, L.J. was the right one, and that it was not intended that the provisions for the limitation of liability should be construed in the manner contended for by the respondents. They referred to

The Seringapatam, 3 W. Rob. 38;
Prehn v. *Bailey and others*; *The Ettrick*, *ante*, pp. 428, 465; L. T. Rep. N. S. 817; 45 Ib. 399; 6 P. Div. 127;
De Vaux v. *Salvador*, 4 Ad. & Ell. 420.

Butt, Q.C., *Benjamin*, Q.C., and *Myburgh*, Q.C., for the respondents, contended that the payment of 8*l.* per ton provided for by the Act was intended to be a payment in full of all demands, reserving all rights. The practice of the Admiralty Court was not to strike a balance, as alleged by the appellants, but to give two distinct judgments one against each ship, as may be seen from an inspection of the proceedings in suits both before and since the Judicature Acts, for example in *The R. L. Alston* (4 Asp. Mar. Law Cas. 509; 7 P. Div. 49; 46 L. T. Rep. N. S. 208), separate reports are made; in fact, proceedings might be taken in two different courts, as in the case of *The Velocity* (3 Mar. Law Cas. O. S. 308; 21 L. T. Rep. N. S. 686; L. Rep. 3 P. C. 44). This claim could not be set off or proved in bankruptcy, and the argument on the other side is that the words in Order XXII., r. 10, "the court may, if the balance is in the defendant's favour," &c., mean "the court must," &c. If the *Khedive* alone had been found to blame, the respondents would have had to pay no more than the appellants now contend for, and the fact that anomalies may arise is no ground for interfering with an established rule:

Lohre v. *Aitchison*, 4 Asp. Mar. Law Cas. 12; 4 App. Cas. 755; 41 L. T. Rep. N. S. 323.

The intention of the Legislature was to limit the owners' liability, and to give an equal dividend to all claimants, which the rule we contend for does, and the appellants' construction does not. They also referred to

The Milan, 1 Mar. Law Cas. O. S. 185; 5 L. T. Rep. N. S. 590; Lush. 388;
The Calypso, Swa. 28.

The *Solicitor-General* was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 26.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: This case has been to me one of unusual difficulty. In the courts below judicial opinion has been equally divided, and I fear that, even in your Lordships' House, there is not unanimity. In most cases the argument from abstract justice and equity is (*in re dubiâ*) of great importance; but here it seems to me that there is little, if any, room for that argument. Whatever in this case was the liability to damages within the meaning of the Merchant Shipping Amendment Act of 1862, to that liability the statutory limitation must be applied. That liability depends upon a rule of the Admiralty jurisdiction, which to myself has always seemed arbitrary; and in examining the practice and procedure of the Court of Admiralty, in order to ascertain the true results of that rule, we not only enter upon a branch of forensic jurisprudence, the forms of which are different from those of the common law courts (in which other questions of liability to damage usually arise), but we find important variations in those forms themselves. The rule was thus stated by Sir William Scott, in the case of *The Lord Melville* (in 1816, not reported): "When it (*i.e.*, loss by collision at sea) happened by the common fault of both parties, the ancient rule of the Admiralty was, that it should be considered a common loss, to which both parties were liable." In the case of *The Woodrop* (2 Dod. 83) the same very learned judge said: "The rule is that the loss must be apportioned (meaning, equally apportioned) between them, as having been occasioned by the fault of both of them." The Merchant Shipping Amendment Act of 1862 provides that in all cases of collision, where there is no loss of life or personal injury (no special reference being made in the Act to the particular case of both ships being in fault), the owners of any ship "shall not be answerable in damages in respect of loss or damage to ships, goods, merchandise, or other things" to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage. This is a limitation of the amount for which the owner shall be "answerable in damages;" it does not make him, in any case, "answerable in damages" upon any principle or to any extent upon or to which he would not have been so "answerable" if the Act had not passed. Nor does it relieve him, wholly or partially, from any loss to which he might have been subject, otherwise than by liability in damages. If, for instance, his whole ship were wholly lost in a collision, for which it was alone to blame, he must bear that whole loss, in addition to his liability in damages, as limited by the statute, to the owners of the other ship, and also to the owners of any cargo. And, if the true result of the Admiralty rule is, as the Master of the Rolls and Brett, L.J. considered it to be, that in a case in which both ships are to blame only one of them is really liable in damages to the other, such damages representing a moiety of the difference of the aggregate loss, beyond the point at which the one loss balances the other, the fact that the rest of the loss must be borne by each shipowner who has suffered it is quite consistent with the limitation of liability by the Merchant Shipping Amendment Act. The question is, whether there are in these cases two cross liabilities in damages of each shipowner to the other for half the loss which that other has sustained, or only one liability for a moiety of the difference of the aggregate loss beyond the point of equality. If both parties were solvent, and if there were no statutory limit of liability, the result either way would practically be the same; because up to the point of equality the loss would be borne, in the one view, by the owner who suffered it, and, in the other view, the one liability would be compensated by, or set off against, the other, according to an equity which would certainly have been enforced

in the Court of Admiralty. If, however, by the effect of a supervening bankruptcy before judgment, or of the statutory limitation of liability, the position of the two parties were rendered unequal, so that a claim by the one would only be to receive a dividend out of a fund, while a claim by the other would be payable in full, the distinction may become important. But a consequence arising out of circumstances foreign to the rule itself ought not to be regarded in the determination of this question, whether it may tend practically to disturb or to maintain that equality of participation in the loss arising from a common fault, which is the principle of the Admiralty rule. The solution of this question appears to me to depend upon the true effect of the procedure, and the forms of decrees of the Admiralty Court in this class of cases: for the new method of procedure under the Judicature Acts, by claim and counter-claim, cannot, in my opinion, make any difference. If the course of the court had been to deal with the whole controversy between the owners of the two ships in a single proceeding, the natural result of the rule would, I think, certainly be that for which the appellants contend. If both ships had suffered an exactly equal amount of damage, ascertained in the same suit, it cannot be conceived that the court, acting on such a rule, would adjudge the owner of the one ship to pay any damages at all to the other, In general, this would not happen, but one ship would have suffered more damage than the other. The natural result of this inequality of loss would seem to be, not that either owner should pay anything to the other up to the point at which (if there had been no such difference) the loss would have been equal, but that the difference only should be equally divided between them, the one bearing and the other paying a moiety of that difference.

The whole difficulty, as it seems to me, arises out of the fact that the course of the Court of Admiralty was not, and, from the nature of the case, hardly could have been, to deal with the whole controversy between the owners of the two ships in a single suit. When a suit for collision was brought it was always by one party alleging the other party to be in fault; and there was also generally (when both were ultimately found to blame, and when both had sustained damage) a cross suit by the other party, with a like allegation of fault against his opponent. At the hearing, whether of one such suit only, or of two such suits, heard separately, or conjoined, the court, when it determined that both ships were to blame, usually pronounced in each suit a separate decree. It cannot be denied that the more common and recent form of such decrees seems (*primâ facie*, at all events) favourable to the contention of the respondents. In each suit there was, as I have said, a separate decree declaring that both ships were in fault, "and that the damage arising therefrom ought to be borne equally" by the owners of both ships; and afterwards proceeding to "condemn" the defendants and their bail "in a moiety of the damages proceeded for by the plaintiffs;" and referring it to the registrar, assisted by merchants, to assess the amount of such damages (with or without costs, as the court might think fit). Under every such decree the registrar made a report, finding that a moiety of the damages sustained by the plaintiffs amounted to so much, and (ordinarily) computing interest thereon from the date of the decree. A moiety of the damages sustained by the other party (if plaintiff in a cross suit) was in like manner found (also with interest) sometimes by the same, and sometimes by a separate report. It does not appear that, on the face of the reports made under this form of decree, any balance was ever struck; but, unless the parties, by a voluntary settlement, rendered further resort to the court unnecessary, the proper course would have been for that plaintiff to whom a balance was due to apply to the court for a monition requiring the other party to pay it. A monition was seldom issued in practice: indeed, Mr. Butt in his argument for the respondents stated that he had been unable to find one on the records of the court. But there cannot, I think, be any doubt that, if issued, it would have been in favour of one plaintiff only and that for the balance, representing one moiety of the excess of the aggregate loss beyond equality, and the interest thereon, and the costs (if any) to which that plaintiff might be entitled. The computation of interest by the registrars in cases of this class might, at first sight, seem to imply that there was, in that stage, an ascertained judgment debt carrying interest. But I think this cannot be a correct view, whatever (in other respects) may be the effect of the decrees under which the registrars acted. It does not appear to have been the general course of the court that those decrees should contain any direction as to interest; and I think it more probable that the principle on which interest was computed under them is that mentioned by Mr Sedgwick in his book on damages (chap. 15, pp. 373 and 385-7), where he treats of the power of a jury to allow interest, as in the nature of damages, for the detention of money or property improperly withheld, or to punish negligent, tortious, or fraudulent conduct; the destruction of or injury to property involving the loss of any profit which might have been made by its use or employment.

I understand the Master of the Rolls and Brett, L.J. to have been of opinion that everything in this course of procedure, prior to monition, was not in form only (according to the style of the Admiralty Courts), but substantially interlocutory; that the decree was not, either before or after the report of the registrar, equivalent to a final judgment constituting a liability in a certain amount of liquidated damages; that, for this purpose, a monition (which, both in form and in substance, would be an order to pay) was necessary; that such monition could only issue for a moiety of the excess of the aggregate loss beyond the point of equality, in conformity with the principle of the rule declared on the face of the decree itself; and that there was, therefore, no liability in damages except for that balance. Baggallay and Cotton, L.JJ., on the other hand, thought that the amount of the liability of each party to pay damages to the other was fixed by the decree in the suit of each plaintiff, and that the monition was merely a step towards execution. If no light could be obtained from any other source than the analogy of the forms of procedure in courts of common law and equity, I should have found great difficulty in dissenting from the conclusions of Baggally and Cotton, L.JJ. But, in determining the effect of Admiralty procedure, authorities in the Admiralty Courts ought to prevail over reasoning founded upon the procedure of other tribunals. I referred

in the outset to the terms in which the "ancient rule of the Admiralty" was stated by Sir W. Scott in the case of *The Lord Melville*; and I recur to them for the purpose of observing that they would hardly seem to be quite accurate if the loss to be "apportioned" (according to the other form of expression used by him) were only that of one ship considered separately and without regard to the loss of the other. At all events, the phrase "a common loss" seems to me to point, more naturally, to what Lord Denman, C.J. understood to be the result of the Admiralty rule. "The positive rule" (he said in *De Vaux* v. *Salvador*, 4 Ad. & Ell. 420) "of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two." The observation which I have ventured to make upon Sir W. Scott's words is, in itself, slight, and would be of no weight at all if there were no precedents of the Court of Admiralty in accordance with Lord Denman's statement of the rule. But there do appear to be such precedents, older than the forms recently in issue, and differing from them. Whatever else may be doubtful in this case, it is, at all events, certain that the ancient rule of the Admiralty and the present rule are the same. The earliest recorded precedent is that of *The Petersfield* and *The Judith Randolph* (not reported, cited in *Hay* v. *Le Neve*, *post*), decided by Sir James Marriott in 1789 (following, as it would seem, a case determined in Queen Anne's time). which was treated by Lord Gifford when delivering the opinion of this House in *Hay* v. *Le Neve* (2 Shaw. Sc. App. 395) as an authority for the application of the Admiralty rule, which the House of Lords ought to follow. In *Hay* v. *Le Neve* the question, which is now so important, did not arise, because there only one of the ships which came into collision had sustained any damage. But a decision, so recognised by this House, is entitled to great weight on all points relating either to the principle or to the application of the rule. The exact terms of the final judgment entered up in *The Petersfield* and *The Judith Randolph* were thus stated to the House of Lords by Lord Gifford: "The judge by his interlocutory decree pronounced, that both ships were in fault, and that the *Judith Randolph* was most in fault, and decreed that the whole damage sustained by the owners of the ship *Petersfield* and her cargo which was sunk and lost, as well as the 230*l.* damages and expenses given against the ship *Petersfield*, and the costs of suit here on both sides, be borne equally by the parties to this suit; and assigned for liquidation of damages and taxation of expenses the third session of next term; and referred the liquidation of the said damages and expenses to the registrar, taking to his assistance two merchants." This form of decree agrees with Lord Denman's statement of the rule. Its effect is, I think, clear; 230*l.* damages and expenses had been ascertained (I presume, in a suit brought by the owners of the *Judith Randolph*) as the amount of the loss and expenses suffered by the *Judith Randolph*, in a moiety of which (as I suppose) the *Petersfield* had been "condemned." But the amount of the loss and expenses suffered by the *Petersfield* was, as yet, unascertained. Let it be supposed, for illustration's sake, that, when ascertained, the loss and expenses suffered by the *Petersfield* and her cargo might amount to 1770*l.*, which, added to 230*l.*, would make 2000*l.* This decree certainly could not and did not mean that the owners of the *Petersfield* and her cargo, who had suffered in damages and expenses 1770*l.*, should be liable in 1000*l.* damages and costs to the owners of the *Judith Randolph*, whose total loss and expenses did not exceed 230*l.*, and should themselves be entitled to receive back from the owners of the *Judith Randolph* the exact amount which they so paid. The effect of that operation would simply be that the parties would be left in the same position as they would have been at common law, each bearing his own total loss. The effect of such a form of decree could, therefore, only be that the owners of the *Petersfield* and her cargo should bear their own greater loss to the extent of 1000*l.*, and that the owners of the *Judith Randolph*, after bearing the whole amount of their smaller loss, namely, 230*l.*, should pay the residue of 1000*l.*, being a moiety of the difference of the aggregate loss, to the owners of the *Petersfield*. This is, in substance, that mode of applying the Admiralty rule for which the appellants here contend. Dr. Lushington appears to have followed this precedent in 1841, referring expressly to *Hay* v. *Le Neve*, in the case of *The Washington* (5 Jur. 1067), when, two cross actions being tried by agreement at the same time, he "decreed the damages, costs, and expenses of both parties to be thrown together, and to be equally divided." It further appears to me that this view of the real meaning of the procedure in such cases goes far to reconcile with sound principle the course taken by Dr. Lushington in *The Seringapatam* (3 W. Rob. 38) and *The Tecla Carmen* (Lush 79), which (in the former case especially) would otherwise have seemed arbitrary, and hardly consistent with the respect due to those decrees of Her Majesty in Council in favour of the owners of the *Harriett* (1 Mar. Law. Cas. O.S. 152; 5 L. T. Rep. N.S. 210) and the *Tecla Carmen*, the fruits of which he thought himself entitled to withhold from the plaintiff, unless (in the one case) they would "submit to the deduction of a moiety of the damages which had been sustained by the owners of the *Seringapatam*" (without a decree in any cross suit), and (in the other) until a cross suit should be brought to hearing. These authorities are, I think, sufficient to prove that the course of the Court of Admiralty has been to use its powers over its own procedure, so as either at the hearing of a cross suit after decree and report in the original suit, or at the hearing of two conjoined suits, or in that later stage at which a monition might be applied for, to bring about the same result as if the whole controversy between the owners of the two ships had been, from the first, dealt with in one proceeding, and this, not by way of set-off, but in a manner which can only be explained as resulting from the view which that court took of the principle, and the just consequences, of its own rule.

One further observation I desire to make, as offering (what seems to me) a not improbable explanation of the ordinary form of decree. It is that, as every suit of this kind was originally brought by a plaintiff alleging his adversary to be in fault (and not admitting the existence of fault on both sides), and as each suit was or might be separately brought to a hearing, the form of the decree made separately in each

suit, before "liquidation of damages," would naturally be such as might be applicable to the possible case (which actually occurred in *Hay* v. *Le Neve*) of that plaintiff's ship only having suffered any damage; in which case the moiety of that damage only which was mentioned in that decree would be taken into account. My conclusion, upon the whole, is that the opinion of the Master of the Rolls and Brett, L.J. ought to prevail, and that the judgment appealed from should be reversed. In arriving at this conclusion, I have not only the hesitation which I must always feel in differing from the opinion of my noble and learned friend Lord Bramwell, but I am also bound to acknowledge that my own impression, down to the conclusion of the arguments, had been different. A fuller consideration of the authorities to which I have referred has convinced me that they are not reconcilable with the judgment of the Court of Appeal.

Lord BLACKBURN.—My Lords: In this case two ships, the *Voorwarts* belonging to the appellants, and the *Khedive* belonging to the respondents, came into collision, and damage was thereby occasioned to each of the ships and to the cargo on board, so that the owners of each ship and the owners of the cargo each sustained loss arising from the same accident, and each had a claim for recompense from those who were responsible. No loss of life or personal injury was incurred. It was ultimately determined that the collision arose from the fault of both ships, and according to the rule in the Admiralty, that being so, the whole damage arising from the collision ought to be borne equally by the owners of the two ships, without inquiring in what degree each was to blame. There was no fault or privity on the part of the owners of the *Khedive*, and they were entitled to take steps for limiting their liability; and as the moiety of the damage in any view of the case exceeded the amount to which their liability was limited, they instituted an action for this purpose in the Admiralty Division, bringing that amount into court, and making the owners of the *Voorwarts* and all other persons claiming damages from the collision, defendants. The amount of the damage to the *Voorwarts* exceeded the damage to the *Khedive*, and the question which it is intended to raise is whether the owners of the *Voorwarts* were to prove for the whole moiety of the loss and damage sustained by them and to be paid in respect of such moiety *pari passu* with the other claimants on the fund, which is the contention of the respondents, or whether they were to prove for the moiety of the loss and damage sustained by them, less a moiety of the los and damage sustained by the *Khedive*. One practical difference is, that if the respondents are right the amount to be paid out of its fund in court to the owners of the cargo, who are not to blame, will be diminished, for the benefit of the *Khedive* which was to blame, and, as was said by Baggallay, L.J.. in *Chapman* v. *Royal Netherlands Steam Navigation Company* (4 Asp. Mar. Law Cas. 107; 4 P. Div. 157; 40 L. T. Rep. N. S. 433), "it certainly strikes one as improbable that such an apparently inequitable result should be in accordance with a true construction of the Merchant Shipping Acts; but, if such be their true construction, we are bound to adopt and act upon it, however inequitable the result may be." Perhaps it is too strong to call the result inequitable, but I think it is certainly one which the Legislature were not likely to have wished to bring about, and that if they had had it brought to their notice they probably might have altered the language of the Acts, so as to make it clear that they did not intend to bring about such a result. Whether, on the true construction of the Acts as they are framed, the result follows is the question. Another result is that, as between the shipowners, the ship which seeks to limit its liability will always, whether its damage be greater or less than the other, obtain a benefit; whether that is to be wished depends upon which was most to blame.

This is in substance an appeal from the decision in *Chapman* v. *The Royal Netherlands Steam Navigation Company* (*ubi sup.*), in which the question was decided, and it was so argued. In that case the *Savernake* and the *Vesuvius* had come into collision, and both were to blame. The owner of the *Savernake* brought the amount of his statutable liability into court, and made the owners of the *Vesuvius* and all other claimants defendants. Jessel, M.R., in that suit, declared "that the defendants, the Royal Netherlands Steam Navigation Company, are entitled to prove for the moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the *Savernake*, and to be paid in respect of such balance *pari passu* with the other claimants out of the fund in court." That is the declaration which the appellants say ought to be made here, and if it were made the rest of the order would easily be framed. But this declaration was altered in the Court of Appeal by a majority consisting of Baggallay and Cotton, L.JJ., Brett, L.J. dissenting and thinking that the declaration of Jessel, M.R. was right; so that as far as mere weight of authority goes it was pretty equal. I need hardly say that the question is one of difficulty. On the best consideration I can give I think that Jessel, M.R. and Brett, L.J. were right. The solution of the question before the House depends upon two questions: First, what is the true construction of the statutes putting a limit on the liability of shipowners to make recompense in damages to those injured by a collision brought about in whole or in part by the negligence of their servants? Secondly, what is the nature of the recompense in damages awarded by the rule of the Admiralty between the owners of the two ships which came into collision, when both are to blame? I will first consider the statutes. The first Act which limited the liability of shipowners in cases of collision was the 53 Geo. 3, c. 159, and though that Act has been repealed by the 17 & 18 Vict. c. 104, I think its provisions are material in construing those provisions which have been by the 17 & 18 Vict. c. 104, as amended by the 25 & 26 Vict. c. 63, substituted for those contained in it. Stat. 53 Geo. 3, c. 159, begins by a recital that it was expedient to prevent any discouragement to merchants and others from being interested in shipping belonging to this realm, and it was confined to British ships. Sect. 1 enacts "that no person, owner or part owner of any ship, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted or occasioned without the fault or privity of such owner, which may happen" to the cargo of the ship, "or to any other vessel," or to any goods

being in or on board any other vessel, "further that the value of his or their ship or vessel, and the freight due, or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage." There were three cases decided between the passing of this statute and its repeal which were not cited in the argument, but I think it right to bring them before your Lordships' notice. In 1818 in *Wilson* v. *Dickson* (2 B. & Ald. 2) the Court of King's Bench decided that the value of the ship was to be taken as "the existing value at the time when the loss takes place." In *Brown* v. *Wilkinson* (15 M. & W. 391), in 1846, Parke, B. intimates a strong opinion that the value, if it was *res integra*, ought to be taken as the value at the time of the commencement of the voyage, but adds "as however, the point has been decided by the case referred to, we should pause before we overruled that authority. It is not, however, necessary in this case to do so, for we think that according to the true meaning of that decision the value at the time of loss, to which the damages were then restrained, is the value at the moment the loss commences by the collision, whence the injury, and it is not to be reduced by the consideration that the defendant's vessel is about to founder, at which time it is really of no value, for that would be to exempt the defendant altogether, which the statute certainly does not contemplate under any circumstances." This was quite sufficient to suggest the expediency of substituting a fixed rule for ascertaining the amount of the limit of liability, as was afterwards done, though not till 1862, by the 25 & 26 Vict. c. 13, s. 64. In the interval between these two cases, that of *The Dundee* (1 Hagg. Adm. 109), was decided by Lord Stowell, in 1823. That was a case of collision in which the *Dundee* was solely to blame, and consequently her owners were liable for the whole loss. The question there raised was what was to be included in the word "appurtenances" in the 53 Geo. 3, c. 159, a question no longer of importance since the repeal of that statute.

On a prohibition in *Gale* v. *Laurie* (5 B. & C. 156), the King's Bench put the same construction on the words as Lord Stowell had done, so that the point, if still important, would probably be held concluded by authority. But the judgment of Lord Stowell contains a great deal material to the present inquiry. He begins by saying that the loss arose from "a want of that attention and vigilance due to the security of other vessels that are navigating on the same seas, which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages. The quantum of reparation due in such cases has been differently measured in the maritime laws of different commercial countries, and of the same countries, our own amongst others, at different periods. The ancient general law exacted a full compensation out of all the property of the owners of the guilty ship upon the common principle applying to persons undertaking the conveyance of goods" (I should rather say undertaking the management of anything likely to do mischief unless attention and vigilance is used by these who manage it) "that they are answerable for the conduct of the persons whom they employed, of whom the other parties who suffered damage knew nothing, and over whom they had no control. To this rule our own country conformed, and it is not to be denied that the term compensation is not very accurately applied to any restitution that falls short of a fair and full indemnification for the injury done. But Holland having introduced a law for the protection of its navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard, their ship, freight, apparel, and furniture, England followed in successive statutes, by which it protected owners from responsibility beyond their interests. First, in the case of embezzlements committed by some of the crew of the ship herself, by 7 Geo. 2, c. 15, and in a succeeding statute (26 Geo. 3, c. 86), this protection was extended to the case of embezzlements committed by other persons. The Legislature proceeded in a later statute (53 Geo. 3, c. 159) to give the same protection in the case of all losses otherwise produced. The latter statute, which most immediately applies to the present question, in the first enacting clause subjects the ship, tackle, apparel, and furniture and its freight, but in the following clauses the word 'appurtenances' is introduced, and is repeated as subject to contribution." He then discusses the nature of the fishing stores on a Greenland voyage, and the case of *Hoskins* v. *Pickersgill* (Marsh. Ins. 765), in which it was held that fishing stores were not included in the word "furniture" in the construction of a policy of insurance, and proceeds: "I am not sufficiently aware whether this would govern the construction of the same word occurring in an Act of Parliament or in the phraseology of a court in which its meaning is, perhaps, more to be collected from its proper and genuine import than from a prevailing understanding controlling its proper meaning in a contract between two individuals whose words were not to be carried beyond their own intentions in the contract. But it is unnecessary for me to pursue that question further, because it is an admitted fact that this mode of initiating a suit, by the arrest of the ship, tackle, apparel, and furniture, is the ancient formula of the court, though leading to a full remedy affecting all the property of every kind belonging to the owners. The same formula has existed and operated its remedy under all the variations by which the remedy has been modified. It has been no further restricted than as the statute has restricted it; but the initiatory terms 'tackle, apparel, and furniture' founded the suit sufficiently to enable it to embrace all the objects which the statute left subject to its operation. These restrained them only by their own particular restrictions. The same words went as far as the general law went, notwithstanding the narrowness of those terms, and they must now go as far as the general law, limited only by that statute, extends." Before going further, I may observe, first, that neither in *Wilson* v. *Dickson*, *The Dundee*, nor *Brown* v. *Wilkinson* did any question arise as to how a court of equity was to work the jurisdiction given it in cases where there were several losses to several parties arising out of the same collision, and the fund brought into court was to be distributed among them rateably, which is the present case. In each of these cases there was one loss

only. Next, that Lord Stowell treats it as quite clear that, though the mode in which the Court of Admiralty founded its jurisdiction was by a seizure of the ship, the recompense in damages decreed by that court could be enforced against the owners out of all their property of every kind, so that the result was that by the general law the owners might be made to pay to their uttermost farthing the recompense in damages decreed by the Court of Admiralty, however small the value of their ship when siezed was. Park, B., in *Brown* v. *Wilkinson* (*ubi sup*), says: "From the practice of the Court of Admiralty no light could be derived on this question, for that court proceeds *in rem*, and can only obtain jurisdiction by seizure, and the value when seized is the measure of liability." It is not, I think, necessary to decide between these very high authorities. If it were, I should wish to make further search among the cases on prohibition; but *primâ facie* one would say that Lord Stowell was more familiar with the subject, and, therefore, more likely to be accurate. And lastly, that Lord Stowell seems to me to think that the recompense in damages was to be regulated according to the established law in the Court of Admiralty, which is my own opinion. What that established law is, is a question which I will discuss hereafter.

Where there were several losses occasioned to several persons by one act of negligence of those for whom the owner was responsible, the 53 Geo. 3, c. 159, s. 7, permitted the owner to file a bill "in any court of equity having competent jurisdiction against all the persons who shall have brought any such actions, &c., and all other persons who shall claim to be entitled to any recompense for any loss or damage arising or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion to ascertain the amount of 'the value,' and for the payment and distribution thereof rateably amongst the several persons claiming recompense as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompense according to the rules of equity and as the case may require." There are carefully drawn provisions requiring the plaintiff in such a bill to make all persons whom he knows of as having any claim for recompense arising out of that one transaction, defendants, so that they may, if they please, claim; and by sect. 10 it is enacted that the court in which the bill is filed shall have full powers for ascertaining the value and the amount of the losses or damages claimed by the defendants respectively, and "generally to do what may appear to be just" in such suit. By the 17 & 18 Vict. c. 104 this statute was repealed, and other enactments provided in the ninth part of that Act, sects. 504 and 505, were repealed by the 25 & 26 Vict. c. 63, and for these was substituted sect. 64 of that latter Act. It is in these words: "The owners of any ship, whether British or foreign, shall not in cases where any of the following events occur without their actual fault or privity, that is to say: 1. Where any loss of life or personal injury is caused to any person being carried in such ship; 2. Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board such ship; 3. Where any loss of life or personal injury is, by reason of the improper navigation of such ship as aforesaid, caused to any person carried in any other ship or boat; 4. Where any loss or damage is, by reason of improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat, be answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ships, boats, goods, or merchandise, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage, nor in respect of loss or damage to boats, goods, or merchandise, or other things, whether there is in addition loss of life or personal injury or not to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage." The case which we have to deal with falls within the fourth of these heads, and, as I think in respect of such losses the only difference intended to be made from the law as it was under 59 Geo. 3, c. 159 was to extend the protection to foreign ships as well as British, and to substitute as the limit of liability a fixed and easily ascertainable sum for the value of the ship, freight, and appurtenances. As regards the mode in which the limitation of liability was to be worked out where there were more persons than one who had sustained loss from the same separate neglect or on the same occasion, the elaborate provisions of 59 Geo. 3, c. 159, are repealed, and in lieu of them is substituted sect. 514, which I think was intended to give the jurisdiction to any court of equity in any part of the British dominions, and in Scotland to the Court of Session, but to make no other difference in the substance of the law. And I think, though the words are changed—principally I think with a view to brevity even at the risk of obscurity—they ought to be construed with reference to the former law and the extent to which it was intended to alter it. And, doing so, it seems to me that the phrase "be answerable in damages" is not to be confined to the damages to be recovered or enforced in an action directly brought against the owner, but it is to be construed as meaning that the aggregate of the recompenses which he has to distribute under sect. 7, "according to the rules of equity, and as the case may require," shall be so limited. This is an important link in my chain of reasoning. I think that the principle laid down in *Rex* v. *Loxdale* (1 Burr. 445), as to the construction of statutes *in pari materiâ* applies; if I am wrong in this, so much of what I rely on is *debile fundamentam*, and I agree that so far *fallit opus*. If I am right, I cannot but think that if Baggallay and Cotton, L.JJ. had had their attention called to the very wide words of sect. 7 and sect. 10 of the 53 Geo. 3, giving the Court of Equity, whose powers the Master of the Rolls was exercising, every power for distribution of the value amongst the several persons entitled to such recompenses, and "generally to do therein as shall appear to be just," and had agreed with me in thinking that though these words are not repeated in 17 & 18 Vict. c. 104, s. 514, the previous law is to be borne in mind when construing that section, their opinions might have been different; at least, Baggallay, L.J. would have more fully developed his reasons for thinking that the true construction of the Act compelled him to put a construction on it, which he, in the passage already cited, calls "apparently inequitable in its result." And Cotton, L.J. would have given his reasons for saying as he does that the result the Master of the

Rolls had come to was "apparently against the words and meaning of the Merchant Shipping Act." But the argument at your Lordships' bar was mainly rested on the effect of the rule in Admiralty in the Court of Admiralty, and the proceedings in the Court of Admiralty, before there was any limitation of liability at all. That court has jurisdiction over both the parties to a collision. Either of them may, if he pleases, abandon or not exercise his right to claim a recompense from the other. But when one does institute a suit the other cannot baffle him by refusing to appear, even though his ship is not within reach of the court; the institution of the suit gives a maritime lien against the ship forming the foundation of an inchoate right to seize the vessel whenever it comes within the reach of the court, even though in the meantime it had become the property of a *bonâ fide* purchaser without notice: (*The Bold Buccleugh*, 7 Moo. P.C. 267.) And according to Lord Stowell in *The Dundee* (*ubi sup.*), the Court of Admiralty, when it seized the ship, could enforce a full remedy affecting all the property of every kind belonging to the owners, however small the value of the ship seized might be. These cases were not cited by Brett, L.J., but they seem to me strong authorities in favour of the view he took of the Admiralty procedure. In this case, as in most others, both parties appeared and both made claims. And the great question was, whether both, or only one, and if so, which of the vessels was to blame. It was ultimately decided that both were to blame, and then the court pronounced the judgment which since the decision of this House in *Hay* v. *Le Neve* (*ubi sup.*) has always been pronounced in such cases, viz., that the collision in question in the cause was occasioned by the fault or default of the master and crew of the *Khedive*, and by the fault or default of the master and crew of the *Voorwaarts*, and that the damage arising therefrom ought to be borne equally by the owners of the *Khedive* and the owners of the *Voorwaarts*. I say that this has always been the form of the judgment since *Hay* v. *Le Neve*. I do not think that such could have been the form of the judgment before that case, for it would have had an important bearing on the question then in issue, and not only was Lord Gifford, who presided, a very accurate lawyer, but it appears from the report that he consulted Lord Stowell, who furnished him with authorities, and would certainly have quoted the form of the judgment if it had then existed. Before the decision in *Hay* v. *Le Neve* Lord Stowell had in the *Woodrop* (*ubi sup.*) laid down that when both ships were to blame "the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them." As the *Woodrop* was solely to blame he had no occasion to say on what principle it was to be apportioned. In *The Lord Melville*, a case not reported anywhere, as far as I can find, but cited by Lord Gifford in *Hay* v. *Le Neve* from a shorthand note of the judgment furnished to him, he said: "The ancient rule of the Admiralty was that it should be considered a common loss to which they were justly liable." I do not doubt that "justly" is a misprint for "jointly." The Court of Session had in *Hay* v. *Le Neve* apportioned the damage by making the ship most to blame bear two-thirds of it, and the ship least to blame one-third. And the question before the House was, if this was right? In that case only one of the ships had put in a claim, and there was no cross-claim—why, I do not know—but the House had not to consider any question arising from the absence of a cross-claim. Lord Gifford consulted Lord Stowell, and was furnished by him with a note of a decision of Sir T. Marriott. That was in a case in which the *Petersfield* and the *Judith* had come in collision and both were to blame, but the *Judith* most, and in which—I do not quite understand how—the *Judith* had recovered 230*l.* damages against the *Petersfield*. The decision of Sir T. Marriott was, "that the whole damage sustained by the *Petersfield* and her cargo, as well as the 230*l.* damages and expenses given against the ship *Petersfield*, and the costs on both sides, be borne equally by the parties in this suit." I may observe that Lord Stowell introduced a rule that, though the damages were to be divided, each party should, in such cases, bear his own costs, and that it has been determined that the liability of the shipowner to make good costs is in no way affected by the statutes limiting his liability: (see *Ex parte Rayne*, 1 Q. B. 982.) In these authorities the decision of the House of Lords was that the damages arising from the collision ought to be borne equally by the owners of the two ships in fault. I do not think attention was called to the effect which this might have on the interest of the innocent owners of cargo. In the possible event of one set of owners proving insolvent whilst the others were solvent, the owner of the cargo would, if the rule was as laid down in the *Lord Melville* that the owners were liable jointly, receive full indemnification for his loss from the solvent owners; by the rule as laid down in *Hay* v. *Le Neve* he only gets one-half from them, and gets a dividend only from the insolvent owners. This rule has been stigmatised as *judicum rusticorum*, and is justified on the ground of general expediency avoiding interminable litigation at the cost of some inevitable injustice in particular cases. But if the recompense in damages which the one ship is to make to the other is to be considered as quite a distinct thing from that which the other is to make to it, this injustice is increased in a manner which is not only not inevitable, but which as it seems to me, it requires some subtle and technical reasoning to bring about, It was not disputed that in practice, when the damages were ascertained, and it was proved that the damage to one ship was greater than that to the other, the balance, and the balance only, was paid. The Master of the Rolls, in *Chapman* v. *Royal Netherlands Steam Navigation Company* (*ubi sup.*), said that balance "was all that is ever recovered in the action, that is the substance of it." He had just before said that "the monition finally issues for the balance." Inquiry has been made and it turns out that the parties to collision suits having always given substantial bail; there is no instance to be found in which a monition ever issued at all, the money being always paid without anything in the nature of an execution. But I think it can be hardly doubtful that if in any case it ever should be necessary to issue a monition it would not be issued for more than the balance. Had the statute of 53 Geo. 3. c. 159, been unrepealed, and had the Master of the Rolls been exercising the

jurisdiction given in such wide terms by the 7th section to determine "according to the rules of equity, and as the case may require," and by the 10th section "generally to do therein as shall appear to be just," I do not think that there could be much doubt that he did right in making his order according to the substance of what was done. I have already expressed my opinion that the statute now in force, though couched in different words, is to be construed as giving the same power as was given by the repealed Act.

The very ingenious argument of the counsel for the respondent was I think this: there was from very early times a jurisdiction exercised by the courts of common law, and I presume by all Superior Courts, to prevent their process being abused or used for the purposes of oppression, and therefore when A. had obtained a judgment in one court against B., on which he was about to issue execution for the full amount, the court on its being brought to their notice by B. that he had obtained a judgment against A. either in the same court, or another on which he could issue execution against A., would restrain A. from issuing execution on the judgment in their court except on the terms that he consented to set the one against the other, and would issue execution only for the balance. There were differences of practice in the Queen's Bench, and in the Common Pleas at one time, as to the extent to which the interests of the attorneys were considered (see *Hall* v. *Ody*, 2 B. & P. 28), but those I need not notice, and it was argued with great ingenuity that the cross-claims of the two ships which had come into collision were as distinct as any two actions in different courts, and that the undenied practice merely arose from the Admiralty interfering to prevent the abuse of its process. Even if this were made out I should be unwilling to give effect to what I cannot but think very technical and artificial reasoning. But I do not think it made out. The two claims arose out of one and the same accident. They are determined in one and the same court, and they depend on one and the same question, namely, were both or only one of the parties to blame? And that question is determined once for all between the same parties, and the amount of the damage is also determined by the same court, and between the same parties. Even if the course of pleading had always been as it appears latterly to have been to condemn each separately, and order the damages to be assessed separately, I should still say that they were in substance at least, not distinct and separate actions. But as I have pointed out, I think there can have been no settled form before *Hay* v. *Le Neve*. I think the forms produced were all comparatively modern. No practical consequences resulted from these forms, and consequently nothing called upon the courts to consider to what consequences they led. In the case of *The Seringapatam* (*ubi sup.*) where the *Seringapatam* and the *Harriet* had come into collision, and the owners of the *Harriet* which had gone to the bottom, refused to give bail to the action against them by the *Seringapatam*, Dr. Lushington decided, I cannot but think erroneously, that he had no power to stay the action by the owners of the *Harriet* till they gave bail in the action against them. Whether he was right or not is not since the 24 Vict. c, 10, material, but he so thought, and that looks as if he thought them distinct actions. But when the *Seringapatam* dropped its action against the *Harriet*, and the *Harriet* proceeded against the *Seringapatam*, and finally judgment was given that both were to blame, and that judgment was affirmed on appeal, the question was raised in a very practical shape. The counsel for the owners of the *Harriet* argued that the Court of Appeal had in effect, though not in express terms, said that the owners of the *Harriet* shall receive a clear moiety of the damage." Dr. Lushington took a course which could not be justified on the ground that the court was preventing an abuse of its process on any other ground than that taken by the Master of the Rolls, in *Chapman* v. *Royal Netherlands Company* that they were not independent actions, and that the substance was that the balance only should be paid. I have only to add that, whilst I think that the Chancery Division in *Chapman* v. *Royal Netherlands Company*, and the Admiralty Division in the present case, are to conduct the limitation action brought under the 17 & 18 Vict. c. 104, s. 514, according to the procedure as altered by the various subsequent Acts, that those Acts make no difference in the substance of what they are to do. They ought to make exactly the same declarations, and do the same things which the Court of Session following their own procedure ought to have done if the limitation action had been brought in that court. I began by saying what was the question intended to be decided in this House. I doubt if it is raised, I doubt if the appeal is not premature, but I do not think that your Lordships should on that account refrain from deciding it. If the House adopts the view which I take of the law, I think the proper order would be to adopt that of the Master of the Rolls in the former case, and declare "that the defendants, the owners of the *Voorwaarts*, are entitled to prove for the moiety of the loss and damage, sustained by them, less a moiety of the damage sustained by the steamship *Khedive*, and to be paid in respect of such balance *pari passu* with the other claimants out of the fund in court." and with the declaration to remit the action to the Admiralty Division to do what is just in the action. I have had the opportunity of perusing the opinion of Lord Bramwell, who takes the opposite view. I have read it very attentively but it has not changed my opinion.

Lord Watson.—My Lords: I have only to state my entire concurrence in the judgments which have just been delivered.

Lord Bramwell.—My Lords: I entirely agree that the question is, what was the practice or what is the practice or law of the Court of Admiralty in proceedings in that court where both ships are held to be to blame? If I had had to form my own opinion upon that matter unassisted and unbiassed by the opinions of my noble and learned friends who have addressed your Lordships, I confess that I should have come to a different conclusion from that to which they have come, because I should, upon an examination of the practice and what I may call the necessity of the case, have come to the conclusion that there were separate decrees in each case for the damages, or a moiety of the damages, sustained by each ship, and that the fact that the balance was afterwards ascertained, was a mere matter of arrangement and convenience for the avoidance of what I

may call a sort of circuity of proceeding, that is to say, a payment by one ship and repayment by the other. And I must say that at the present moment it seems to me extremely difficult to say that that must not of necessity be the law; because what is to happen if proceedings are brought by the owners of one ship in one court and by the owners of the other ship in another court in another country? or, if the owners of the ship sued in this country do not think fit to bring their cross-action or to make their counter-claim, I cannot see what is to happen in such a case as that; and I can foresee great difficulties from the opinions which have just been expressed in your Lordships' House in the case of actions which may be brought in the common law courts in this country. I must acknowledge that I had written a long judgment in support of the views which I am now expressing, but it is not my intention to trouble your Lordships with that opinion, for I really have not confidence enough in my own opinion, in a matter of this description, to differ from the opinions which have been expressed by my noble and learned friends who have already addressed your Lordships. It is not a question of principle; it is not a question of reason; but it is a question of what was the law of the Court of Admiralty; because, undoubtedly, what was the law formerly is the law still, for the Judicature Act has not changed the law in that respect. I therefore will not trouble your Lordships with the opinion which I should have expressed, for I feel bound to give up my own judgment in a case of this description, yielding to the opinions of my noble and learned friends.

The LORD CHANCELLOR (Selborne).—My Lords: The order which I should propose to your Lordships, and move for the purpose of giving effect to the opinions which have been expressed by the majority of your Lordships upon this appeal, is to reverse the order appealed from, and to affirm the judgment of the Admiralty Division dated the 5th April 1881, with the following declaration: That the defendants the owners of the steam vessel *Voorwaarts* are entitled to prove against the fund paid into court under that judgment for a moiety of the loss and damage sustained by them, less a moiety of the loss and damage sustained by the steam vessel *Khedive*, and to be paid in respect of the balance due to them after such deduction *pari passu* with the other claimants out of such fund. It will be for your Lordships to consider what ought to be done with regard to the costs in the court below and here. With respect to that question I venture to point out to your Lordships that this case comes before the House not under the ordinary circumstances which make it fit to apply the rule that the costs should follow the event, but under these circumstances that in another case—namely, the case of *Chapman* v. *The Royal Netherlands Steam Navigation Company* between other parties, a decision had been pronounced by the Court of Appeal reversing the judgment of the Master of the Rolls, which it was inevitably necessary for the court below to follow unless it was reversed by this House. The point also was one which all your Lordships felt to be a point of difficulty involving an abstruse matter of law. Taking all these circumstances into account, and I may add quite consistently, as it seems to me, with the principle of the rule which we are applying, I would submit to your Lordships that no costs should be given either in the Court of Appeal or of this appeal.

Order appealed from reversed. Decree of the Admiralty Division, dated the 5th April 1881, affirmed, with a declaration. No costs in the Court of Appeal, or of the appeal to this House.

Solicitors for the appellants, *Clarkson, Greenwell*, and *Wyles*.

Solicitors for the respondents, *Freshfields* and *Williams*.

July 10 *and* 11, 1882.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

BURNAND *v.* RODOCANACHI AND OTHERS.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Valued policy—Money paid as compensation—Salvage—Indemnity.

The valuation in a valued policy of insurance, while inclusive as between the parties for all purposes of the contract, is not conclusive for other purposes collateral to the contract.

The respondents were the owners of a cargo shipped on board a United States merchant ship which was destroyed by the Confederate States cruiser Alabama. *The appellant was an underwriter of a valued policy of insurance on the cargo including war risks, and paid the respondents the valued amount as for an actual total loss.*

An Act of Congress was afterwards passed in the United States for the distribution of a compensation fund among persons who had suffered damage from the Alabama. *The Act provided that no claim should be allowed for which compensation had been received from any insurer, but that, if such compensation were not equal to the amount of the loss actually suffered, the difference might be awarded; and (sect.* 12) *that no claim should be allowed by or on behalf of any insurer.*

The amount of the respondents' loss was greater than the valuation in the policy, and they received the difference from the fund under the Act.

Held (affirming the judgment of the court below), that the amount so paid was a free gift which the underwriters were not entitled to recover from the assured, though they had paid as for an actual total loss.

THIS was an appeal from the judgment of the Court of Appeal (Bramwell and Brett, L.JJ., Baggallay, L.J. dissenting), reversing a judgment of Lord Coleridge, C.J., in favour of the plaintiff (the present appellant), in an action tried by him without a jury.

The case is reported in 44 L. T. Rep. N. S. 538; 4 Asp. Mar. Law Cas. 400; and in 5 C. P. Div. 424, and 6 Q. B. Div. 633.

The facts, which were undisputed, appear from the head-note above, and are fully set out in the report in the court below.

Butt, Q.C., *Cohen*, Q.C., and *Hollams* appeared for the appellant, and argued that the underwriters having paid as for an actual total loss were entitled to all the rights of the assured, and an Act of the American Congress cannot affect the legal rights of British subjects in England. The United States received their sum as trustee

for those whose claim they put forward, and there is a moral obligation so to apply it. If this cargo had been salved and had come in specie into the hands of the respondents, the appellant would have had a claim to it, and this sum is in the same position. The valuation in the policy is conclusive as between the parties. They referred to

Randal v. *Cockran*, 1 Ves. sen. 98;
Blaauwpot v. *Da Costa*, 1 Eden, 130;
Gracie v. *New York Ins. Co.*, 8 Johns. N. Y. Rep. 237;
North of England Ins. Ass. v. *Armstrong*, 3 Mar. Law Cas. O. S. 330; L. Rep. 5 Q. B. 244; 21 L. T. Rep. N. S. 822;
Darrel v. *Tibbitts*, 5 Q. B. Div. 560; 42 L. T. Rep. N. S. 797;
Simpson v. *Thomson*, 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279; 38 L. T. Rep. N.S. 1;
Stewart v. *Greenock Mar. Ins. Co.*, 2 H. L. Cas. 159;
Bruce v. *Jones*, 1 Mar. Law Cas. O. S. 280; 7 L. T. Rep. N. S. 748; 1 H. & C. 179; 32 L. J. 132, Ex.

The *Attorney-General* (Sir H. James, Q.C.) and the Hon. *A. E. Gathorne Hardy*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the arguments for the appellant their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne.)—My Lords: This is a short, but interesting and important question, but I believe there is no doubt in the minds of your Lordships that the judgment under appeal is right. Now, if I may venture to do so, with that sincere respect which I always feel for everything which falls from judges so eminent as Lord Coleridge, C.J., and Baggallay, L.J., I will indicate what I think is the fallacy in the reasoning of those learned judges. It is this: they have taken the valuation of the policy as conclusive, and as operating by way of estoppel between these parties for a purpose for which, as it appears to me, it is not conclusive, and does not estop them. For the purpose of the contract of insurance, and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and the effect of it may be that for those purposes the assured is not entitled to say, "My loss has been greater than that which was covered by the policy." He cannot say that for the purpose of withholding from the insurer any indemnity or right by way of subrogation or substitution to which by the true legal result of the contract the insurer is entitled. Whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it. It is admitted that that is the English law when it is attempted to use the valuation for the purpose of determining what is, and what is not, a constructive total loss. Now it appears to me that for every other purpose collateral to the contract, for the purpose of every question as to whether a particular claim to something which has arisen *aliunde* is, or is not, within those rights which result in law from the contract, there is no more reason for holding the valuation to be conclusive between the parties, or to operate by way of estoppel, than there is in the case in which it is admitted that in England it does not so follow. The title to a particular indemnity granted in particular terms out of a particular fund at the disposal of the United States of America by an Act of the Supreme Legislature of the United States, is not a title which I think can possibly result in law from the contract itself. If such a right exists it must exist by the combined effect of the contract between the assurer and the assured and the Act of Congress. It cannot follow from the contract of insurance alone without the Act of Congress. If the Act of Congress is consistent with such a right, having regard to the contract of insurance, still more if the Act of Congress fairly and equitably interpreted confers such a right, there is no reason whatever why the right should not receive full effect. But how is it possible that such an effect could be produced as to a right which could have no existence apart from the Act of Congress, if the Act of Congress itself expressly excludes it? I cannot for a moment understand the doctrine of moral right and obligation, or implied trusts affecting supreme governments and independent states, as applied to a question of this kind. The rights resulting from the contract must be such as in point of law the contract makes; the rights resulting from the Act of Congress must be such as according to its true construction and legal effect the Act of Congress makes; and the rights resulting from both together must be such as are consistent with and flow from the legitimate operation of the whole. Here it is admitted that there is in the Act of Congress everything said and done which a supreme Legislature could possibly say or do for the purpose of excluding the present claim, and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part, but to the unvalued part of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress. It was a true and *bonâ fide* valuation, but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover, and the insurers have not paid.

Whatever views of moral obligation may be entertained with regard to the Act of Congress, I think it is correctly described by Brett, L.J. as an act of pure gift from the American Government. We cannot go behind it and inquire into the motives for an Act of a supreme legislature on a matter within their legislative powers; and that being so, I am entirely unable, for any practical purpose, to distinguish this case, in which the Supreme Government of the United States, having absolute power of disposition over this fund, have, by a solemn Act of their Congress, declared that it should be given, not in respect of the loss which had been indemnified as between the assurers and the assured, but in respect of the loss which the assured had suffered beyond that amount, from the case of a voluntary gift by an individual on the same terms. Mr. Butt admitted that, if a member of the family of the shipowner who had suffered the loss, or of the owner of the cargo, had, after the insurers had paid the loss, made a will in the precise terms of this Act of the Congress of the United States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers

could not have claimed the gift. I am unable to see, for any legal purpose, a distinction between such a case and the present. It is a satisfaction to me to find that, in taking that view of the matter, I only differ from Baggallay, L.J. so far as this: he thought that the cases of *Randel* v. *Cockran*, (*ubi sup.*) and *Blaauwpot* v. *Da Costa* (*ubi sup.*), under the Order of Council of the 18th June 1741, were authorities in point, and covering the present case. With the greatest respect for that learned judge I am unable to agree in that conclusion. I should not have had any difficulty at all in this case in upholding the claim of the appellant if the Act of Congress of the United States had been in terms similar to that proclamation. The difference is, that when the King of Great Britian came to distribute the fund which arose from the seizures of goods which had been taken by way of reprisal from Spain, the Crown directed it to be divided into moieties; one moiety was to go to the officers and sailors of the ships that had made the captures, but the other moiety was to be paid to and amongst such of His Majesty's subjects as had suffered by the unjust seizures and depredations of the Spaniards. There was no such exclusion of insurers as there is in the present case; in point of law and equity, too, the true result of the contract of insurance was, that the insurers had taken the loss upon themselves, and were entitled to all indemnities received in respect of the loss; they were sufferers in equity at all events, if not in the strictest legal sense, from those depredations; they were to take the place of the original sufferers, and to have all their rights, and therefore, according to the true effect of that proclamation, it was a grant by the Crown in their favour. If anything of the same sort had been done by the Act of Congress in the present case it would be very probable that your Lordships would come to the same conclusion. I see that Brett, L.J. expresses some hesitation upon that subject. It is not necessary for me to say more about it, excepting that I do not myself share that hesitation. I put the matter entirely upon the ground that the terms of the grant in the cases which have been referred to not only impliedly, but actually, according to their fair and legitimate construction in law and equity, operated in favour of the insurers, who, having paid the loss, were entitled to be recouped. Those cases appear to me to be clearly and broadly distinguishable from the present case. I think that the view taken by the majority of the Court of Appeal is correct, and therefore I move your Lordships to dismiss this appeal with costs.

Lord BLACKBURN.—My Lords: I am of the same opinion. The point is a very short one, and one upon which I have no doubt whatever. The general rule of law is, that where there is a contract of indemnity, and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back. The first question is this: There has been a policy of insurance, and a total loss, by capture and destruction, of the property insured, and a payment of the full value insured, a payment of the total loss under that policy. Subsequently to that payment there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy; and the question, I apprehend, comes to be, was that sum or was it not paid so as to be a reduction or diminution of their loss? The cases which have been cited *Randal* v. *Cockran* (*ubi sup.*) and *Blaauwpot* v. *Da Costa* (*ubi sup.*), bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming into the hands of the English Government; and the King was pleased—for I think it clear that he was not bound—to say that half of that money should be applied to those who had suffered from the captures. It was certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the sufferers. But then I think that that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the King was bound to pay the money—he was not; it was not because there was a moral obligation to pay it; it was because, *de facto*, there was a payment which prevented, or diminished *pro tanto*, the loss against which the insurers were bound to indemnify the assured. There was a subsequent case, *Godsall* v. *Boldero* (9 East, 22) which has not been cited, which proceeded upon an error, and has since been reversed, where a person insured the life of Mr. Pitt, having no other interest in his life than as a creditor, which gave him an interest, and the House of Commons voted out of pure grace and favour a large sum of money to pay Mr. Pitt's debts, and the executors paid this debt. The insurance company set up a defence that this was a contract of indemnity, and that Mr. Pitt's debts having been paid there could not be a right to recover against them. Lord Ellenborough, C.J., falling into a blunder which has since been corrected, thought that the contract of life insurance was a contract of indemnity, and accordingly held that it was a good defence on the part of the insurance company. That decision stood until it was decided in the Exchequer Chamber, in the case of *Dalby* v. *India and London Life Insurance Company* (15 C. B. 365; 24 L. J. 2, C. P.) that it went altogether upon a mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort. But, if it had been a contract of indemnity, the grant of Parliament to pay Mr. Pitt's debts would have prevented the man from sustaining any loss by Mr. Pitt's death, and consequently the decision would have been right. I mention this merely to show that the question is not whether the money was voluntary paid or not, but whether *de facto* the money which was paid did reduce the loss.

In the present case the Government of the United States did not pay it with the intention of reducing the loss. Lord Coleridge, C.J. says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs, deprive a man suing

in this country of any right which he has. I quite agree in that, but I think that Lord Coleridge, if he had taken the same view that I do of the matter, might have seen that an Act of Congress of the United States might effectually prevent any such right arising. If once the right had vested to recover any such sum, of course an Act of Congress could not take it away; but when Congress in express terms says, "We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and a different purpose," it effectually prevents the right arising. Bramwell, L.J., in his judgment, has used the phrase, "It was not given as salvage." I should myself prefer to use my own phrase expressing the same idea, and to say that it was not paid in such a manner as to reduce the loss against which the plaintiff had to indemnify the defendants; it is the same thing, but rather differently expressed. That would, I think, dispose of the case, if it were not for a point which Mr. Butt has submitted, namely, that, because this was a valued policy of insurance, the value being put at 15,000*l.*, the defendants could never, under any circumstances as against the plaintiffs, set up the fact that the value of the property exceeded 15,000*l.* Upon the statement of that point it looks so artificial when applied to these facts that one might almost rest there, and say it cannot be. I think it is plain that the reasons for which the valuation has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether that principle was rightly applied in the case of *The North of England Insurance Association* v. *Armstrong* (*ubi sup.*) it is not necessary now to say. I own that, if I had a similar case to decide, I should pause before I said that it was rightly decided; but it is not at all necessary to consider that here. It is plain to my mind that the valuation being only for the purpose of the policy of insurance, and for the purpose of binding the defendants to admit it in favour of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had to indemnify them. The circumstances that by agreement between the parties the amount they had contracted to pay was not to exceed 15,000*l.* appears to me quite immaterial. For these reasons I agree that the judgment, as it stands, is right, and ought to be affirmed.

Lord WATSON.—My Lords: I have come to the same opinion upon this point, which is one of novelty, but not of great difficulty, and arises, I think, entirely upon the terms of the Act of Congress. If compensation had under that statute been awarded by the American Congress to the respondents in respect of their losses, then I take it that the same rule would be followed as was adopted by the courts in the two cases which have been referred to, *Randal* v. *Cockran* (*ubi sup.*) and *Blaauwpot* v. *Da Costa* (*ubi sup.*). In that case the money voted would have been received by the respondents towards indemnification for the loss against which they were insured; and, upon the principle that one who has been already indemnified against that loss must impart to those who have indemnified him any benefits which he subsequently obtains of that description, the appellant would have been entitled to judgment. But in this case the Act of Congress declares in very express terms, when you take the whole of sect. 12 together, in the first place, that no compensation is to be given by the commissioners on account of loss which has been insured against, or covered by insurance; and secondly, that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to the claimant must be given to compensate him for any loss either for want of insurance or from being under-insured. In the present case it is perfectly obvious from the statements made by the parties, upon which they agreed, that compensation was awarded to the respondents upon the second of these grounds, namely, in respect that the insurance which they effected fell short of protection against the whole loss which they sustained. It is conceded that compensation might be given to the respondents in these very terms and upon this footing by any benevolent individual, who, being under no obligation to give it, chose to indemnify the respondents; and it is conceded that in the event of his doing so no claim would lie to that money at the instance of the underwriters. Why the American Congress were not in a position to do the same I have not been able to understand, and I do not think that any cause whatever has been shown why they should not do so. Legal obligation is out of the question, but we have heard something about moral obligation. I do not understand what that means. I think that this fund was entirely at the disposal of the Legislature of the United States, that it was an act of grace on their part to assign it, and give it to either one or other of the losers by the act of the *Alabama*, and that in giving it as they have done they were attaching a condition to the gift which was not only entirely within their power, but which they might attach without violating any legal responsibility or moral obligation. These being my views, I entirely concur in the disposal of this case in the manner which is suggested.

Lord FITZGERALD.—My Lords: I concur in the judgment of the Lord Chancellor, and in the reasons he has expressed for that judgment. I adopt also his criticisms on the authorities cited, and his limitation to the rules which was contended for, viz., that on a valued policy the value agreed on was as between the parties conclusive under all circumstances and for all purposes, whether incidental to the contract or collateral and subsequent. The case presented itself to my mind thus: it is really the old action for money had and received. The plaintiff alleges that the defendant had received a sum of money, which in equity and good conscience he ought not to retain, but should pay over to the plaintiff. The defendant admits that he received the sum in controversy, but denys the plaintiff's equity. I have been wholly unable to discover on what this supposed equity rests. The United States Government might have done as it pleased with the whole sum, and when it was devoted to the purposes specified in the Act of Congress it may be regarded as a free gift for those purposes. The 12th section prohibits its application to such a claim as the plaintiffs. The defendant received the money under the Act of Congress, and the judgment of the American court,

to keep it for himself, not to pay it over to the plaintiff.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Waltons, Bubb,* and *Walton.*

Solicitors for the respondents, *Markby, Stewart,* and *Co.*

July 3, 4, 6, *and Aug.* 1, 1882.

(Before the LORD CHANCELLOR (Selborne), Earl CAIRNS, Lords O'HAGAN, BLACKBURN, WATSON, and FITZGERALD.)

GLYN, MILLS, AND CO. *v.* EAST AND WEST INDIA DOCK COMPANY.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading in parts—Tittle of indorsee—Liability of warehouseman to deliver—Merchant Shipping Act 1862, *ss.* 66-78.

A warehouseman with whom goods have been warehoused under the provisions of the Merchant Shipping Act 1862 (25 *&* 26 *Vict. c.* 63), *ss.* 66-78, *is in the same position as the shipowner or master, and is entitled to the same protection.*

If one of a set of bills of lading made in parts is produced to the master of a ship by the consignee or an indorsee, and the master has no notice or knowledge of any prior indorsement of one of the other parts, he is justified in delivering the goods upon the parts presented to him; but, if he has notice or knowledge of two conflicting claims, he must deliver to the rightful holder at his peril, or interplead.

Fearon *v.* Bowers (1 *H. Bl.* 364) *disapproved.*

C. and Co. were consignees of goods shipped under a bill of lading made out in three parts. They indorsed the first part to the appellants for valuable consideration, and upon the arrival of the ship the goods were warehoused with the respondents under the provisions of the Merchant Shipping Act 1862, *ss.* 66 *et seq., and entered at the customs by C. and Co. as owners. The respondents had no notice or knowledge of the title of the appellants. C. and Co. afterwards produced to the respondents the second part of the bill of lading, and required delivery of the goods upon orders signed by them as consignees.*

Held (*affirming the judgment of the court below*), *that the appellants could not maintain an action against the respondents for a conversion of the goods.*

Barber *v.* Meyerstein (*L. Rep.* 4 *H. L.* 317; 3 *Mar. Law Cas. O. S.* 449; 22 *L. T. Rep. N. S.* 808) *discussed and explained.*

THIS was an appeal from a decision of a majority of the Court of Appeal (Bramwell and Baggallay, L.JJ., Brett, L.J. dissenting), reported in 6 Q. B. Div. 475, 4 Asp. Mar. Law Cas. 345, and 53 L. T. Rep. N. S. 584, reversing a judgment of Field, J. in an action tried before him without a jury in Dec. 1879 (5 Q B. Div. 129; 4 Asp. Mar. Law Cas. 220; 42 L. T. Rep. N. S. 90).

The appellants, who were bankers in London, had advanced money to Messrs. Cottam, Morton, and Co. upon the security of a cargo of sugar, of which Cottam, Morton, and Co. were the consignees.

The bill of lading had been made in three parts, and Cottam, Morton, and Co. indorsed the first part to the appellants as agreed.

Upon the arrival of the ship the cargo was warehoused with the respondents under a stop-order for freight, in accordance with the provisions of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63). Cottam, Morton, and Co. were entered in the manifest as consignees of the cargo, and they handed to the respondents the second part of the bill of lading, and paid the freight. They afterwards gave a delivery order to a firm of Williams and Co., upon which the respondents delivered the sugar to them.

The respondents had no notice of the appellants' title.

The bank then commenced this action against the dock company to recover damages as for a conversion of the goods.

The facts, which were not disputed, appear more fully in the reports in the courts below.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Benjamin,* Q.C., and *Barnes* appeared for the appellants, and contended that the legal position of the appellants as the first indorsees was settled by the decision of the House of Lords in *Barber* v. *Meyerstein* (L. Rep. 4 H. L. 317; 3 Mar. Law Cas. O. S. 449; 22 L. T. Rep. N. S. 808). Messrs. Glyn had a right to the goods, and Cottam and Co. had no right to indorse to anyone else. Messrs. Glyn were the true holders of the bill of lading, and the indorsement of the other part would not make the indorsee "holder" in the legal sense. Under the provisions of the Merchant Shipping Act 1862 the respondents held the goods for the ship till the freight was paid, and then for the "owner"—that is, for Messrs. Glyn and Co. The shipowner would not be discharged until he had delivered to the true owner in accordance with the bill of lading, and the warehouseman must be in the same position. The Bills of Lading Act (18 & 19 Vict. c, 111) shows that Glyn and Co. might have been sued for the freight. [Lord BLACKBURN referred to *Watts* v. *Ognell,* Cro. Jac. 192.] The question arose in the case of *Fearon* v. *Bowers* (1 H. Bl. 364); but that decision, which was approved in *Lickbarrow* v. *Mason* (1 H. Bl. 357; 1 Sm. L. C.) and in *The Tigress* (32 L. J. 97, P. M. & A.; 1 Mar. Law Cas. O. S. 117; 8 L. T. Rep. N. S. 117; Brow. & Lush. 38), goes too far to be maintained at the present day, and the point is so far without any authority. The shipowner is bound to deliver according to his contract, under which all rights and liabilities had passed to the appellants. The word "accomplished" in the bill of lading must mean "rightly accomplished," and if the dock company deliver to the wrong person they must be liable. As soon as the freight was paid and the stop taken off the contract of affreightment was dead, and the dock company held subject to the orders of the "holders of the bill of lading;" and they have delivered to persons who were not holders in law. They did not receive the goods as bailees of Cottam and Co., but held for the owner subject to the shipowner's lien for freight. See *Hollins* v. *Fowler* (L. Rep. 7 H. L. 757; 33 L. T. Rep. N. S. 73) and the cases there cited. [The LORD CHANCELLOR referred to *Gurney* v. *Behrends,* 3 E. &. B. 363.] A bill of lading is a document of title, the transfer of which transfers the contract. They also cited

Re Westzinthus, 5 B. & Ad. 817;
Townsend v. *Inglis,* Holt. N. P. 278;
Knowles v. *Horsfall,* 5 B. & Ald. 134.

Sir *H. Giffard*, Q.C., *Cohen*, Q.C., and *Pollard*, for the respondents, maintained that the judgment of the court below was right. The goods were delivered to the respondents as bailees for Cottam, Morton, and Co., and were held for them with no notice of any other title whatever. Therefore, under the circumstances, the respondents were justified in delivering to the order of Messrs. Cottam, Morton, and Co., and such delivery was not a conversion. They referred to

Mills v. *Ball*, 2 B. & P. 461;
Jones v. *Smith*, 1 Hare, 43.

The *Solicitor-General* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 1.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: Having had the advantage of seeing in print the opinion of my noble and learned friend, Lord Blackburn, on this case, with which I agree, I shall content myself with making a very few observations. Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner, therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that "the one of those bills being accomplished, the others are to stand void." It would be neither reasonable or equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bonâ fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case, when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice, indeed, that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to inquire whether there has in fact been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such inquiry. This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those of your Lordships' House in *Shaw* v. *Foster* (L. Rep. 5 H of L. 321; 27 L. T. Rep. N. S. 281) and *London and County Bank* v. *Ratcliffe* (6 App. Cas. 722; 45 L. T. Rep. N. S. 322). It was admitted in the argument at the bar that the right of the shipowner to deliver to the first person who claimed it by virtue of an indorsed bill of lading (the shipowner having no notice of any better title) could not be denied, although such person might not, in fact (if there had been a prior indorsement of another part of the bill of lading to another person for valuable consideration), have the legal title to the goods. It is clear, therefore, that the shipowner may be discharged by a *bonâ fide* delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when the part of the bill of lading on which he makes a like *bonâ fide* delivery is not indorsed. I have spoken of the "shipowner" throughout, because, in my opinion, the position of the dock company, for the purposes of the present question, is not in any respect different from that of the shipowner. The appeal, therefore, ought, in my opinion, to be dismissed, with costs.

Earl CAIRNS.—My Lords: I also am of opinion that this appeal must fail. There is no necessity for going at length into any of the facts of the case, for on the facts there has really been no dispute; but I think it is desirable to state at the outset that the opinion which I have formed is that the respondents are under no higher liability in this case than the shipowner himself would have been, and on the other hand that they are not under any lower or less liability, and that the case may be looked upon, in a general point of view, as if the delivery had here been, not by the dock company, but by the shipowner himself. I think that that is satisfactory, because the opinion which your Lordships will express will be an opinion applicable generally to the case of shipowners, and will not be founded upon any special circumstances connected with the present case. So also, it appears to me that neither the appellants nor the respondents in this case can be said to be guilty of any lâches whatever, much less of any want of good faith. There was no lâches in law on either side, nor was there any bad faith. It is quite clear that Cottam, Morton, and Co. produced to the dock company, whom I will suppose to be the shipowner, one part of the bill of lading, and on the production of that part of the bill of lading the delivery of the goods took place. Then, that leads me to consider what is the position, with regard to a bill of lading of this kind, of a shipowner at an out-port? A shipowner or his agent at a distant port undertakes to carry certain goods; he receives the goods upon a contract of affreightment; he, or the captain, his servant, the master of the ship, gives a bill of lading. I will suppose, in the first place, that he gives a bill of lading consisting of only one part. Now the contract in a bill of lading of that kind is, that the shipowner will deliver to the consignee, or to his order, or to his assigns, the goods which are undertaken to be carried. Of course, in a contract of that kind, it is obvious that questions of some difficulty and some embarrassment may arise. The assumption is that the person who ships the goods, or the consignee, will not necessarily be the person to whom the delivery is to be made. The delivery is to be made to him or, in the alternative, to his order or to his assigns. Questions, it is obvious, therefore, may arise: Has the consignee ordered the delivery to be made to any person else? Has he assigned the contract or the property in the goods? If he has, to whom

has he assigned it? Are there more assigns than one, and, if so, in what order of assignment do they stand? Now, if there were only one part of the bill of lading, the process, as it appears to me, would be an extremely simple one. The bill of lading would be the title deed, and whoever came to the shipowner, or to the master of the ship, and demanded delivery of the goods, in whatever right he claimed, whether he claimed as the original consignee, or whether he claimed as a person coming by order of the consignee, or whether he claimed as the assign of the contract or of the property, in any of those cases all that the master of the ship (who is not a lawyer, and has not, perhaps, a lawyer at his side) would have to say is, "Where is your title deed? Produce your title deed." If he had not a title deed, the master would be entitled to say, "I will not deliver these goods to you." If, on the other hand, he had the bill of lading, and if there was no fraud, and no notice of any different title brought home to the master, all that the master would have to do would be to deliver to the person having that title deed, and then he would be free from any responsibility. But the confusion, the difficulty, and embarrassment have arisen from there not being what I have supposed, one title deed, but there being more than one, in this case three parts of the title deed, that is to say, of the bill of lading. Now, I ask the question, For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to enquire whether to them it is a benefit, or whether at this time of day (many of the reasons, if not all the reasons, for having bills of lading in parts being very much modified) it would not be better for every one that there should be only one part; that is a question for the mercantile world to consider. It is quite sufficient for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading. Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which, as it appears to me, he does protect himself is by stating that, although "the master or purser" hath affirmed to three bills of lading," that is to say, has signed three bills of lading, "all of the same tenor and date," yet, notwithstanding that fact, "one of those bills of lading being accomplished, the others shall stand void," which I understand to mean, that if upon one of them the shipowner acts in good faith, he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others. If one is produced to him in good faith, he is to act upon that and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced.

I put it to the learned counsel who argued the case whether he could suggest any other explanation of these words which would give them a rational meaning, but I could not learn from the bar that there was any other explanation that could be suggested. Then that being the case, there has occurred here exactly one of those instances in which the shipowner requires protection. He has had one of these bills of lading produced to him. I use the term "shipowner" because for this purpose I assume that the dock company is in the position of the shipowner. He has had in good faith one of the parts of the bill of lading presented to him; he has had no notice of any title of variance with that; he has acted upon the bill of lading so produced, and it appears to me that if he, or those who stand in his place, is not to be protected, the final clause might as well be struck out of the bill of lading. Now, it is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading that it has been signed in more parts than one, will be to require that all the parts are brought in; that is to say, that all the title deeds are brought in. I know that that is the practice with regard to other title deeds; and it strikes me with some surprise that anyone would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert, and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that, if they suffer, they suffer in consequence of their own act. Whether that be so or not, it seems to me that in this case the dock company, standing in the position of the shipowner, require to be protected, that they have done that which it was their positive duty to do, and that the judgment of the court below ought to be affirmed.

Lord O'HAGAN.—My Lords: I also have had the advantage of reading the opinion of my noble and learned friend (Lord Blackburn), and its exposition of the law presents the view which, after serious consideration, I have adopted in common, I believe, with all your Lordships. I cannot say that I have not had some hesitation in the adoption of it. The conflict of decision between able judges of equal authority and equally divided, the diversities of reasoning even between those who in the result have agreed, the want of any recent evidence as to the usages of commercial men in these countries with reference to bills of lading, and especially such dealings with them as are the subject of our consideration, made me doubtful for a time; but I am satisfied upon the whole that the ruling of the Appellate Court was right, and ought to be upheld. The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created and the duties imposed by it; and amongst them was the obligation to deliver them to such person or

persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the shipowner or the master. On the payment of the freight, and the removal of the stop-order, it seems to me that they were bound as he would have been to deliver them to the person making presentment of the bill of lading. I think, in the absence of express decision, the weight of authority having relation to it sustains the judgment of the court below; I think that usage, as far as we have any means of ascertaining it, is inconsistent with the plaintiffs' claim, and I think, finally, that principle and policy and the necessities of mercantile affairs are quite in favour of the action of the defendants. As to authority, there is none which deals with the precise state of facts before us. The case of *Fearon* v. *Bowers* (*ubi sup.*) was different from this, as there the person yielding up the goods was the captain of the vessel, and not the warehouseman, and he had to choose between two claimants—the consignee and the indorsee—whereas there was only one claimant known to the defendants, and they had had no notice of any other. I concur in the view of Lord Tenterden, that the law should not commit a discretion to the captain of a ship so unreasonably large and so capable of being put to evil uses. But that case could scarcely have been entertained at all, if the lesser power to hand goods to the holder of a bill of lading, *bonâ fide* and without knowledge of any adverse title, had not been assumed to be warranted by usage and by law. I do not think the approval of that case in *Lickbarrow* v. *Mason* (*ubi sup.*) by Lord Loughborough and Buller, J. can be held to have established it in all its dangerous extent. The circumstances they were considering do not necessitate the minute examination or the complete rejection or adoption of its doctrine. But this, at least, may be said that, unless the holder of a bill of lading was then understood to be entitled to receive the goods of which it guaranteed the delivery, we can scarcely conceive that the larger proposition would not have been at once repudiated. And in the case of *The Tigress* (*ubi sup*) before Dr. Lushington, when he refers to the case of *Fearon* v. *Bowers*, he does not expressly adopt it, in its fulness, as he did not need to do for the purpose of his judgment, but confined himself to approval of it so far as may be applied in the conditions of that before us. He says of *Fearon* v. *Bowers*: "This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of his bill of lading. It is clear, therefore, that the master would at least have been justified in delivering to the plaintiffs, as holders of the first bill of lading presented, and it must be remembered that the bills of lading contain a proviso that, the first being accomplished, the others shall stand void."

Plainly, Dr. Lushington considered the first presentment sufficient to entitle the holder to the delivery of the goods, and held that the delivery on such presentment was the "accomplishment" within the proper meaning of the instrument on which the others should "stand void." And accordingly the case is simply headed, "A master is justified in delivering the goods to the holder of the first bill of lading presented," which is the case of the defendants, who stand in the master's place. It seems to me that, taking these cases together, they constitute a reasonable body of authority in support of the judgment of the court below. Then as to the practice in such matters, we have no parol testimony about it, nor any proof at the particular trial of this case; but we have the statement of Lee. C.J., a long time ago, that a usage existed then which would have fully warranted the course of the defendants; we have his direction of a verdict founded on the proof of it; we have Lord Tenterden suggesting the limitation of the rule so acted on by the Chief Justice, but not denying its existence or disapproving of it, save as to its excessive operation; and we have the uncontradicted assertion of a living judge of great experience in mercantile cases, that it is still the "undoubted practice" to deliver, "without inquiry," to the holder of a bill of lading. And lastly, that principle and policy are in favour of such a practice appears to me reasonably plain, when we consider how impossible it would be for a master in a multitude of cases to institute satisfactory inquiry as to the transactions, *dehors* the part produced to him, which might qualify or destroy the right to the possession of the goods. The fact that so very few complaints of misdelivery are recorded during a century and more, either on the score of error or of fraud, demonstrates how little practical evil has come of the usage; whilst, if it had not prevailed, the prompt and unfettered action required by the needs of commerce might have been much restrained in very many instances. It is always painful to decide, when the decision must necessarily injure one of two blameless parties; but in this case the plaintiffs, who had the property which secured the advance undoubtedly vested in them by the indorsement of the bill of lading, have never lost their title to that property or the right to recover it, if wrongfully taken from them. If they had acted as the bank did in *Barker* v. *Meyerstein* (*ubi sup.*), there could have been no risk of loss. They might have taken other precautions (such as getting all the three parts of the bill of lading) with a like result, and they are not now precluded from seeking redress from anyone who may have illegally obtained possession of their goods. But the defendants who have done nothing *malâ fide* who have acted, as I conceive, according to usage and within their right, should not be made answerable for an error, for the consequences of which they are not, in my opinion, legally or morally responsible. I think that the appeal should be dismissed with costs.

Lord BLACKBURN.—My Lords: This is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts. There is, since the decision of *Lickbarrow* v. *Mason* (*ubi sup.*) now nearly 100 years ago, no doubt that, before there was any statute effecting the matter, the bill of lading was a transferable document of title, at least to the extent, as was said by Lord Hatherley, L.C. in *Barber* v. *Meyerstein* (*ubi sup.*) that, "when the vessel is at sea and the cargo has not arrived, the parting with the bill of lading is the parting with that which is the symbol of property, and for the purpose of conveying a right and interest in the property is the property itself." The very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had; and the consequence of making a document of title in parts is, that it is possible

that one part may come into the hands of one person who *bonâ fide* gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee, or pawnee, and another part may come into the hands of another person who, with equal *bonâ fides*, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen unless there is a fraud on the part of those who pass the two parts to different persons, such as would bring them within the grasp of the criminal law, and, from the nature of the transaction, such a fraud must speedily be detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our courts where the rights of the two holders have had to be considered. The last of those was *Barber* v. *Meyerstein* (*ubi sup.*), in this House; and, so far as that decision extends, the law must be taken to be settled. I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only, which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as might be thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues it is of vast importance not to unsettle the principles which have been already settled, and when a new case has to be decided it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear in many respects a close resemblance to those in *Barber* v. *Meyerstein* (*ubi sup.*), but they are not quite the same; and the question on the solution of which, in my opinion, the decision in the present case ought to depend, did not arise in *Barber* v. *Meyerstein*, though Lord Westbury did in that case mention it when he says: "There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property, and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party; but, although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods." That point did not arise, and Lord Westbury did not express any opinion on it. He only mentions it, so as to show that it was not decided either way. In the present case Cottam and Co., on the 15th May 1878, applied in writing to Glyn and Co., bankers in London, for an advance on the security of certain bills of lading. From the terms of the application, it is plain that the bankers were to have a property, with a power of sale, in the goods represented by the bills of lading so far as was necessary to secure their advance, and that, subject thereto, Cottam and Co. were to remain owners of all the rest of the interest in the goods, and might do, as owners, everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by Brett, L J.—I mean, whether the property which the bankers were to have was the whole legal property in the goods, Cottam's interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam and Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowners' lien, and were entitled to maintain an action against anyone who without justification or legal excuse deprived them of that right. Cottam and Co. delivered to the bankers, as part of their security, a bill of lading for twenty hogsheads of sugar by the *Mary Jones*, shipped by Elliot, in Jamaica, deliverable to Cottam and Co., or to their assigns, indorsed in blank by Cottam and Co. This bill of lading bore on the face of it, distinctly printed, the word "first," and at the end had the usual clause, "In witness whereof the master of the ship hath affirmed three bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void." There could be no doubt, therefore, that the bankers had distinct notice that there were two other parts of the bill of lading. It appears in *Barber* v. *Meyerstein*, that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had insisted upon having all three parts of the bill of lading delivered to them, and so no doubt might Glyn and Co. have done here; but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty, and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud than the risk of offending a good customer by making inquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this may be, it appears that Glyn and Co. made no inquiry, and were content to take the one part; and as, in fact, neither of the other parts had been transferred, the security which Glyn and Co. had was not impeached by such a prior transfer, and as the *Mary Jones* was then at sea, the question mainly discussed in *Barber* v. *Meyerstein* does not arise in this case. The *Mary Jones* arrived on the 27th May, and next day the master reported her at the Customs, and the goods were there, for Customs purposes, entered by Cottam and Co. as owners. All this was quite right and did not require the production of any bill of lading; it could and ought to have been done as well as if the other parts of the bill of lading had been delivered to Glyn and Co. or had remained locked up in the desk of the shipper,

Elliott in Jamaica. The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Act, 1862. secs. 66 to 78. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after the report of the ship, which would not in this case be till the 31st May. But the master, apparently being in a hurry, on the 28th May prepared and signed a notice to the East and West India Docks to "detain all the undermentioned goods which shall be landed in your docks now on board the ship *Mary Jones*, from Jamaica, whereof I am master, until the freight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to receive the directions of James Shepherd and Co. The whole cargo as per bills of lading. This stop was lodged with the dock company on the 29th May, The dock company, it appeared, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest, and in this case the copy manifest was signed and lodged on the 28th May. It is not necessary to inquire what would have happened if before the seventy-two hours had expired a duly authorised person had tendered the freight and demanded delivery, for no such thing occurred; and I think as soon as the seventy-two hours had elapsed the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then. The counsel for the respondents wished your Lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam and Co. were a party. I do not see any evidence of this; and, looking at the manner in which the admissions were made so as to apply not only to the *Mary Jones*, but to two other ships mentioned in the 6th and 11th paragraphs of the statement of defence, I should, if necessary, draw the inference that it was not the fact. Then, on the 31st May, on which day the seventy-two hours had expired, Cottam and Co. brought down and showed to the dock company a bill of lading, with the word "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn and Co. It was not indorsed. The clerk of the dock company entered in the books of the company that Cottam and Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to show that he had seen it and returned it to Cottam and Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the stop for freight was removed to the order of Cottam and Co., unless, in the meantime, they had got notice that another bill of lading was, as the witness says, out. It appeared in *Barber* v. *Meyerstein* that in the case of Abraham, whose honesty they seem to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn and Co. have done in the present case. They did not do so; and the stop for freight having been removed, the dock company, though not till the month of July, delivered the goods to the order of Cottam and Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been indorsed to Glyn and Co., but having from the form of the bill itself noticed that there were two other bills of lading, either of which Cottam and Co. if dishonest enough, might have indorsed and delivered for value to some other party.

The real question, I think, is, whether the dock company were, under such circumstances, justified in or rather excused for delivering to Cottam and Co.'s order, though, if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn and Co., it would have been a mis-delivery, for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by the statute to deliver them to the person to whom the shipowner was bound to deliver them; and, as I think, they were justified or rather excused by anything which would have justified or excused the master in so delivering them. So that, I think, the very point which has to be decided is that raised by Lord Westbury—viz., what will excuse or justify the master in delivering. The case of *Barber* v. *Meyerstein* settles that the mere fact there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bill of lading were left in the hands of the mortgagor or pledgor in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors Acts have a good title; but there is not in this case, any more than there was in *Barber* v. *Meyerstein*, any evidence to raise such a question. But the master is not in the position of a purchaser from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading, in this case Cottam and Co., or their assigns; that is, assigns of the bill of lading, not assigns of the goods; and I quite assent to what was said in the argument that this means to Cottam and Co. if they have not assigned the bill of lading, or to the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam and Co. on their producing the bill of lading unindorsed, he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by Cottam and Co. He would not fulfil his contract if he delivered them to anyone else, though, if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.

But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished, the others to stand void. In *Fearon* v. *Bowers* (*ubi sup.*), decided in 1753, Lee, C.J, is reported to have ruled "that it appeared by the evidence that according to the usage of

trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." Lord Tenterden says (I quote from the fifth edition, the last published in his lifetime, part 3, chap. ix., sect. 24), "But perhaps this rule might, upon further consideration, be held to put too much power in the master's hands." It is singular enough that 129 years should have elapsed without its having been necessary for any court to say whether this rule was good law. It was suggested on the argument with great plausibility that, especially after the caution given immediately after the passage I have read in Abbott on Shipping, part 3, chap. ix., sect. 25, masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow *a fortiori* that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by Lord Tenterden; it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder, or interplead. But where the person who produces a bill of lading is one who—either as being the person named in the bill of lading which is not indorsed or as actually holding an indorsed bill—would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to someone else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts. It is not merely that as Bramwell, L.J. says: "It is the undoubted practice to deliver without inquiry to anyone who produces a bill of lading"—*i.e.*, when no other is brought forward—and that the evidence given in *Fearon* v. *Bowers* must have proved that much, though it seems also to have proved more; but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part. I cannot say on this anything in addition to what Baggallay, L.J. says, and I quite assent to his reasoning. I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this contract if he *bond fide*, and without notice or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading designating him—either as being the person named in the bill if it has not been indorsed, or if there be a genuine indorsement as being the assign—as the person to whom the goods are to be delivered. In that case, as against the owner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I. in *Watts* v. *Ognell* (Cro. Jac. 192). "That depends," says Willes, J. in *De Nicholls* v. *Saunders* (L. Rep. 5 C. P. 589; 22 L. T. Rep. N. S. 661)), "upon a rule of general jurisprudence, not confined to *choses in action*, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and, without notice of any assignment, fulfils it to the person with whom he made the contract, he is discharged from the obligation." The equity of this is obvious. It was acted upon in *Townsend* v. *Inglis* (*ubi sup.*), where goods lodged in the docks by Reid and Co. were by them sold to Townsend, and a delivery order was given by Reid and Co. to Townsend. Townsend paid for the goods to Reid and Co.'s brokers, who misappropriated the money. Then Reid and Co. countermanded the order and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reid and Co. and the dock company. Gibbs, C.J., a very great commercial lawyer, left to the jury the question as to whether Townsend was, on the evidence as to previous dealings, justified in paying the broker, which the jury found he was, and the plaintiff had a verdict against Reid and Co.; but he directed a verdict for the dock company, saying: "Though the skins were the property of the plaintiffs from the completion of the bargain, the company had made no transfer, and had no notice of their possessory title when they delivered the skins to Reid and Co." In *Knowles* v. *Horsfall* (*ubi sup.*) Abbott, C.J. treats this as indisputable. Goods, parts of which were in a warehouse, had been sold by Dixon to the plaintiff. Abbott, C.J. says as to the parcel in the warehouse: "If the plaintiffs had given notice of the sale to the warehouse keeper, the latter would not have been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there." I know of no case in which this principle has been departed from intentionally and though it is very likely that it may have been sometimes lost sight of, I do not know to what cases Willes, J. alludes. The sum involved in this case is not large, but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous, Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is therefore of great importance, and requires careful consideration; and that being so, I have felt some diffidence in differing from the two learned judges who had below come to a different result. Field, J. seems to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord Westbury did not arise. Brett, L.J. thinks that the master cannot be excused as against the first assignee of one part of the bill, who has the legal right to the property, for delivering under any circumstances to one who produces another bill of lading bearing

a genuine indorsement, unless he would be excused in all circumstances — in other words, unless *Fearon* v. *Bowers* is good law to its full extent. In this I cannot agree. I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong; and I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe in such a case in delivering without further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him. I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Act 1862, sects. 66-78, is under an obligation cast upon him by the statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master; and I find as a fact that this was the position of the respondents here. On this *ratio decidendi* I think that the appeal should be dismissed with costs.

Lord WATSON.—My Lords: I am of the same opinion. It appears to me that the goods in question were placed in the custody of the respondents under the provisions of the Merchant Shipping Act of 1862; and I agree with your Lordships that, in the circumstances of this case, the duty of the dock company, in regard to their delivery, differed in no respect from that of the shipowner. The nature and extent of the obligation undertaken by the shipowner to deliver the goods at the end of the voyage must depend upon the terms of the bills of lading, which contain his contract with the shipper; and every assignee of a bill of lading has notice of, and must be bound by, those stipulations, which have been introduced into the contract, for his own protection, by the shipowner. In the present case the master, for the convenience of the shipper, subscribed to three bills of lading of the same tenor and date, by which he undertook to deliver the goods at the port of London, to Cottam and Co. and their assigns, and each bill of lading bore the usual affirmation by the master that he had signed three in all, "the one of which bills being accomplished, the others to stand void." That is a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter, after he has delivered the goods upon one of the bills of lading, against subsequent demands for delivery, at the instance of the holders of the other bills of the set, It is, in my opinion, inconsistent with any reasonable construction of the stipulation, that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because in that case it would give him no protection. The stipulation can have no intelligible meaning or effect, if it does not under some circumstances enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has by virtue of it, the right of property in the goods. On the other hand, it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to affect the rights *inter se* of the holders of the bills of lading. That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the bills of lading, although it does not represent the property of the goods, with this qualification, that *bonâ fides* being an implied term in every mercantile contract, the delivery must be made in good faith, and without knowledge or notice of any right or claim preferable to that of the person to whom he so delivers.

Lord FITZGERALD.—My Lords: I also have had the advantage of reading the judgment of the noble and learned Lord (Lord Blackburn). I had previously arrived at the same result, though not entirely on the same grounds, and I concur in the decision which has now been announced. I entirely concur in the condemnation of the law laid down in *Fearon* v. *Bowers* (*ubi sup.*) (if it was so laid down there), that in case of presentation to the captain of two or more parts of the bill of lading by parties claiming to be holders, and adversely to each other, the captain was not bound to look into the merits of the particular claims, but had a right to deliver to which of the claimants he thought proper. Such a rule would go far to enable the captain to violate his contract and his duty, and to "accomplish" his obligation by delivery to one whom he may have had reason to believe was not the real owner of the goods. Before the close of the argument, Earl Cairns suggested for your Lordships' consideration that the practice of having so many parts of the bill of lading all in the nature of originals was introduced for some purpose of convenience to the consignor or consignee, and that the concluding passage, "the one of which being accomplished, the others to stand void," was probably intended for the protection of the shipowner. He further suggested that, in carrying into effect that object, the true interpretation should be that if the master, acting in entire good faith, delivered the cargo on one part of the bill of lading either to the consignee named in it as such, or to an indorsee of one part, he would have "accomplished" the bill of lading so far as it is a contract for carriage and delivery, and be protected, even though another part of the bill of lading should prove to be outstanding in the hands of a prior indorsee for value, but of which the master had no notice. It is singular that on this point there seems to have been hitherto no direct decision, though the present form of bills of lading has been in use, and the practice of having several parts of the bill of lading has been followed, for considerably more than a century. In *Fearon* v. *Bowers*, tried in 1753, there were three parts and the same form, and in *Wright* v. *Campbell* (4 Burr. 2046), in 1767, there were two parts, and the form the same. *Fearon* v. *Bowers* may be considered to bear on the question of construction, for Lee, C.J. is there represented to have said' "All the captain had to do was to deliver on one of the bills of lading."

In the absence of any authority to the contrary, I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery, the noble and learned Earl suggested the true interpretation of "one of which being accomplished, the others to stand void." I should have had some difficulty in assenting to the proposition, either generally or as applicable to this particular case, that a delivery which, if made by the master, would justify or excuse him, would equally justify or excuse the warehouseman. The position of the warehouseman when the stop-order had been removed seems to me to be different, and possibly his liability more extensive. If we had to determine that question, it would be necessary to consider carefully the position of the warehouseman, and to have regard to the Merchant Shipping Amendment Act (25 and 26 Vict. c. 63, sects. 67 to 75), and in this particular case to his obligation under the memorandum at the foot of the manifest. I refrain from pursuing this topic further, as I do not consider it to be a necessary part of your Lordships' decision, nor does it, in my opinion, affect the result. A loss has been sustained by the wrongful act of Cottam and Co., which must be ultimately borne by one of three parties. Williams and Co. are not before us, and I say nothing as to whether or not they may be ultimately subject to any liability; but as between the plaintiffs and the defendants in this suit, it seems to me that the plaintiffs, who, by their omissions and want of proper caution, and by their misplaced confidence in Cottam and Co., have enabled Cottam and Co. to commit that wrong, ought, in reason and justice, to bear the loss. The plaintiffs omitted to get up from Cottam and Co. the second and third parts of the bill of lading, or to make any inquiry about them. They were not bound to do so, nor did that omission affect their legal title, but it left them open to a risk from which they are now to suffer loss. The insecurity created by that omission might have been ratified by notice of their title to the master, or by notice to the defendants at any time before the actual delivery to William and Co. The plaintiffs used no proper caution, and took no action of any kind in relation to the goods until after the misdelivery to Williams and Co., and the discovery of the insolvency of Cottam and Co.; and if we could put the question to them, "Why did you pursue so incautious a course?" their reply probably would be, "We trusted to the integrity of Cottam and Co., and we left the entry and warehousing of the goods, the payment of freight, and all matters of detail to Cottam and Co."

It cannot be truly said that, as between the plaintiffs and defendants, the plaintiffs are innocent sufferers by the act of a third party. The result has been the misdelivery of the goods, which the plaintiffs charge as an act of wrong by the defendants, rendering them liable in this suit. Having regard to the plaintiffs' legal title, it was no doubt a misdelivery; but the defendants are excused by law from the consequences of an error into which they have been led by the plaintiffs. In *Lickbarrow* v. *Mason*, Buller, J., in delivering his opinion in this House, observes "that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible," and I may amplify his language by interpolating after "property" the words "and the advance and security of capital." It will be observed that, in this present decision of your Lordships, nothing has been expressed adverse to that proposition. We give full effect of the bill of lading as a symbol of title to the property comprised in it, and to its indorsement as a transfer of that title as full and effectual as if accompanied by a delivery of actual possession. We do no more than lay down a rule of construction, and apply a well-established principle of law, to this particular case, and we hope it may serve as a landmark for the future.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors: for the appellants, *Murray, Hutchins,* and *Stirling*; for the respondents, *Freshfields* and *Williams.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

Nov. 21 *and* 24, 1882.

(Before BAGGALLAY, BRETT, and LINDLEY, L.JJ.)

KAY *v.* FIELD AND CO.

Charter-party—Exceptions—Detention by frost—Customary manner of loading—Demurrage.

It was agreed by charter-party that the plaintiffs' ship should "proceed to Cardiff East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron; the cargo to be loaded as fast as steamer can take on board, and stow within the customary working hours of the port, commencing when the steamer is in berth and ready to load. If longer detained, merchants to pay steamer 30l. per day demurrage. Detention by frost, &c., not to be reckoned as lay days."

The ship was intended to be loaded with C. and Co.'s iron, though this fact was unknown to the plaintiff when the charter-party was made. C. and Co.'s wharf is some distance from the East Bute Dock, situated upon a canal which leads into the West Bute Dock; and their customary manner of loading was to bring rail iron from their wharf in lighters into the West Bute Dock, and thence into the East Bute Dock. All other makers of rail iron, of whom there were about six at Cardiff, have wharves on one or other of the two docks, and load vessels either directly from the quay, when they are alongside, or by lighters within the dock. The ship arrived in the East Bute Dock, and loading was commenced, but was interrupted for sixteen days by reason of a severe frost, which prevented the lighters coming down the canal from C. and Co.'s wharf to the West Bute Dock, the docks themselves being free from ice.

Held, in an action to recover demurrage for the sixteen days' detention, that the defendants were not protected by the exception in the charter-party as to detention by frost.

The decision of Pollock, B. reversed.

THE action was brought to recover sixteen days'

demurrage for detention of the plaintiffs' steamship *Cid*.

At the trial at Swansea Summer Assizes 1881, Pollock, B. referred all questions of fact in the cause to a special referee. The material facts stated in the report were as follows:—

By a charter-party made the 18th Dec. 1880, it was agreed between the plaintiffs and the defendants that the plaintiff's steamer *Cid* should "proceed to Cardiff East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron. The cargo to be loaded as fast as steamer can take on board and stow within the customary working hours of the port, commencing when steamer is in berth and ready to load. Detention by frost, floods . . . . not to be reckoned as lay days."

There are two docks at Cardiff, the East Bute Dock and the West Bute Dock, connected by a canal with locks at both ends. The West Bute Dock is also connected by a junction canal with the Glamorganshire canal.

Iron rails shipped at Cardiff are almost entirely manufactured by some five or six makers having their works at some distance from Cardiff, Messrs. Crawshay and Co. being one of such makers. With the exception of Crawshay and Co. all the manufacturers rent wharves or quays in the docks themselves for their own exclusive use, some of them in the East Bute Dock and some in the West Bute Dock. Crawshay and Co., who manufactured their rails about twenty-four miles from Cardiff, have no exclusive wharf on either dock, but they have a wharf on the Glamorganshire canal nearly opposite the junction canal leading from the Glamorganshire canal to the West Bute Dock.

There are in the docks berths alongside the dock quays which are open to the public on application to the dock authorities. Vessels are also moored in tiers in the dock basins for the purpose of being loaded with rails and other cargo from lighters brought alongside. A railway runs along the quays round both docks. Large steamers cannot go into the West Bute Dock, and shippers having wharves in that dock send their iron by lighters into East Bute Docks to load vessels that may be in that dock. Crawshay and Co. forward their iron from their wharf in lighters to vessels in the East Bute Dock, and the vessels are moored at the top of that dock for the purpose of receiving Crawshay and Co.'s cargo from their canal wharf. The *Cid* was in fact to be loaded with rail iron supplied by Crawshay and Co., but there is no evidence that the shipowner was aware of this when he entered into the charter party, or that he knew of the custom of the port of Cardiff, or of the way in which Crawshay and Co. conducted their business.

On the 8th Jan. 1881, in anticipation of the *Cid's* arrival, the whole of the iron intended for her had been sent down from the works to the wharf. The *Cid* arrived at Cardiff on the 11th Jan., and was berthed at the top of the East Bute Dock, and the master that day gave notice to Crawshay and Co. of the steamers arrival, and that she was ready to receive her cargo. Lighters loaded with the *Cid's* iron arrived at the East Bute Dock on the evening of the 11th Jan. The loading commenced on the 12th Jan., and was continued till the 15th Jan.

From the 16th Jan. to the 31st Jan. all the usual approaches from Crawshay and Co.'s wharf to the docks were impassable, and the loading was wholly discontinued. Demurrage was claimed under the charter-party in respect of this period. During all the time the docks themselves were not frozen. Steamers and lighters could move about, and vessels could go out to sea, but no reasonable means could have been adopted to convey the iron from the wharf into the dock, neither could any marketable railway iron have been obtained from any other source. The referee found that every exertion was made to forward the iron, and had it not been for the frost the vessel would have been loaded, according to the custom of the port, within a reasonable time.

Upon these facts as found by the referee the learned judge gave judgment for the defendants. The plaintiffs appealed.

Sir *F. Herschell* (S.G.), and *Brynmôr Jones* (with them *McIntyre*, Q.C.), for the appellants, cited

Hudson v. *Eade*, 18 L. T. Rep. N. S. 764; 3 Mar. Law Cas. O. S. 114; L. Rep. 2, Q. B. 566; 3 Q. B. 412;
Kearon v. *Pearson*, 7 H. & N. 386;
Lawson v. *Burness*, 1 H. & C. 396;
Tapscott v. *Balfour*, 27 L. T. Rep. N. S 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 41;
Commercial Steamship Company v. *Boulton* 3 Asp. Mar. Law Cas. 111; 33 L. T. Rep. N. S. 707; L. Rep. 10 Q. B. 346.

Butt, Q.C., and *Channell* (with them *Dillwyn*) for the defendants.

Baggallay, L.J.—In this case the plaintiffs' claim is for demurrage for delay in loading the plaintiffs' vessel. By the terms of the charter-party the steamer *Cid* is to proceed to Cardiff East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of iron rails, "the cargo to be loaded as fast as steamer can take on board and stow within the customary working hours of the port, (Sundays and holidays excepted), commencing when the steamer is in berth and ready to load." The charty-party contains also the following proviso, "Detention by frost, floods, riots, and strikes of workmen, accidents to machinery, or quarantine, not to be reckoned as lay days." Now the steamer was in fact ready to load on Jan. 11, 1881, and the loading was completed on Feb. 2, 1881; the interval between these two dates is twenty-two days, and inasmuch as six days would have sufficed to load the vessel if the work had proceeded regularly, the plaintiffs claim demurrage for sixteen days at the rate of 30*l.* a day, the rate agreed upon in the charter-party. The defence was that there had been a frost, that the delay in loading was caused thereby within the meaning of the exception in the charter-party, and the defendants claimed the benefit of that exception. The question then turns upon the construction of the charter-party. The Solicitor-General contends that the detention to which the charter party applies is a detention from some cause which happens after the vessel begins to load, and that, as she was ready to load on Jan. 11, the detention after that must arise from some delay, not in bringing the cargo from some other place, but in the actual loading in the East Bute Dock. The contention on the other side is, that we ought not to place so narrow a construction upon the words East Bute Dock, but that we ought to treat all the usual store places of iron, including Messrs.

Crawshay's wharf, as if they were within the limits of the dock. I do not think so. I do not think this latter construction would be within the fair meaning of the words of the charter-party. Loading does not, in my view, begin when the goods leave the wharf of the manufacturer, but when they begin to be put on board the vessel. No doubt, in a very exceptional case like that in *Hudson* v. *Ede* (*ubi sup.*), the meaning of loading may be extended, but that was in consequence of the very special circumstances of that case, and only in consequence of those special circumstances. I do not think the report of the referee is quite clear and satisfactory as to the facts, but, giving it a fair interpretation, I do not think that enough has been found in this case to bring it within the exceptional circumstances of *Hudson* v. *Ede*. I have purposely refrained from going very much into the details of the case, preferring to leave my learned brothers, who are more familiar than I am with this sort of case, to deal with them. Thinking as I do that loading can only fairly be said to begin when the goods begin to be put on board, I think that the decision of the learned judge below was wrong, and that this appeal must be allowed.

Brett, L.J.—In this case we have to apply certain facts to a charter-party. Let me say at the outset that a great difficulty arises in this case from the way in which it was tried. Instead of being tried at Swansea before the learned judge in the ordinary course, when he would have had the evidence and facts fully before him, it was sent, from the force of circumstances of which we know nothing, and which we have no right to criticise, to an official referee to report upon to the learned judge, and that report of the official referee is to be supposed to contain all the facts of which we can have any cognisance. Now, it appears that at Cardiff there are several docks; the East Bute Docks and the West Bute Docks are separate and distinct docks, and besides these two there are other docks at some distance from them; all these are large and magnificent docks. There is a water communication between the East and the West Bute Docks by means of a short canal, and there is a further water communication with the West Bute Dock by means of a junction canal, which joins that dock to the Glamorganshire canal, which is a canal running into the country. Further, a railway runs all round the East and West Bute Docks. Iron rails shipped at Cardiff are almost entirely manufactured by five or six makers whose works are at some distance from Cardiff; some of these makers have storing wharves on the East Bute Dock, and some on the West Bute Dock, but Crawshay and Co. have no storing wharf on either of those docks, but have it at some distance from the docks, namely at the junction of the Glamorganshire canal with the junction canal that I have referred to. Now, if iron rails are to be loaded from a wharf on the West Bute Dock into a large steamer, they have to be sent by lighters from the West to the East Bute Dock, because large steamers cannot go into the West Bute Dock. Again, if iron rails are to be loaded from a wharf on the East Bute Dock, they are loaded either from the quay if the ship has a quay berth, or by lighters if the ship is lying in the tiers. Again, Crawshay and Co., because their wharf is so far off the docks, have for more than thirty years put their iron on lighters at their wharf, and so sent it down the junction canal into the West Bute Dock, and so through the short canal into the East Bute Dock. So that with regard to shipments of iron rails in the East Bute Dock there may be said to be three customary modes of loading: one mode employed by shippers who have wharves on the East Bute Dock, another mode employed by shippers who have wharves on the West Bute Dock, and a third mode employed by Crawshay and Co. It cannot be truly said that there is any one customary mode of loading iron rails at Cardiff. Under these circumstances a charter-party is entered into, not by Crawshay and Co., but by an ordinary charterer or shipper, and the terms of that charter-party are as follows: [His Lordship here read the material parts of the charter-party, and continued:] The first remark I have to make about that charter-party is, that it is somewhat informal because it speaks of lay days when strictly speaking there are no lay days provided for by it; we only make out by calculation that a reasonable time for loading the vessel in question would have been six days: that is agreed.

Now, what is the state of affairs between the shipowner and the charterer? The shipowner has no means whatever of knowing from what manufacturer of rail iron at Cardiff the cargo will come. His duty is to take his ship to the East Bute Dock; when he has done so, and has berthed her, and made her ready to load, his duty, as far as the commencement of the loading is concerned, is completed. Then comes the duty of the charterer, which is to begin at once to load. Now first, ought this charter-party to be construed as between the shipowner and the charterer as if the East Bute Dock was the only dock at Cardiff, and was in fact the port? I think so. I think this is clear both from authority and from the words of the instrument. In my opinion you have no right to take into consideration anything that occurs outside the East Bute Dock, either in the port or town of Cardiff or elsewhere. The question resolves itself into this: When does the loading of the vessel begin within the terms of this charter-party? Now, unless there is something peculiar in the terms of the contract, I think that all stipulations as to loading apply to the place where the actual loading is to take place. I do not wish to be understood to hold that the loading does not begin until the goods are actually being lifted on to the vessel; but I do not think that it can fairly be said to begin until the goods get within the actual place where, according to the terms of the charter-party, the loading is to take place; it appears to me that the bringing of the goods to that place, and what happens to them on their way there, has nothing to do with the loading within the terms of the charter-party. It seems to me that this not only follows from the terms of the charter-party, but that it was so held in *Hudson* v. *Ede* (*ubi sup.*). Now, if that be so, if every stipulation as to loading applies to the place of loading, then the exception in the charter-party applies to the same place; therefore, here, where the exception is detention by frost, that exception must be read as limited in the same way as the obligation, and so a detention by frost must mean a detention by a frost which actually prevents loading within the East Bute

Dock. I think this principle was also held in *Hudson* v. *Ede*. Therefore the only detention by frost which could absolve the charterer from his duty to load was a detention by a frost which prevented loading within the limits of the East Bute Dock. There was no such detention in this case. It follows from what I have said that the words "customary manner of loading" apply to the place of loading, that is in this case, to the East Bute Dock; therefore they do not help us. But it is said that, under the circumstances of this case, we ought to say that in the case of Crawshay and Co. their loading begins before the time when the goods they are to load arrive within the East Bute Dock, that it begins indeed at the time when their iron leaves their wharf a quarter of a mile off. Now, under what circumstances can we go beyond the limits of the place named in the charter-party, and say that loading begins outside those limits; That there are circumstances which may require us to do so was decided in *Hudson* v. *Ede*, by which case we are bound and from which we do not dissent; but it is admitted that the facts of that case were exceptional, and the very reasoning of that case admits that strong reasons are necessary to make it right to hold that in any particular case loading is to be said to begin before the goods arrive at the place of loading. In *Hudson* v. *Ede* everybody who shipped grain at Sulina brought it down from Galatz straight to the ship; that was the only way in which vessels to be loaded with grain at Sulina could be loaded at all, namely, out of lighters which had come all the way down the river from Galatz, and the court in that case expressly relied on the fact that every shipper shipped his corn in this way; indeed, that case was decided only upon the ground that the custom was universal and must be taken to have been the basis of the contract. The Lord Chief Baron adds an expression at the end of his judgment, which shows that, if one shipper had not followed this custom, that might in his opinion have made the whole difference. If this be so, then this case comes within the general ruling of *Hudson* v. *Ede*, and not within the exception that was allowed in that case; and I think that the learned judge who decided this case, and decided it upon the authority, as I understand his judgment, of *Hudson* v. *Ede*, was wrong in supposing that the facts of this case were such as to bring it within the exceptional state of facts upon which that case was decided. I am of opinion that the facts of this case are clearly distinguishable from those in *Hudson* v. *Ede*, and that this appeal must be allowed.

Lindley, L.J.—I also am of opinion that the judgment of the court below was wrong, and that this appeal must be allowed. The case strikes me thus: According to what I take to be the true construction of the charter-party, it may be divided into two parts. The first part has relation to the duty of the shipowner; the ship is to go to a particular place. I may pause to point out that the charter-party does not profess to define the duty of the shipper as to getting the goods to that place, it presupposes them to be there. Next, the cargo is to be loaded as fast as the steamer can take on board and stow, &c., and a clause is introduced to give the shipper the benefit of certain unavoidable detention by certain specified causes. Now, delay having taken place in consequence of one of those specified causes, we have to say how far the shipper can claim the benefit of the exception. The question is, what is such detention as is contemplated by this charter-party? Can it be said that detention owing to a cause which prevents the shipper getting his goods to the place of loading is within the fair meaning of this charter-party? I think not, I think it has nothing to do with it. I think it is plain that this is the true construction of the document, and any authority that is said to militate against this view must be carefully examined before it is allowed to prevail. Now it is said that *Hudson* v. *Ede* is an authority against this view. All I wish to add to what has been said about that case by Brett, L.J. is, that the remark of the Lord Chief Baron, quoting a remark of Willes, J., at the end of his judgment in the Exchequer Chamber, shows plainly that for the purposes of that case the court regarded the various wharves at Galatz as the shore from which the goods were loaded, and that they based their judgment upon the invariable nature of the custom of thus loading. I do not think that the facts of this case bring it within *Hudson* v. *Ede*, and that therefore this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *Ingledew* and *Ince*, for *Ingledew*, *Ince*, and *Vachell*, Cardiff.

Solicitors for the respondents, *Nichol*, *Son*, and *Jones*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

Tuesday, Nov. 7, 1882.

(Before Sir R. Phillimore.)

The Alne Holme (Second Action.)

Collision—The Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 34—*Counter claim—Bail.*

Where, in a damage action, the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 34, *although they voluntarily give bail.*

This was a motion by the defendants in a damage action to order the plaintiffs to give bail to answer counter-claim in the action.

It appeared that a damage action was instituted in the High Court by the owners of the *Medea* against the owners of the *Alne Holme* in respect of a collision between the *Medea* and the *Alne Holme*; by reason of the damage to the *Medea* she had gone to the bottom.

The owners of the *Medea* asked, in the first instance, for the undertaking to give bail, but subsequently gave notice that they would not require bail, though as a matter of fact bail was given.

The defendants had counter-claimed, and were now asking that the plaintiffs should be forced to give security to answer the counter-claim.

Bucknill in support of the motion.—The Admiralty Court Act 1861 (24 Vict. c. 10), sect. 34

provides that: "The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, suspend the proceedings in the principal cause, until security has been given to answer judgment in the cross cause." Security has been given by the defendants. The *Medea* cannot be arrested, seeing she is at the bottom of the sea, and therefore the plaintiffs are entitled to have security given by the defendants. The fact of the plaintiffs not requiring bail to be given was a mere device to prevent the defendants availing themselves of the statute, but the defendants have actually given bail, and therefore the statute is complied with. Further, the owners of the *Medea* are a foreign company, and it would be a great hardship that the defendants should have no security.

Dr. *W. Phillimore* against the motion.—The section quoted was passed to remedy cases where the plaintiff was able to lay his hands on the *res*, while the defendant was unable to obtain any security, and was thus placed in a very much worse position than the plaintiff. In the present instance the plaintiffs required no security, and were consequently on the same footing as the defendants prior to the passing of the Act. If the defendants choose to give security it is immaterial to us.

Sir R PHILLIMORE—I dismiss the motion with costs, being of opinion that the statute was not intended to include cases like the present.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

Solicitors for the defendants, *Robins* and *Cameron*.

Tuesday, Nov. 7, 1882.

(Before Sir R. PHILLIMORE.)

THE FALK.

Collision—Bail—Sale of ship in another action—Payment of proceeds into court.

Where after judgment against a ship in a damage action, where bail has been given and the ship released, judgment is given against the same ship in a necessaries action in which the ship is sold and the proceeds of the sale of the ship paid into court, the plaintiffs in the damage action cannot be paid out of the proceeds to the prejudice of other claimants still having maritime liens upon the proceeds.

THIS was a motion by the plaintiffs, in an action for damage by collision, for payment out of damages and costs.

The action was brought by the owners of the *Vero F.* against the owners of the *Falk* to recover damages in respect of a collision between the two vessels.

The *Falk* was arrested, whereupon bail was given by Messrs. Jones, Heard, and Co., of Cardiff, the ship's agent, in the sum of 300*l.*, being the amount claimed on the writ in the action.

The action was tried, and the *Falk* was held alone to blame for the collision and condemned in the damages thereby occasioned to the *Vero F.*, and a reference was ordered to the registrar and merchants to assess the amount of the damage. The registrar assessed the damages at 125*l.*, and his report was not objected to.

The plaintiff's costs were taxed at 229*l.* The amount of damages and costs exceeding the amount of the bail given, the plaintiffs applied for and obtained leave to re-arrest the ship to obtain security for the amount exceeding 300*l.*; whereupon, to avoid the arrest of the ship, the solicitors for the defendants gave an undertaking to put in the required supplementary bail, and the ship was not re-arrested in that action.

Subsequently to these proceedings, several actions for wages and necessaries (the *Falk* being a foreign ship) were instituted against the *Falk*, and these actions proceeded to judgment; and in one of them the ship was, by order of the court, sold, and the proceeds of the sale were paid into court.

The plaintiffs in the collision action now applied for payment of their damages and costs out of such proceeds.

L. E. Pike, for the plaintiffs, in support of the motion.—When it was found that the amount of bail given in the collision action was insufficient to satisfy the damages and costs, the plaintiffs applied for and obtained an order to re arrest the *Falk*, which order placed that vessel under the control of the court. The proceeds of the sale of the *Falk* are now in court, and as the plaintiffs in the damage action have a prior lien to the plaintiffs in the necessaries action, the money should be paid out in priority to the other claims.

J. P. Aspinall, for Messrs. Jones, Heard, and Co., in support of the motion.—By the practice of the Court of Admiralty the mode of enforcing payment has always been by monition to the owners of the ship held to blame, and in default of payment recourse is had to the bail; and the money in court being the property of the owners of the *Falk*, that should be applied to the payment of damages and costs before coming upon the bail.

Dr. *Phillimore*, for the plaintiffs in the necessaries action, against the motion.—The plaintiffs in the collision action have no right to the proceeds of the sale in the necessaries action. By taking bail they had given up their maritime lien on the *Falk*, and that lien is to be considered as discharged. In all cases where the ship has been re-arrested as a security where the bail has ultimately been found insufficient, it has been either in respect of costs or where no other actions had been instituted against the ship. The plaintiffs in the damage action are now in the position of execution creditors, and their claim as such is postponed to the claim of those who have a lien still unsatisfied on the ship. *The Wild Ranger* (Br. & L. 84) is a direct authority in my favour.

L. E. Pyke in reply.—The *Wild Ranger* is distinguishable; in that case no order was made to re-arrest the ship after judgment had been given. This is virtually an application for payment out of money in respect of costs, the costs greatly exceeding the amount of damage. In both *The Freedom* (1 Asp. Mar. Law Cas. 136; 25 L. T. Rep. N.S. 392; L. Rep. 3 A. & E. 495) and the

Hero (Br. & L. 447) the ships were re-arrested because the bail was insufficient.

Sir R. PHILLIMORE.—I reject the motion; the plaintiffs in the damage action having taken bail cannot be paid out of the proceeds to the prejudice of other claimants still having liens upon the proceeds.

Solicitors for the plaintiffs in the damage action, *Ingledew* and *Ince*.

Solicitors for Messrs. Jones, Heard and Co., *Clarkson, Greenwell*, and *Wyles*.

Solicitors for the plaintiffs in the necessaries action, *Fielder* and *Sumner*.

Tuesday, Nov. 14, 1882.

(Before Sir R. PHILLIMORE.)

THE ALNE HOLME (First Action).

Collision—Damage to cargo—Stay of proceedings—Limitation of liability—Merchant Shipping Acts.

Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendants' ship at 8l per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action.

THIS was a motion by the defendants in a damage suit to stay proceedings in a prior suit brought against the same ship.

An action had been brought by the owners of cargo shipped on board the *Medea* against the owners of the *Alne Holme* in respect of the loss of cargo occasioned by a collision between the *Medea* and the *Alne Holme*, and the *Alne Holme* had been found solely to blame. A reference had been held, and the registrar's report was to issue in a few days. Subsequently to the above action another action was brought by the owners of the *Medea* against the owners of the *Alne Holme* in respect of the same collision, and it was now prayed that further proceedings in the first action might be stayed until judgment had been given in the second action.

Bucknill, for the defendants, in support of the notion.—The claim of the owners of cargo is for 3200*l.*; the claim of the owners of the *Medea* is for 7000*l.*, making a total, which is 2000l. in excess of the value of the *Alne Holme*, reckoning her value at 8*l.* per ton. This being so, the defendants propose to bring a limitation of liability suit, should the plaintiffs in the first action issue execution, but if proceedings in the first action are stayed and the defendants are successful in the second action, the plaintiffs in the first action will get 20*s.* in the pound, and the expense of a limitation of liability suit will be saved. The defendants are willing to pay the money into court, and pay interest on it.

Dr. *W. Phillimore*, for the plaintiffs in the first action, against the motion.—The action instituted by the owners of cargo has proceeded to judgment in due form, the registrar's report will shortly be out, and the plaintiffs are entitled to issue execution for the money. The second action has nothing whatever to do with the owners of cargo, and it is unfair that one action should be tied up until judgment in another action.

Sir R. PHILLIMORE.—I am of opinion that to stay the proceeding in the first action would be unfairly prejudicial to the plaintiffs in that action, and therefore I must dismiss the motion with costs.

Solicitors for the owners of cargo, *Stokes, Saunders*, and *Stokes*.

Solicitors for the owners of the *Alne Holme*, *Robins* and *Cameron*.

Friday, Nov. 3, 1882.

(Before Sir R. PHILLIMORE.)

THE IMMACOLATA CONCEZZIONE.

Transfer—Sale of ship—Action for necessaries—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 6.

Where a necessaries action against a ship in the City of London Court has proceeded to judgment, by which a sale of the ship is ordered, and subsequently another action is commenced in the High Court by material men having a possessory lien upon the ship, and an appearance has been entered to the action in the City of London Court by the plaintiffs in the High Court, the sale will be stayed, and the City of London Court action transferred to the High Court upon the application of the plaintiffs in the High Court.

THIS was a motion on behalf of certain shipbuilders, plaintiffs in an action in the High Court, for repairs done to the *Immacolata Concezzione*, for the transfer to the Admiralty Division of the High Court of Justice of an action for necessaries pending in the City of London Court.

A necessaries action was brought in the City of London Court against the above-named ship, and judgment was given for the plaintiffs, ordering the sale of the ship by the bailiff of the City of London Court.

The plaintiffs in the action in the High Court intervened, and entered an appearance in the action in the City of London Court. Subsequently to the institution of the action in the City of London Court, an action for repairs effected upon the ship was brought in the Admiralty Division of the High Court, against the ship, by the parties moving the court.

Dr. *W. Phillimore*, for the plaintiffs in the action in the High Court, in support of the motion,—The proceeds of a sale of the *Immacolata Concezzione* by the bailiff of the City of London Court would be ridiculously small, as no one would care to buy her in consequence of the institution of the second action for repairs. The plaintiffs in the action in the High Court have a possessory lien on the ship, by reason of their repairs to her, and are therefore moving the court that the City of London Court action may be transferred to the High Court, in order that they may be more adequately capable of enforcing their claim against the ship.

Gainsford Bruce, for the other plaintiffs, against the motion.—The plaintiffs in the action in the High Court are in nowise entitled to have the County Court action transferred to the High Court. Under sect. 6 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71) it is provided that "the High Court of Admiralty of England, on motion by any party to an admiralty cause pending in a County Court, may, if it shall think fit, with previous notice to the other party, transfer the cause to the High Court of Admiralty;" but the plaintiffs in the action in the High Court are not parties to the Action in the City of London Court, and therefore have no right to have that action transferred to the High Court. The proceedings in the City of London Court action were in every way regular, and the City of London Court, with respect to this action for necessaries, is of co-ordinate jurisdiction with the High Court, and therefore it is an unlawful act on the part of the marshal of the High Court to interfere with the sale of the ship by the bailiff.

Dr. *Phillimore* in reply.—The plaintiffs in the High Court entered an appearance in the City of London action, and by so doing made themselves parties to the action, and moreover under rule 10 of Order XXXIII. of the County Court Rules, they clearly are persons claiming to have an interest in the vessel, and so are entitled to intervene for the purpose of having the action transferred to the High Court.

Sir ROBERT PHILLIMORE.—I allow the motion without prejudice to the rights (if any) of the plaintiffs in the City of London Court action.

Solicitors for the plaintiffs in the High Court, *Thomas Cooper* and *Co.*

Solicitors for the plaintiffs in the City of London Court, *Stocken* and *Jupp*.

Tuesday, Jan. 24, 1882.

(Before Sir R. PHILLIMORE).

THE HELENSLEA.

THE CATALONIA.

Practice—Admiralty action in personam—Service of writ in personam — Address of defendant incorrect on writ—Defendant resident out of jurisdiction—Judicature Act, Order II., rr. 3, 4 *—Consolidation.*

The misdescription of the residence of a defendant, whereby he is alleged to be resident within the jurisdiction, whilst he is in fact resident out of the jurisdiction, is not a sufficient ground for setting aside a writ in personam intended for service as soon as the defendant shall come within the jurisdiction.

Consolidation of cross causes of damage will not be ordered where service of the writ in the principal action has not been effected.

THIS was a motion by the defendant, the owner of the barque *Helenslea*, to set aside the writ in a damage action, brought by the Cunard Steamship Company, the owners of the *Catalonia*. It appeared from the affidavits filed on both sides, that cross actions had been instituted by the respective owners of the *Helenslea* and *Catalonia* in respect of a collision between the two vessels in or near Cork Harbour in Dec. 1881.

The writ in the first or principal action, instituted by the Cunard Steamship Company on the 25th Dec. 1881, was *in personam* and directed to "William Stephen, of the city of London," defendant, and was indorsed: "The plaintiffs, as owners of the steamship *Catalonia*, claim the sum of 10,000*l*. against the defendant as owner of the barque *Helenslea*, for damage occasioned by a collision which took place in or near Cork Harbour in the month of December 1881, between the *Helenslea* and the *Catalonia*, including costs of suit." On the 26th Dec. 1881 a cross action *in personam* was instituted by the owner of the *Helenslea* in respect of the same collision, and an appearance was duly entered in answer to the writ in this action by the Cunard Steamship Company.

On the 26th Dec. 1881 the Cunard Steamship Company took out a summons in the cross action calling upon the plaintiff in the same to show cause why the cross action should not be consolidated with the principal action. This summons came on before the registrar, and was by him referred to the judge.

Before this summons came on for hearing, the solicitors for William Stephen gave notice of motion to direct the writ in the principal action to be set aside, and filed affidavits in support of such motion, from which it appeared that they, on behalf of the owner of the *Helenslea*, had refused to accept service of the writ in the principal action; that the questions in both actions were identical; that William Stephen was the sole owner of the *Helenslea*; that he resided and carried on business at Dundee in Scotland, and had no residence or place of business in England; that the writ in the principal action had never been served upon him; that he was advised that the writ could not have been issued without untrue representations as to his place of residence, and that he was entitled to have the writ set aside as improperly issued.

It was agreed that the affidavits should be evidence in both actions,

Dr. *W. Phillimore* for the owner of the *Helenslea*. —Inasmuch as the collision occurred without the territorial jurisdiction of the court and the *Helenslea* has not been arrested, the writ, if it is to be served without the jurisdiction, should be set aside, because prior to its issue the leave of the court should have been obtained. The ruling in *The Vivar* (35 L. T. Rep. N. S. 782; 3 Asp. Mar. Law Cas. 308; 2 P. Div. 29) is a direct authority in my favour. But if the writ is to be served within the jurisdiction, it is vitiated by the false description of the owner of the *Helenslea*. The form in the schedule appended to the Judicature Act of 1873 is an argument in favour of the view that a writ for service within the jurisdiction is only effectual where the defendant resides within the jurisdiction. With respect to the consolidation summons, if the writ fails, the summons fails also; but even if the writ be not set aside, no consolidation order ought to be made, because service of the writ has not been made nor accepted nor bail given.

Butt, Q.C. and *Myburgh* for the Cunard Steamship Company.—The writ does not describe the defendant as of London, and there was no intention of serving him without the jurisdiction. But it is intended to serve the defendant with the

writ the first time he crosses the border, and if then the description in the writ be wrong it can be amended. Order II. r., 3, contemplates such variations under the words "with such variations as circumstances may require." Seeing that the owners of the *Catalonia* are the plaintiffs in the principal action, they are entitled to have the conduct of the proceedings, and therefore the consolidation order should be made.

Sir ROBERT PHILLIMORE.—I am of opinion that I cannot grant the motion to set aside the writ issued on behalf of the Cunard Steamship Company. The writ in question is not a writ for service out of the jurisdiction; it is simply a writ for service within the jurisdiction, and it is said that it has been taken out in order that the defendant may be served with it, if he comes within the jurisdiction, at any time whilst it remains in force. At present it seems to me that no sufficient reason has been shown why it should be set aside as irregular, and I must therefore reject the motion. It may be that hereafter some reason, which does not exist at present, may arise in favour of a similar motion being granted; but as to that I express no opinion. I do not think I can make any consolidation order in this case. Service of the writ taken out by the Cunard Steamship Company has not been made or accepted, and in these circumstances I am of opinion that I ought not to order the two actions to be consolidated. Two suits can only, I think, be consolidated after each of them has become a *lis pendens*; and it is clear that a suit *in personam* does not become a *lis pendens* until after service of the writ of summons. On this point the well-known case of *Ray* v. *Sherwood* (1 Curteis, 173, 193; 1 Moore P.C. 353) is an authority.

[On the 3rd March 1882 the matter was settled by the respective parties before the cross action instituted by the owner of the *Helenslea* was heard.]

Solicitors for the Cunard Steamship Company, *Gregory, Rowcliffe*, and *Co.*

Solicitors for the owner of the *Helenslea*, *Thomas Cooper* and *Co.*

Tuesday, Feb. 7, 1882.

(Before Sir R. PHILLIMORE.)

THE MIRANDA.

Practice—Preliminary act—Amendment.

In a damage action the court will not allow a party to amend a mistake in his preliminary act, prior to trial, although he applies upon affidavit, alleging that the mistake was the result of a clerical error.

THIS was a motion by the plaintiffs (the owners of the *Cleanthes*) in a damage action to amend their preliminary act. An affidavit in support of the motion was made by the plaintiffs' solicitor, who stated that by mistake the words "the engines of the *Cleanthes* were put full speed about between two and three minutes before the collision" were inserted in the 12th article of the draft preliminary act, and were copied into the filed preliminary act, and that the words should have been "the engines of the *Cleanthes* were put full speed astern about two or three minutes before the collision," and that this was the result of a clerical error; that the proposed amendment was *bonâ fide*, and was not required by any information received by the plaintiffs subsequent to the filing of the preliminary act; and further that the error had been discovered prior to the opening of the defendants' preliminary act.

Dr. *W. G. Phillimore* in support of the motion.—In *The Vortigern* (Sw. 518) Dr. Lushington lays it down that an application to amend a mistake in a preliminary act must be made immediately upon discovery, and must be supported by affidavit. Both these conditions have been complied with.

Myburgh, Q.C., against the motion, was not called upon.

Sir ROBERT PHILLIMORE.—I shall adhere to the practice I have always followed with regard to applications for leave to amend preliminary acts, and refuse to allow any such amendments to be made. The parties in an action of damage are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary acts, and it is open to them in their statement of claim, or statement of defence, to state correctly any facts which may have been omitted or erroneously stated in their preliminary acts; but I am quite sure that it would be improper for the court to allow any alterations to be made in the preliminary act. I therefore cannot accede to the application in this case, and I must reject the motion with costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Cooper* and *Co.*

Wednesday, April 26, 1882.

(Before Sir R. PHILLIMORE.)

THE LOTUS.

Salvage—Tender—Costs.

In a salvage suit, where the tender was held sufficient, but was not liberal, the Court gave the salvors their costs up to the time of the payment of the tender into court.

THIS was a salvage action, brought by the owners, master, and crew of the screw steamship *Dora*, of 645 tons gross register, belonging to the port of Newcastle, against the screw steamship *Lotus*, her cargo and freight.

The *Lotus*, a screw steamship of 476 tons net register, belonging to the port of Liverpool, left Bordeaux on the 12th Jan. 1882, bound on a voyage to Liverpool, laden with a general cargo, and manned by a crew of eighteen hands all told.

On the 13th Jan. the screw shaft of the propeller of the *Lotus* broke; and on the 15th, when about sixteen miles off Point Baleines, on the coast of France, whilst at anchor, the *Dora* was signalled. The *Dora* then bore down upon the *Lotus* and towed her to a safe anchorage off Pauillac in the Garonne. The towage lasted from about 8 a.m. on the 15th till about 1.15 a.m. on the 16th, and extended over a space of from seventy-five to eighty miles.

The defendants, on the 27th March 1882, paid into court by way of tender for the salvage services, the sum of 300*l.*, alleging that the same was sufficient. The plaintiffs rejected this tender, and replied that it was not sufficient. The *Lotus*,

her cargo and freight, were valued at 20,000*l.*; the *Dora*, her cargo and freight, at 25,000*l.*

Myburgh, Q.C. and Dr. *W. G. F. Phillimore*, for the plaintiffs, contended that the tender was inadequate, and that under any circumstances they ought to have their costs:

The William, 5 N. of Cas. 108.

Butt, Q.C. and *Stewart*, for the defendants, *contra*.

Sir ROBERT PHILLIMORE.—Looking to the circumstances of this case, I am of opinion that the tender is adequate, though not liberal. There is a question of some importance as to costs. I find that my predecessor, Dr. Lushington, in the case of *The William* (5 N. of Cas. 108), upon the subject of costs, said: "I have considerable difficulty upon the subject of costs. In ordinary cases, the rule of the Court of Admiralty has been this: if a tender is made and rejected, which is afterwards pronounced sufficient, it ought to be followed by condemnation of the salvors in the costs, and no doubt, if I look to the practice of the other courts—I allude particularly to the opinion expressed by Lord Cottenham and the Master of the Rolls—costs are not given with a view of punishment, but as a matter of justice to the other party. I have considered how far this doctrine is applicable to cases of salvage, and I confess I have great difficulty in applying it with all its rigidity to such cases, for this reason: in the very nature of salvage services, there is something so loose and indefinite, and so difficult to be determined by the best constituted minds, when looking at their own case, that I am not inclined to press the doctrine to its full extent. Where there has been an offer on the face of the proceedings so large that it ought to have been accepted, I must administer justice in conformity to the rule I have mentioned. In the present case, however, whilst I certainly think the tender ought to have been accepted, yet, at the same time, looking at the value of the property and all the circumstances, I do not think that I ought to deprive the salvors of all reward; nor do I think that it would be for the interest of the public if I were to do so; because it is desirable to hold out a degree of extra encouragement, if I may say so, for the preservation of property. Upon the whole, therefore, in this case, though it is with some doubt, I do not condemn the salvors in costs." Dr. Lushington therefore held, in that case, that in a cause of salvage, where the tender was sufficient but not liberal, he had a discretion in the matter of costs. The exercise of this discretion as to costs is not affected either by the Judicature Acts or the Rules of the Supreme Court, and I shall give the salvors in this case their costs up to the time when the money was paid into court, and I shall make no order as to costs after that time.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Walton*.

Solicitors for the defendants, *Walker, Son*, and *Field*.

QUEEN'S BENCH DIVISION.

Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

April 22, 29, *May* 6, 13, *and July* 31, 1882.

(Before FIELD, J.)

STOCK *v.* INGLIS.

Marine insurance — Insurable interest — Floating policy on goods—No specific appropriation of goods to contract—Property in goods not passed —Interest in profits.

There is no insurable interest in a purchaser of goods sold under an executory contract to answer a specific description, until the property in the goods has been transferred to the buyer by an appropriation of the goods to him; and if the goods are lost before such appropriation takes place, the buyer cannot recover for them under an open policy, although after the loss he pays for them and declares them under the policy.

Where A. contracted to sell goods to B. and C., and B. was buying to complete a contract made with C. for the sale of such goods, and this was unknown to A. and C., and all the goods were shipped together by A., without being specifically appropriated to either B. or C., and were lost, it was held that although after the loss C. paid for the goods and obtained the necessary documents entitling him to their possession if they had existed, there was no such appropriation as gave him an insurable interest.

D. and Co., sugar merchants of London, entered on 7th Jan. 1881 *into a contract with B. and Co. (of Bristol) to sell them* 200 *tons of sugar,* 21*s.* 9*d. per cwt. net f.o.b. Hamburg; the further terms of the contract were "for January delivery at Hamburg; payment by cash in London in exchange for bill of lading." D. and Co. entered on* 12*th Jan.* 1881 *into a contract with the plaintiff to sell him also* 200 *tons of sugar upon similar terms to those of the contract with B. and Co. As a matter of fact B. and Co. had entered into the contract of the 7th Jan. with D. and Co. to enable them to execute a contract previously made by them on the same day with the plaintiff for* 200 *tons at an advanced price. At the time of the shipment D. and Co. only knew that they had engaged to sell* 400 *tons destined for Bristol, i.e.,* 200 *tons to B. and Co. and a like number to the plaintiff, and while the plaintiff knew that* 400 *tons were coming from Hamburg, viz.,* 200 *under his contract with D. and Co., and* 200 *under his contract with B. and Co., he did not know that D. and Co. were the shippers of the latter* 200 *tons. The provisions of the Statute of Frauds had been complied with by all parties in the case of the contract of the 7th Jan. between D. and Co. and B. and Co., of that of the* 12*th Jan. between D. and Co. and the plaintiff, but not of that of the 7th Jan. between B. and Co. and the plaintiff, for the latter had not signed any note of the contract so as to become liable on it. About the end of January D. and Co. advised their Hamburg forwarding agents that they had sold* 400 *tons for Bristol, giving them the necessary orders for their shipment. In consequence of there not being enough sugar of the specific description at Hamburg to meet these orders, D. and Co.'s forwarding agents could only ship to Bristol* 3900 *bags by a particular steamer, and proposed to send the* 100 *short by the next*

steamer. They took several bills of lading for the said 3900 *bags, by which they were made deliverable to "order Bristol." This shipment of sugar was thus* 100 *bags too few to satisfy the two contracts of the 7th Jan. and the 12th Jan.; and between those two contracts D. and Co. did not make any appropriation of these* 3900 *bags, so as to distinguish one set from another. With this sugar thus on board the steamer which left Hamburg went down on the following day with her cargo. On the same day, but before hearing of the loss, D. and Co. duly took up the bills of lading, and proceeded to apportion the* 3900 *bags between B. and Co., and the plaintiff, and in so doing specifically appropriated* 2000 *of the bags to B. and Co., and* 1900 *to the plaintiff, and made out separate invoices to each. The invoices were made to comply with the terms of the contract. Before these invoices were posted by D. and Co. news arrived of the loss of the sugar, and on the same day the plaintiff in Bristol became advised of the loss. The plaintiff in the meanwhile had effected with the defendant (an underwriter at Lloyd's), together with others, a floating policy in respect of the goods shipped under his contract with D. and Co. and B. and Co. The plaintiff, on the news of the loss, anticipating that he might have the* 200 *tons on board coming to him under his contract of the* 12*th, although without any specific advice of the shipment, declared on the steamer under the said policy in respect of the said* 200 *tons. D. and Co. forwarded invoices of the two shipments to B. and Co., and the plaintiff who paid the amount and obtained the bills of lading of the sugar thus invoiced to them. B. and Co. also made out their invoice to the plaintiff for the* 200 *tons under their contract, and the plaintiff paid the amount of the contract and received the bills of lading of the sugar thus invoiced. The plaintiff also declared on the said policy for this further loss. It was the defendant's proportion of the total claim that the plaintiff sought to recover.*

Held, that the plaintiff had not any insurable interest in any portion of the sugar shipped and lost, for there had been no specific appropriation of the sugar to the contract of the 7th and 12th Jan., and so no property in it had passed to the plaintiff.

Held, also, that though the plaintiff had an insurable interest in "profits" to be derived from the sugar, yet the loss of "profits" could not be recovered on a policy merely on "goods."

FURTHER CONSIDERATION.

C. Russell, Q.C., *Myburgh*, Q.C., and *Danckwerts* for the plaintiff.

Butt, Q.C., *Cohen*, Q.C., and *Barnes* for the defendant.

The facts and arguments appear sufficiently in the judgment.

Cur. adv. vult.

July 31.—FIELD, J. delivered the following judgment:—The plaintiff in this action (a Bristol merchant) seeks to recover from the defendant (an underwriter at Lloyd's) under a "floating" marine policy on "goods," a proportionate part of the value (with 10 per cent. profit) of 3900 bags of sugar, lost with the *City of Dublin*, on the 4th Feb. 1881, on a voyage from Hamburg to Bristol. The sugar had been shipped at Hamburg by or on behalf of Messrs J. V. Drake and Co. (London merchants), and had been bought by them of German manufacturers. In the process of manufacture of sugar, although the parcels manufactured at each "make" are in general respects similar, the parcels turned out at any one make will differ slightly from any other in the number of degrees of saccharine matter which it contains, and the bags of each particular make bear a distinctive mark and number (say D. 200, D. 201, &c.), and the whole lot contains the same number of degrees of saccharine matter, and is otherwise identical in quality and description. The sugar contained in each lot is separately analysed in Germany, and a certificate of the analysis referring to the mark and number of the bags in which it is packed is forwarded to Drake and Co. in London, so that the quantity of net saccharine matter in the lot is communicated to them. The sugar is then invoiced to Drake and Co. in bags, the invoice referring in like manner to the marks and numbers; by comparison, therefore, of the marks invoiced with the certificates of analysis, Messrs. Drake and Co. know the quantity of saccharine matter contained in each parcel invoiced. The sugar is then forwarded by the manufacturers to an agent of Drake and Co. at Magdeburg (Paul Peckstein), and the amount of the invoice is paid in cash on behalf of Drake and Co. by their German bankers (the Credit Anstalt, of Leipsic) to the manufacturer upon delivery by them to the railway company. In order to secure the repayment to the Credit Anstalt of this advance there is an arrangement between them and Drake and Co. by which certain forwarding agents at Hamburg (in the present instance Herrman and Theilnehmer) ship and consign the sugars on their arrival at Hamburg, according to Drake and Co.'s orders. The forwarding agent, however, does not ship them in Drake's but in his own name, and he takes the bills of lading deliverable to "order," in London or Bristol, as the case may be, and then forwards the bills indorsed in blank to the London correspondent of the Credit Anstalt, who is instructed by the latter to deliver them to Drake and Co. against cash payment by them of the amount of the invoice. The forwarding agent of course keeps Drake and Co. advised of the marks and numbers in course of delivery and arrival at Hamburg, and asks for and obtains shipping orders from them, and as the certificates of analysis already in the possession of Drake and Co. enable them to know the precise net saccharine contents of each lot of 500 or 600 bags so advised, they can allot each bag or lot of bags to such one of their buyers with whom they are under contract, so as to correspond in respect of the specific qualities of net sugar with the degree contracted for. The contracts for delivery in England made to Drake and Co. are uniform, or nearly so in terms. They are for delivery *f.o.b.* Hamburg, and the quantities are expressed in "tons" weight. But the price is not calculated according to the weight per ton of the gross, but at so much per degree of net saccharine matter contained in the sugar as represented by the analysis. A standard degree is specified in the contract (say 88) with a payment or allowance of 6*d.* for every degree above or below the average analysis of the whole contract, but anything above a given percentage (say 92) is not paid for, and if the average analysis of the whole contract exceed (say 90), such excess is not paid

for. When, therefore, Messrs. Drake and Co. are desirous of appropriating at Hamburg the number of bags required for the execution of one or more contracts for sugar destined for any one port (say, Bristol), it is obvious that the assortment must be so made before shipment that there shall be delivered such a gross number of bags as the port requires, and the bags so shipped must be made up of such particular bags as shall contain enough sugar of certain degrees, so that, on arrival of the bills of lading in London, Messrs. Drake and Co. can make up each particular contract in such manner that no part of the sugar to be supplied under that contract shall exceed 92, and that the average of the whole shall not be more than 90; for all net above, although paid for by Drakes in Germany, would, under the terms of the contract, go for nothing in England, and so be a loss to them. Messrs Drake and Co. having thus ascertained which of the bags advised can be best averaged to any particular port, the gross quantity destined to that port is shipped without any subdivision, leaving the operation of apportioning the gross shipped to the port amongst the different contracts at the port till after the receipt by Messrs. Drake and Co. in London of the bills of lading. Indeed, in some cases it is impossible for them to make this further apportionment before, and it is their usual course of business not to make it until after they have obtained the bills of lading by payment to the agent of the Credit Anstalt of the amount of the invoice. After having thus obtained the bills of lading, Drake and Co., on comparison of the bills of lading with the certificates of analysis, apportion the bags and the bills of lading representing them between their different buyers at the port for which they are shipped, and invoice the sugar to them accordingly. Messrs. Drake and Co's transactions of this character are very extensive, and have been so as well with the plaintiff as others, and the general course of business between them and their buyers has been for the buyer to bear the cost of the insurance against sea risks from the time of delivery. The buyers have usually themselves effected the insurance or declared the risk under floating policies, but in some cases Messrs. Drake and Co. have effected the insurance as agents of the buyer.

The sugars which were lost had been shipped on the *City of Dublin* in intended performance of two contracts made for sale and purchase entered into by Drake and Co. with two Bristol buyers, and at the time of the loss on the 4th Feb., the position of things with regard to these contracts was as follows: By the earliest of these two contracts (the 7th Jan.) Drakes agreed to sell to a Bristol firm (W. Beloe and Co.) 200 tons of sugar, price 21*s.* 9*d*, per cwt. net, *f.o.b.* Hamburg, for 88 deg. net saccharine contents, sugar to analyse between 85 and 92 net, 6*d*. per cwt. to be paid or allowed for each degree above or below 88, but anything above 92 not to be paid for, and should the average analysis of whole contract exceed 90 such excess not to be paid for. For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading. By the second contract of the 12th Jan. Drakes agreed to sell to the plaintiff a similar quantity at a like price upon indentical terms. After the loss it became for the first time known to Drake and Co., and to the plaintiff, that Beloe and Co. had entered into the contract of the 7th Jan. with Drakes, for the purpose of enabling him to execute a contract previously made by him on the same day with the plaintiff for 200 tons at an advance price. Although not, I think, material, it is as well to observe that in this contract the condition contained in Drake's contract with Beloe as to the excess over 92 not being paid for, was omitted, and it contained an additional term, also in my view immaterial, that the price *f.o.b.* was on "a steamship to Bristol." At the time of shipment and loss, therefore, all that Drakes knew was that they had engaged to sell 400 tons destined for Bristol, *i.e.*, 200 to Beloe, and 200 to plaintiff, and although plaintiff knew that he had 400 tons coming from Hamburg, *i.e.*, to be shipped by Drakes, and 200 to be shipped by some unknown shipper under Beloe, he did not know that Drakes were the shippers of the latter 200, nor did Drakes know that Beloe was under any contract to deliver, or plaintiff under any contract to take, 200 tons contracted for by Beloe. It is also of importance to note that although in the case of the contract between Drakes and Beloe of the 7th Jan., and of that between Drakes and the plaintiff of the 12th, the provisions of the Statute of Frauds were complied with by all the parties to them, such was not the case with the contract of the 7th Jan. between Beloe and the plaintiff, for that contract, although signed by Beloe as if he had been acting as broker, was not, nor was any note of it, signed by the plaintiff (Beloe being a principal, and so not his agent for that purpose). The consequence of course was that, although Beloe, if he had been the party sought to be charged in any action upon this contract, could not have availed himself of the provisions of the Statute of Frauds, the plaintiff was never until after the loss in a position to be charged in any action with any liability under it. The ultimate destination of the whole 400 tons thus being Bristol, and the whole being delivered by Drakes *f.o.b.* at Hamburg during the month of January, it became necessary that provision should be made for shipment. The ordinary course of business, which course was known to the plaintiff, was for Drakes' forwarding agents at Hamburg to ship by that boat of the Hamburg and Bristol line of steamers next due to sail after the time fixed for delivery, and the *City of Dublin* was the one in turn for the departure at the end of the last half of January. The agents for this line are at Hamburg Niessle and Günther, and at Bristol Edward Stock and Son, and the latter make it their bnsiness to keep themselves informed of all contracts for sugar made for shipment from Hamburg to Bristol, and to keep Niessle and Günther advised of all such sales. The plaintiff had, immediately after making each contract of the 7th Jan. with Beloe and the 12th with Drake and Co., entered into binding contracts for sale to the Bristol Sugar Refinery Company of identical quantities upon identical terms except that the sale was at an advanced price of 22*s.* 7½*d.*, leaving him therefore the difference between that and 21*s.* 9*d.* as profit. The plaintiff was therefore anxious for the regular delivery by Messrs. Drake and Co. of the sugar he had thus contracted for, and he immediately informed Edward Stock and Son of the purchase he had made of Beloe, and requested them to reserve space by the last departure for the month, but, as he did not know from what shippers Beloe would

supply his contract, all the advice he could give was the fact of the sale. In like manner on the 12th Jan. the plaintiff asked Edward Stock and Son to reserve space for that parcel. It also appears that Beloe had requested Edward Stock and Son to reserve space for the same 200 tons, the identity, however, at that time not being known to the agents. The plaintiff also on the 31st Jan. in writing to Drakes, expressed his hope that the 200 tons of the 12th were on the steamer then due to leave Hamburg, and in reply he received a letter from Drakes, that this sugar was not only at Hamburg, but that there would probably be extra expense chargeable to him owing to delay in steamer's arrival out, and consequent delay in departure. About the same time Drake and Co. also advised Herrman and Theilnehmer, their Hamburg forwarding agents, that they had sold 400 tons for Bristol, and gave them the necessary orders as to which bags were to be shipped for that port, begging them to engage room by the *City of Dublin*, and send the bills of lading to London as soon as possible. Although, however, sugar in sufficient quantity, and with suitable analysis, had arrived at Hamburg, so that Drake and Co. could have shipped either the 200 tons contracted for by the contract of the 12th Jan. with the plaintiff, or alternatively the 200 tons of the contract of the 7th Jan. with Beloe, the whole of the sugar which Drakes had appropriated to satisfy the two contracts together had not arrived at Hamburg at the time of the departure of the steamer, and in consequence Herrman and Theilnehmer were not able to ship by the *City of Dublin* more than 3900 bags, and they advised Drake and Co. of this short shipment, proposing to send the 100 short shipped by the next steamer due to sail on the 15th Feb. They did, however, ship 3900 bags, and took several bills of lading by which they were made deliverable to "order, Bristol," but, as Drake and Co. had made no apportionment of the 3900 bags as between the two contracts (7th Beloe's, and 12th plaintiff's) no appropriation was or could be made by them of any specific bags; that is to say, as to which of the bags were to be Beloe's and which of them the plaintiff's, but the whole 3900 were shipped in one undistinguished mass, and all were consigned simply "order, Bristol."

With this sugar thus on board the *City of Dublin* left Hamburg on the 3rd Feb., and on the morning of the 4th went down in the Elbe with her cargo. By the post of the 2nd Feb. Herrman and Theilnehmer had in usual course forwarded the bills of lading, indorsed in blank, to the London correspondent of the Credit Anstalt of Leipsic, and by the post of the 3rd they advised Drakes of their having so done, in order that the latter might take them up together with those of other bags (2900) shipped to London by another steamer in the same manner. On the 4th Feb., and before any intelligence of the loss had reached Drake and Co., they in due course took up the bills of lading by payment of the amount of the invoices to the agents of the Credit Anstalt, and then proceeded to apportion the 3900 bags between Beloe and the plaintiff, appropriating such of them as would make up the proper average for the plaintiff's contract to him, and such as would make up Beloe's contract to him according to the averages contracted for in each contract. At this time they had no knowledge that the sugar invoiced by them to Beloe would in fact be appropriated by him to the plaintiff under the sub-contract of the 7th Jan., and they therefore made out two separate invoices in ordinary course to them as two separate purchasers, as in fact they were. In doing this they had of course, as before explained, so to allot the bags to each particular contract as would best suit their own commercial convenience and advantage; and having made the selection of, and appropriated 2000 of the bags out of the mass to Beloe, and 1900 others to the plaintiff, they made out the invoices accordingly; and of course the result was a short supply of the plaintiff's contract by 100 bags. Each invoice, however, was so made up as to comply with the terms of contract, that to Beloe showing an average percentage on the whole of 89·5875, and that of the plaintiff of 89·35, both averages, therefore, being kept under 90. Certainly, however, before these invoices were posted by Drake and Co. (whether before or after the appropriation does not appear), news arrived by telegram to them of the loss of the sugar. News of the loss also arrived the same day in Bristol, and the plaintiff, anticipating that she might have the 200 tons on board coming to him under his contract of the 12th, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy now under suit for any loss in respect of those 200 tons. In the letter to the plaintiff of the 4th Feb., in which Drakes inclosed the invoice to the plaintiff for the 1900 bags, they proposed that the contract should be cancelled as to the 100 short shipment and to this the plaintiff assented; but this was done after both parties knew of the loss. The invoice to the plaintiff was headed "Contract 12th January." It set out the marks and numbers of the bags, and statement of the degrees of net saccharine matter. With the invoice Drakes also forwarded a cash order for payment of the amount (4162*l.* 16*s.*) in Bristol to the order of Williams, Deacon, and Co. in London, in exchange for the bills of lading; and on the morning of the 5th the plaintiff paid the amount in exchange accordingly, and obtained the bills of lading of the sugar thus invoiced to him under his contract of the 12th. A like course of forwarding invoice and bill of lading was undergone in Beloe's case, between Drakes and him, the invoice being headed "Contract 7th January." The next step in the transaction was, that Beloe being, as before stated, under contract to sell 200 tons to the plaintiff, but at an increased price, made out his invoice to the plaintiff making him debtor to himself, and forwarded it to him with an intimation that the bills of lading were at the bankers, and requesting him to forward to him (Beloe) a cheque for the amount, and this being done the plaintiff received the bills of lading for the 2000 bags thus invoiced, and then also declared upon the present policy for this further loss, making his total claim against the underwriters, including the usual 10 per cent. added for profit, 9530*l.* 19*s.* 8*d.*, and it was the defendant's portion of this sum that the plaintiff sought to recover. In consequence of the loss of the sugar the plaintiff was of course unable to perform his two sub-contracts with the Bristol Sugar Refining Company, and therefore failed to realise the profit he had contracted for.

Upon these facts the plaintiff's right to recover was denied by the defendant on the ground that no property in the sugar had passed to him before the loss; and secondly, that at the time of the loss he had no insurable interest in the sugar itself, and that even if he had an insurable interest in "profits" he was not entitled to declare the loss in respect of that interest upon a policy on "goods." The first question therefore is, whether at the time of the loss, the property in the 3900 bags, or any of them, had passed to and was vested in the plaintiff. Now none of the three contracts which we have to take into consideration in the present case are for the sale of any specific goods—they are all executory; and no general rule can be more clearly established than that in the case of a contract like that to deliver goods to answer a specific description, and when it is for the seller to ascertain which of his goods he will deliver in execution of his contract, the property which he has in those goods does not pass out of him or vest in the buyer until he has made an appropriation of those specific goods to the latter. The question at what period of the transaction in such cases the property passes is often one not free from difficulty. The rule is, that it is a question of the intention of the parties to be collected from the language of the contract coupled with the ordinary and usual course of business; and so collected in the present case, it seems to me that the intention of the parties was that the seller should in each case select and ship at Hamburg the specific number of bags contracted for on board a ship selected by the buyer, the seller taking for them a clean bill of lading to be afterwards handed to the buyer against payment in London of the amount of the invoice. That this was the mode of delivery agreed appears from the terms as well of the two contracts of the 7th as of that of the 12th January. By them the goods which the seller should designate as the goods to answer the contract are to be delivered at Hamburg at a price *f.o.b.*, and of course before any such delivery could have been made the seller must have appropriated to each of his buyers the specific goods which he intended to deliver to him. Messrs. Drake and Co. had no knowledge of Beloe's sub-contract with the plaintiff, nor had they any intention to make any appropriation or delivery at Hamburg to the plaintiff in respect of that contract, nor had the plaintiff any intention of taking delivery from Drake and Co. of that quantity, nor did he know that the 2000 bags which he had thus contracted to buy of Beloe were on board, although as the contract was to deliver on board a Bristol steamer by the end of January, he would probably expect that some Hamburg shipper would ship them by the last steamer of the month. But, if Messrs. Drake had, as they had contracted with the plaintiff to do shipped *f.o.b.* at Hamburg, and appropriated to him under his contract of the 12th Jan. 2000 specific bags of sugar, there would have been a delivery to him of those bags in the agreed mode of delivery; and they would, I think, have become his property and insurable by him as his goods—they would have become so by the appropriation to the plaintiff and the delivery with the plaintiff's assent on board a ship designated by him, and of course would have been at his risk. So, if the like course had been adopted in reference to the 2000 bags of sugar contracted for by Messrs. Beloe, the property in that sugar would, I think, have passed to Messrs. Beloe, and the sugar would have been at their risk on delivery. I do not however, see even in that event the plaintiff would have acquired any property in those 2000 bags, there being no appropriation or delivery to or taking of delivery by him either by or from Drake or Beloe. But it is unnecessary to consider that question, because I have come to the conclusion that there never was before the loss any sufficient appropriation and delivery by Drake and Co., either to the plaintiff or to Messrs. Beloe.

All that had been done by Messrs. Drake was to select from the large quantity of sugar which they had in Germany 4000 bags, with the general intention of sending them to Bristol, with the further intention of subsequently selecting from them bags such as from their analysis would suit Messrs. Drake's commercial convenience and profit to appropriate to the plaintiff and others, as would in like manner suit their contract with Beloe. That selection and appropriation they purposely deferred until after the arrival of the bills of lading in London, and at the time they actually made it the loss had occurred, and at the time that they communicated that appropriation to the plaintiff, and he assented to it, he and they knew of the loss. At the time of the loss, therefore, the power of selecting which bags should go to the plaintiff and which to Beloe still rested with Drake and Co., and no property in any specific bag passed to or vested in either Beloe or the plaintiff; nor could either of them have claimed to have any one bag rather than another. It is unnecessary in this case to consider whether Messrs. Drake and Co. could have withdrawn any of the bags and substituted others, nor is it necessary to say what might have been the result if all the parties had known of the actual state of facts in reference to the three contracts, and had agreed and been willing that the whole 3900 bags should without any further selection have passed to the plaintiff, for this was not the case. Shipping as they did, Messrs. Drake had only the general intention of putting on board goods in quantity and quality fit to answer both contracts, and leaving the specific appropriation of the particular bags to each until they should have recived the bills of lading. The plaintiff, as I have before observed, knew nothing about Drakes being the shippers of any goods which Beloe intended to appropriate to him, and had no intention of taking delivery of anything more than 2000 bags which he had requested Drakes to ship per the *City of Dublin*, Indeed, as Beloe's contract with the plaintiff was at an advanced price, it was absolutely necessary (nothing else having been agreed to by way of substitution) that Messrs. Drake should first appropriate and deliver to Beloe his 2000 bags before the latter could appropriate and deliver to the plaintiff, and none of the parties contemplated that either the plaintiff or Beloe would each take delivery from Drakes of more than his 2000 bags. Neither the plaintiff nor Beloe ever assented to any such general appropriation and shipment as was made by Messrs. Drake, and it did not appear that any such mode of carrying out any contracts in similar terms, under similar circumstances, had ever occurred before, so as to supply the want of actual assent by

any assent to be implied from the course of business. I am, of course, speaking of what happened before the loss; after that event there was an assent by the plaintiff to what had been done, which, if given with a knowledge of all the circumstances, might have operated to pass the property in the whole to him from that time, and for some purposes by relation to the time of shipment. It was also, of course, competent to him to waive the default in delivery at the place agreed on, and, if he pleased, pay for the goods; but then as this assent and waiver did not take place until after the loss, the case of *Anderson* v. *Morice* (3 Asp. Mar. Law Cas. 31, 290; 33 L. T. Rep. N. S. 355; L. Rep. 10 C. P. 58, 609; 1 App. Cas. 713) is an authority to show that it was not competent to him by any assent or election at that stage to enable himself to throw any liability upon the defendant which did not exist at the time of the loss. This proposition was also asserted in *Stockdale* v. *Dunlop* (6 M. & W. 224). In that case there was no contract binding the seller within the Statute of Frauds; and the court held that, although, as between him and the buyer the contract ultimately became capable of being enforced by a subsequent part delivery and acceptance, that circumstance would not operate retrospectively, so as to dispense with a memorandum within the statute, and thus by relation charge the insurer. In the view, therefore, which I have taken of the case upon this point, it is unnecessary to consider the questions which were raised on the argument whether either the Credit Anstalt or Messrs. Drake had (by taking the bills of lading making the goods deliverable to their order) so reserved the *jus disponendi* as to prevent the passing of the property to the plaintiff until after payment, or whether the short shipment of the 100 bags affected the case; and I express no opinion therefore upon either of those points.

But, upon the assumption that this decision might be against the plaintiff upon the question whether the goods were his, it was next argued for the plaintiff that, although the property had not passed, he yet had an insurable interest in the sugar. But the same default which seems to me to have prevented the passing of the property seems to me also to have prevented his having had any insurable interest. It was no doubt truly said for him that by the terms of the contract, and the known course of business, any goods duly shipped in accordance with the contract would have been at his risk after shipment. But in that event he would, according to my view, have had not only an insurable interest, but also property; and the present case is not like that of *Castle* v. *Playford* (26 L. T. Rep. N. S. 315; 1 Asp. Mar. Law Cas. 255; L. Rep. 5 Ex. 165; 7 Ex. 98), in which, although the property had not passed, there was a specific agreement that the goods were to be at the buyer's risk. Neither does the case of *Sparks* v. *Marshall* (2 Bing. N. C. 761), which was strongly pressed upon me in the course of Mr. Myburgh's very able argument, assist the plaintiff, because in that case, although the seller had made default in delivering at Portsmouth according to the contract, the plaintiff had before the loss assented to what was an undoubted appropriation to him, and so the property had passed. But, although the plaintiff had not in my judgment either property or insurable interest in "goods," he had, I think, an insurable interest in "profits," for he had contracts binding both Drakes and Beloe, by which he was entitled to the delivery of 4000 bags of sugar at Hamburg, and had sold at a profit which he was clearly unable to realise for want of the goods. Whether this profit was lost by any of the perils insured against it is unnecessary for me to consider, for it is now well settled that such a loss cannot be recovered under a policy framed like the present merely on "goods:" (*M'Swiney* v. *The Royal Exchange Assurance Company*, 14 Q. B. 634; and *Anderson* v. *Morice*, *ubi sup.*) I am unable, therefore, to give the plaintiff judgment. At first sight this seems to operate harshly on the plaintiff, for he had made a contract to insure and had paid premiums, and may have reasonably believed that he was insured under his floating policy, and so have omitted to effect a fresh insurance. But it is impossible to blame the defendant for this; he has insured at the ordinary market premium such risk coming within his policy as the plaintiff may choose to declare upon it. If the loss is not covered by it, the plaintiff will probably have the opportunity of declaring upon another which is; and suffering, as he no doubt has, the loss of this expected profit, he must consider it as due to Drake's breach of covenant in not delivering to him at Hamburg as he had promised to do; and for this the defendant is in no wise answerable. I give judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for the plaintiff, *Hollams, Son,* and *Coward.*

Solicitors for the defendant, *Bubb, Walton,* and *Bubb.*

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Reported by FRANK EVANS, Esq., Barrister-at-Law.

Friday, June 16, 1882.

(Before JESSEL, M.R., LINDLEY and BOWEN, L.JJ.)

DAVISON *v.* DONALDSON.

Co-owners—Agency—Partnership—Ship's husband—Purchase of stores—Liability of owner—Delay in suing.

A shipowner, by settling accounts with his managing owner, does not relieve himself from liability in respect of goods supplied on the order of the managing owner for the use of the ship, even though his share of the cost of such goods is debited to him in such accounts, and thereby paid for by him.

T., who was ship's husband and managing owner, purchased beef on credit from the plaintiff in Sept. 1877 *for the use of the ship. The defendant was part owner of the ship, and was also interested jointly with T. in the voyages for which the ship was being fitted out. The plaintiff applied to T. for payment, but did not obtain it. In Dec.* 1877 *and Dec.* 1879 *the defendant settled accounts with T. and gave him credit for the price of the goods, supposing he had paid for them. T. having become bankrupt in* 1881, *the plaintiff applied for*

payment to the defendant, and brought his action for the price of the beef.

Held (reversing the decision of Mathew, J.), that the defendant was liable.

THIS action was brought by the plaintiff, in his own right, and as executor of W. Davison, against J. J. Donaldson, one of the co-owners of the ships *Eliza Mary* and *Lucy Jane*, for beef and other goods supplied for the use of the ships between April and Sept. 1877. The principal defence was, that the goods were supplied to C. Tate, the managing owner and ship's husband, and on his order and credit; that W. Davison and the plaintiff knew Tate was the managing owner, and elected to treat him as principal; that no application was made to the defendant or the other co-owners for payment of the charges claimed till Feb. 1881, nor had any of them notice that the charges had not been paid; that W. Davison and the plaintiff knew that the defendant and the other co-owners would from time to time, in the ordinary course of business, settle the accounts of the ships with Tate, and would include therein the sums claimed; that the defendant and the other co-owners, before they had notice that the charges had not been paid, settled with Tate, as such managing owner, accounts in which they paid or allowed him the moneys sued for as moneys paid by him; and that they were induced to pay or allow him such sums by the conduct of W. Davison and the plaintiff, and in the belief (induced by such conduct) that Tate had paid the money sued for, and that W. Davison and the plaintiff had supplied the goods on the sole credit of Tate, and had elected to treat him as the principal.

It appeared that the goods were supplied to Tate's order, while acting as ship's husband, the invoices being made out to "C. Tate and the ship *Eliza Mary*," or to "C. Tate and the ship *Lucy Jane*."

The defendant was co-owner of the ships with Tate, and was jointly interested with him in the voyages for which the provisions were supplied.

The plaintiff and W. Davison were unable to obtain payment from Tate, or his son and partner. Tate died in Oct. 1878, and his son filed a petition for liquidation in Jan. 1881.

Credit was allowed to Tate for the charges in a settled account between him and the other co-owners in Dec. 1877. A further account was settled between his estate and the other co-owners in Dec. 1879, in which the balance of the former account was brought forward.

In neither of these settlements were vouchers produced for the payment of these charges.

The action was tried at the Newcastle assizes, before Mathew, J. in Jan. 1882. The learned judge gave judgment for the defendant.

The plaintiff appealed.

Hopwood, Q.C. and *McClymont* for the appellant. The plaintiff and the defendant were both co-owners and co-partners, and as a partner the defendant is liable for debts incurred in the joint adventure. Credit is not given to the ship's husband, but to the owners of the ships whom he is known to represent. There has not been such delay on the plaintiff's part to alter the position of the defendant, or deceive him. If the defendant paid Tate for beef which the latter had not himself paid for, it was the defendant's own fault. He could have called for vouchers of the accounts.

Cohen, Q.C. and *Edge* for the defendant.—Tate was not dealt with as a partner, but as ship's husband. It is not the course of business for a ship's husband to buy on credit; he ought to pay debts as they become due. The owners were entitled to presume he had done so in the present case. The long credit given by the plaintiff deceived the defendant into supposing all accounts had been paid, and in that belief he settled accounts with Tate. Tate was then solvent, and the defendant could have recovered from him the amount erroneously allowed him in the account. It is well-established law that when a person deals with an agent, either by giving him unreasonable credit or otherwise, so as to deceive the principal and alter the relative position of the parties, the principal is discharged:

Heald v. *Kenworthy*, 10 Ex. 739;
Smyth v. *Anderson*, 7 C. B. 21;
Kymer v. *Suwercropp*, 1 Camp. 109;
Smethurst v. *Mitchell*, 1 E. & E. 623; 28 L. J. 241, Q.B.;
Armstrong v. *Stokes*, 26 L. T. Rep. N. S. 872; L. Rep. 7 Q.B. 598;
Irvine v. *Watson*, 5 Q.B. Div. 102;
Leake on Contracts, 2nd edit. 503.

The creditor chose to make Tate his debtor, and cannot, on his failure to pay, turn round and charge the principal:

Thomson v. *Davenport*, 9 B. & C. 78, 86.

JESSEL, M.R.—The action was brought for the price of beef supplied to Tate, the ship's husband, who was a co-owner with the defendant of two ships. The invoices were in what we are told is the usual form in small transactions of this nature, namely, to "C. Tate and the ship." The beef was supplied for the use of the ships between April and Sept. 1877. Tate did not pay for the beef, but in Dec. 1877 he charged the owners with the beef supplied, in an account rendered to them. It is not suggested that at this time an unreasonable credit had been given to Tate; therefore the allowance of the payment to him in account was not made through any misrepresentation by the creditor, but solely on Tate's representation that he had paid for the beef. On the face of this the co-owner settled the account without calling for the vouchers. No doubt principles may, in many cases, reasonably rely on the honour of their agents and dispense with the production of vouchers; but when they come into court and seek to excuse themselves from liability, if it turns out that they have not required vouchers, they must expect to be dealt with strictly. Here, the defendant and Tate were not only co-owners, but co-adventurers, therefore they were strictly partners. The beef was supplied for partnership purposes, and the defendant was liable to the butcher, and is still liable to his executor. The defence is that the defendant was injured by the long credit given to Tate, which led him to believe Tate had paid for the beef, and prevented him obtaining repayment from Tate while he was solvent. "Therefore," says the defendant, "though I may be liable at law, I have the equitable defence that the plaintiff gave unreasonable credit without telling me, and the plaintiff has elected to treat him as his sole debtor, and cannot sue me." Is this the law, and, if so, on what principle does it proceed? There is no doubt a well-known principle, long acted on, both by courts of equity and courts of common law—

for the equity is the same in both courts—that, if the defendant has been misled, by the words or conduct of the plaintiff, to believe that which is not true, and his position is thereby altered, the plaintiff cannot be heard to deny the truth of what he has thus led the defendant to believe. This is well expressed in *Irvine* v. *Watson*. There the defendants had paid the broker, and the question was whether that discharged their liability to the plaintiffs. Bramwell, L.J. said: "I think it impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief." Assuming that there is no distinction in this respect between a partnership and a case of principal and agent, that observation applies exactly to this case. The payment made by the defendant was not made in consequence of his being misled by the plaintiff. The mere fact that by the conduct of the plaintiff he lost the opportunity of getting the money back is not sufficient. In the same case, Baggallay, L.J., speaking of the observations of Parke, B. in *Heald* v. *Kenworthy*, says: "He sought to limit the qualification of the general rule to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. And, if that limitation is correct, I am of opinion that there is no such payment here as would discharge the defendants." Brett, L.J. says: "Parke, B., after citing the dictum of Bayley, J., to the effect that the seller cannot sue the principal if the state of accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent." Then, referring to the observations of the judges in *Armstrong* v. *Stokes*, Brett, L.J. continues: "Probably their decision means this, that, when the seller deals with the agent as sole principal, and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent." All the judges agreed that when the seller knows there is a principal behind the person dealt with, the seller must be shown to have himself done something to raise an equity against him, or the principal is not discharged; but I am far from saying that there may not be special cases in which mere delay on the plaintiff's part would be held to be sufficiently misleading conduct. It may amount to a representation that he has been paid. *Smethurst* v. *Mitchell* is an authority that, when the goods are not to be delivered till the account is paid, and yet the goods are delivered, whether the seller takes a bill of exchange or not, the seller cannot afterwards claim against the principal. The conduct of the seller would be treated as evidence of payment; it would be conduct naturally leading men of business to believe that the money had been paid. Hill, J. says, in that case, "A question may arise in such a case whether a vendor selling to a person whom he knows to be acting as the agent of an undisclosed principal is not bound to make inquiries, and may not be debarred from proceeding against the principal, if there has been any alteration in the account between the principal and agent, to the prejudice of the former, at any time after the day of payment has arrived." It is said, both in *Smethurst* v. *Mitchell*, and *Heald* v. *Kenworthy*, that there must be a change of position between the principal and agent caused by the seller's conduct. Here it is clear that paying Tate an account in 1877 was not caused by any dealing of the plaintiff with Tate. What occurred afterwards did not affect the plaintiff. A principal cannot be heard to say that the seller's subsequent conduct induced the principal not to sue the agent for repayment of the money. Independently of the settlement of accounts there is no evidence that merely abstaining from pressing the agent is an injury to the principal. A debtor must find out his creditor and go and pay him; when a man is supplied with goods it is his duty to see that the seller is paid. There is no proof of the defendant's allegation that, by reason of the course of trade, in the case of a ship's husband, giving credit to him affords sufficient evidence of an election by the creditor to discharge the principal. There is no authority for such a proposition; and it is not within the equitable principle. A partner ought not to settle with his co-partner without satisfying himself that the payments have been actually made. In my opinion the plaintiff is entitled to judgment.

Lindley, L.J.—I am of the same opinion. Tate and the other owners of the two ships were not only co-owners but co-partners, and, as such, the other owners are jointly responsible with Tate. The plaintiff was in a better position than he would have been if he had had only the option to sue either the agent or the undisclosed principal. Agent and principal were here partners and jointly liable to the creditor. Has the defendant got rid of his liability? The defence is that in 1877 he settled with Tate in this account for the payment to the plaintiff. But he was not induced to do so by the plaintiff's delay—and that is the vice of the defence. The defendant puts it thus: "We should, in Tate's lifetime, have re-adjusted our accounts with him, instead of which we have had other transactions with him on the faith of his having paid the plaintiff, and in 1879 we settled another account with him on that basis. But that is disproved by the whole of the facts. There is nothing to show that the defendant has been so misled as to disentitle the plaintiff to recover from him. There is no evidence that the plaintiff knew anything of the settlement of the accounts, or that he induced it by his conduct. It would be going too far to say that there was any such personal equity as precluded the plaintiff from suing the defendant. I do not say that, under some circumstances, mere delay may not be sufficient to create such a personal equity; but there are no such circumstances in the present case.

Bowen, L.J.—I am of the same opinion. The goods were supplied to Tate as ship's husband; *primâ facie*, therefore, the defendant, who was a partner in the adventure, is liable jointly with the other partners. To get rid of this liability he endeavours to prove a settlement of account between Tate and his co-owners, and that such co-owners were induced thereto by conduct of the

plaintiff leading them to believe that he had been paid by Tate. That was the sole ground on which the defendant relied at the trial. But the creditor had in 1877 been guilty of no delay which could make the co-owners believe that Tate had paid the plaintiff. It was Tate's representation that he had done so, and not the plaintiff's delay, which led to the settlement. At the trial Mathew, J. decided the case on the ground that the plaintiff elected to give credit to Tate, and that the defendant believed that credit had been given to Tate, and that Tate had paid the plaintiff. On appeal the defendant contends that the judgment below may be supported on the ground that the plaintiff's delay after settlement of the accounts changed the relative position of Tate and the defendant, to the injury of the defendant. However, taking this new ground, there is a joint liability from which the defendant has to discharge himself. In very special circumstances delay may amount to misrepresentation; it may be conduct misleading the defendant. But that can only be when there is something in the original contract, or in the conduct of the parties, which renders the delay misleading. That a creditor is not obliged to apply to all his debtors if he can obtain payment from one of them, is a doctrine which is laid down in *Heald* v. *Kenworthy*, is sanctioned by *Irvine* v. *Watson*, and is consistent with Lord Ellenborough's judgment in *Kymer* v. *Suwercropp*. I think the plaintiff is entitled to judgment on the ground that there was no misleading conduct on his part. The question whether, if there had been, and the defendant had been thereby induced to alter his position, the plaintiff would have been entitled, I prefer to express no opinion.

Decision reversed.

Solicitors for the appellant, *Hopwood* and *Sons*, for *R. Purvis* and *Co.*, South Shields.

Solicitor for the defendant, *H. C Coote*, for *H. A. Adamson*, South Shields.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Nov. 25, 1882.

(Before Lord Coleridge, C.J., Pollock, B., Lopes, Stephen, and Williams, JJ.)

Reg. *v.* Carr and Wilson.

Felonious receiving—Bonds stolen from a British ship in a foreign river—Admiralty jurisdiction.

Egyptian and other bonds were put on board a British ship lying in the river, and moored to the shore, at Rotterdam, for conveyance to England. The bonds were stolen, and the prisoners, British subjects, were found dealing with them in England, and were tried at the Central Criminal Court, and found guilty of feloniously receiving the same, well knowing them to have been stolen.

Held, assuming the bonds to have been stolen by a foreigner, or other person not being one of the crew, from the ship at Rotterdam, whilst so moored in the river, that the admiral had jurisdiction over the offence, and that the prisoners were properly tried at the Central Criminal Court.

Case reserved for the opinion of this court by North, J.

The prisoners were tried before me at the Old Bailey, at the session of the Central Criminal Court, on 13th Sept. last, for felony in respect of twenty-five bonds (20*l.* each) of Egyptian Preference Stock, two bonds of 1000 dollars (ten shares), and 500 dollars (five shares) respectively of the Illinois Railway, and thirty other bonds of Egyptian Unified Stock.

The first count charged the prisoners with stealing these securities upon the high seas within the jurisdiction of the Admiralty of England; the second count charged that they being British subjects within the jurisdiction of the Admiralty of England, upon the British ship *Avalon*, then being in a certain foreign port, to wit, the port of Rotterdam, stole the same securities; the third count charged them with larceny of those securities within the jurisdiction of the Central Criminal Court; the fourth count charged them with receiving the same securities within the jurisdiction of that court, well-knowing them to have been stolen; and the fifth and sixth counts respectively charged them with having been accessories after the fact to the theft and the receiving respectively of the same securities by persons unknown.

A copy of the extract of the indictment will be found in the schedule to this case, and the indictment may be referred to as a part thereof.

I was asked by the counsel for the prisoner Wilson to quash the second count of the indictment; but it was suggested by Sir H. Giffard, who appeared for the prisoner Carr, that the better course would be that the prisoners should refuse to plead, and I should direct pleas of not guilty to be entered, and this was accordingly done.

The material facts proved were as follows:—

1. On the 12th July last the above-mentioned Egyptian Preference Stock and Illinois Bonds were made up by Messrs Kelker and Co., bankers at Amsterdam, into a parcel which was marked outside "value 50*l.*," and was addressed to Messrs Mercia, Backhouse, and Co., in London. The Unified Stock was made up into another parcel similar to the first, except that it was marked outside as "value 100*l.*" These parcels were of a class known as "valued parcels." They were traced clearly from Amsterdam to Rotterdam, to the office of Messrs Pieters and Co., the agents there of the Great Eastern Railway Company, on whose behalf they were received.

2. There was evidence that these two parcels were (with two others) taken from Pieters and Co's office by a man employed by them for that purpose, and placed by him on board the steamship *Avalon* about half past five p.m. on the same 12th July.

3. The *Avalon* is a British vessel, registered at Harwich, and sailing under the British flag. She is about 240 feet in length, with a gross tonnage of 1,670 tons; and draws about ten feet six inches of water when loaded. She is the property of the Great Eastern Railway Company, and is regularly employed by them in their trade between Harwich and Rotterdam. On the evening in question she was lying in the river Maas, at Rotterdam, about twenty or thirty feet (the captain also described it as "about the breadth of the court") from the quay, and against a "dolphin," a structure of piles for the use of the company's ships only, projecting from the quay for the purpose of keeping vessels off the quay. She was moored to the quay in the usual manner.

4. The place where the *Avalon* was lying was

in the open river, sixteen or eighteen miles from the sea. There is not any bridge across the river between that point and the sea. The tide ebbs and flows there, and for many miles further up the river. The place where the *Avalon* was lying at the dolphin is never dry, and that vessel would not touch the ground there at low water. The Admiralty chart, showing the river Maas from Rotterdam to the sea, was put in evidence at the suggestion of the counsel for the prisoners, and was proved by the captain of the *Avalon* to be correct. It is marked J.T.H. 1.

5. While the *Avalon* was lying at the dolphin, as above described, persons were allowed to pass backwards and forwards between her and the shore without hindrance.

6. The *Avalon* sailed for England the same evening, about six o'clock, and arrived at Harwich the following morning. Upon her arrival the two valued parcels above mentioned (and one of the other parcels) were at once missed, and upon inquiry it was found that they had been stolen. The parcel containing the Unified Stock and the third parcel have never since been traced; but the parcel containing the Egyptian Preference Stock and the Illinois bonds was found in the prisoners' possession on the 1st Aug.

7. The prisoners are British subjects.

8. It was contended for the prisoners that there was no evidence upon which the jury could find them guilty upon the counts charging them with stealing the securities. I was of that opinion, and so directed the jury, and the prisoners were accordingly acquitted upon those counts.

9. It was also contended for the prisoners that unless the jury found that the securities had been stolen from on board the *Avalon* the prisoners must be acquitted, as, if they had been stolen after leaving Pieters and Co.'s office, and before reaching the ship, the offence of stealing them was one which this court had not jurisdiction to try, and therefore the prisoners could not be tried here for receiving, according to the case of *Reg.* v. *John Carr* (one of these prisoners), reported in vol. lxxxvii., p. 46, of the Sessions Papers at the Central Criminal Court, and the cases there cited. I took this view and directed the jury, that unless they were satisfied that the securities had been taken from the *Avalon*, they must acquit the prisoners. They found both the prisoners guilty.

10. I was not asked to leave, and did not leave, any question to the jury whether the securities were stolen before or after the *Avalon* commenced her voyage from Rotterdam. There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed.

11. It was further argued on the prisoners' behalf that even if the securities had been stolen from the *Avalon*, there was nothing to show that they had been taken from a British subject, and, therefore, the case did not come within the Acts 17 & 18 Vict. c. 104, s. 267, 18 & 19 Vict. c. 91, s. 21, or 30 & 31 Vic. c. 124, s. 11, and the thief was amenable to the law in Holland only; and, further, that the case of *Reg.* v. *Anderson* (19 L. T. Rep. N. S. 400; L. Rep. 1 Cr. Cas. Res. 161; 11 Cox C. C. 198) was no authority to the contrary, inasmuch as the prisoner in that case, though a foreigner, was one of the crew of a British vessel, and therefore owed allegiance to the law of England, and upon that ground could be tried here. The counsel of the Crown did not dispute that the offender might be tried in Holland, but insisted that he might be tried here also.

12. I expressed my opinion that if the *Avalon* had, at the time when the securities were stolen, been sailing up or down the river Maas, the person who took them, whether an Englishman or a foreigner, could clearly have been tried here, upon the authority of *Reg.* v. *Anderson*; that the law is the same, whether the ship be anchored or sailing, as appears from the cases of *Reg.* v. *Jemot* and *Reg.* v. *Allen* (7 Car. & P. 664; 1 Moody's Cr. Cas. 494) where the vessels were lying in port, and which cases are referred to by Lord Blackburn with approval in *Reg.* v. *Anderson*; and that it could not make any legal difference whether the vessel was made fast to the bottom of the river by anchor and cable, or to the side of the river by ropes from the quay. I also expressed my opinion that, although the fact that the prisoner in *Reg.* v. *Anderson* was one of the crew was referred to more than once in the judgment of Bovill, C.J., it was not mentioned by any of the other judges, and was not the ground of the decision; and that it made no difference in the present case whether the securities stolen from the *Avalon* were taken by one of the crew or passengers, or by a stranger from the shore.

13. I directed the jury accordingly, telling them that if they came to the conclusion that the securities were taken from the ship, the taking them was an offence which could be tried here; and that, if so, the prisoners could now be tried here for receiving, and could be found guilty of that offence, if the jury thought the facts proved warranted such a finding. I stated at the same time that I should, if necessary, reserve the point for the consideration of this court.

14. With respect to the receiving, no difficulty of law arose, and no point was reserved.

15. The jury found both prisoners guilty upon the fourth count. I postponed passing sentence until the opinion of the court is given; and the prisoners remain in custody.

The question upon which I desire the opinion of the court is, whether, under these circumstances, there was any jurisdiction to try the prisoners at the Old Bailey for the offence of which they have been found guilty. If answered in the affirmative the conviction is to stand. If otherwise, the conviction is to be quashed; but the prisoners are to remain in custody to be tried upon another indictment, on which a true bill against them has been found by the grand jury.

FORD NORTH.

Sir *H. Giffard*, Q.C. (*Tickell* with him) for the prisoner Carr, and *E. Clarke* Q.C. (*Grain* with him) for the prisoner Wilson.—The Central Criminal Court had not jurisdiction to try the prisoners, the offence not having been committed within the Admiralty jurisdiction. It is immaterial that the prisoners were British subjects, as jurisdiction over the offence is not given by the nationality of the prisoners, but must exist independently thereof. The prisoners were convicted of receiving stolen bonds, and without the court had jurisdiction over the thief it has none over the receiver. There is no evidence as to the person

who stole the bonds, and it is consistent with the facts that the thief may have been a Dutchman. On the case as stated it must be taken that the bonds were stolen from the vessel while it was moored to the wharf at Rotterdam. The question is whether the Dutch courts had not exclusive jurisdiction to try the prisoners? It is submitted that they alone had jurisdiction. The ship was attached to the shore by ropes, and became, as it were, part of the shore of the country to which it was attached. When the ship was moored to the quay the English flag was lowered, and the law then governing the ship was the law of Holland. There is no authority that decides that a foreigner on board a vessel at such a place and not being one of the crew and not claiming the protection of the flag of the vessel subjects himself to the jurisdiction of the country to which the vessel belongs. In *Reg.* v. *Anderson* (19 L. T. Rep. N. S. 400; L. Rep. 1 Cr. Cas. Res. 161; 11 Cox C. C. 198), Bovill, C.J., Channell, B., and Blackburn, J. seem to place reliance on the fact that the prisoner was one of the crew of the vessel. This is a new point not hitherto decided. What is the condition of a vessel in a river in a foreign country moored to the shore? It is submitted that the local and municipal authorities have exclusive jurisdiction over offences committed upon it whilst so moored.

Poland (*Goodrich* with him) for the prosecution. —It is submitted that the prisoners were properly tried and convicted. The question depends not on the character of the person committing the offence, but on the character of the ship. At the time the bonds were stolen the ship was within the Admiralty jurisdiction. It was a vessel trading from Harwich to Rotterdam, and when the theft was committed was lying in a tidal river where great ships go, and was in every sense floating within a place where the admiral had jurisdiction:

The United States v. *Hamilton*, 1 Mason (Amer. Rep.) 152.

Even if the theft was committed by a Dutchman, the Admiral had jurisdiction over it. There can be no distinction between a seaman, one of the crew, and a stranger who goes on board to do a criminal act; being on board an English vessel he puts himself within the jurisdiction of the English law, the ship being considered, as it were, part of the English territory. The test of the admiral's jurisdiction has always been whether the ship was upon the high seas or lying in a river where the tide ebbs and flows and where great ships go. The American reports of *Thomas* v. *Lane* (2 Sumner 1), and *The United States* v. *Coombes* (12 Peters 71) were then referred to. In *Reg*, v. *Allen* (1 Moo, C. C. 494) it was held that the Admiralty had jurisdiction over a larceny in a vessel lying in a Chinese river, although there was no evidence as to the tide flowing where the vessel lay. In *Reg.* v. *Jemot* (MSS. 1812) as appears from the report in the *Times* newspaper (29th Feb. 1812), it was held that the Admiral had jurisdiction over a larceny of 40,000 dollars from a British ship while lying in the harbour of St. Jago, in Cuba. The prisoner was convicted and sentenced to death. The case of *Reg.* v. *Keane* (2 Ex. Div. 92) was then cited. The principle on which *Reg.* v. *Anderson* (*ubi sup.*) was decided is applicable to this case, and supports the conviction. The theft in this case was committed on board a vessel sailing under the British flag, and being at the time floating in a tidal river where ships used for commerce go, and therefore it is submitted the admiral had jurisdiction over the offence.

Sir *H. Giffard* and *E. Clarke* were heard in reply.—The case of *Reg.* v. *Leslie* (Bell C. C. 220; 8 Cox C. C. 269) was referred to.

COLERIDGE, C.J.—This case has been argued at some length, and the question raised by it is no doubt of considerable importance. The facts are these. The bonds which the prisoners have been convicted of feloniously receiving were on board an English ship, in the river Maas, off Rotterdam, in front of a "dolphin," and was moored by ropes to the land of Holland. The tide ebbs and flows in the river, and at the place where she was lying in front of the "dolphin" there is always enough water to float ships of her class. There was no actual proof when, or by whom the bonds were stolen. The case states, "There was no evidence upon which the jury could have found that the theft occurred after the voyage began; the evidence rather pointed to its having occurred before she sailed." Whether the bonds were carried off the ship on to the shore, and sent by some conveyance to the prisoners in England, or whether they were brought by the prisoners to England, does not appear. The prisoners were acquitted of stealing the bonds and found guilty of receiving them with guilty knowledge that they had been stolen. It is obvious that the prisoners could not be convicted of feloniously receiving the bonds unless they were stolen within the same jurisdiction where the receiving took place, and therefore it becomes material to inquire whether the jurisdiction of the Admiralty attached, so that the prisoners could be tried at the Old Bailey. It is admitted that the exact point raised in this case has never arisen for decision in our courts before.

There appear but two points for us to decide. 1. Was the ship within the jurisdiction of the Admiralty so as to make offences committed upon it triable according to the English law? 2. If that point is answered in the affirmative, were the prisoners, according to the decisions, liable to be tried in the English courts? First, as to the place. The place appears to me to come within the old definition of the Admiralty jurisdiction. The ship was at a part of the river which is never dry, and where it would not touch the ground at low water, and the tide ebbs and flows in the river, and great ships do lie and hover there. That is sufficient to bring this ship within the Admiralty jurisdiction. Without saying that the reports of the cases of *Rex* v. *Jemot* and *Rex* v. *Allen* (*ubi sup.*) are as full as could be desired, it seems very difficult to draw any tangible distinction between them and the present case. This case also falls within the decision of *Reg.* v. *Anderson* (*ubi sup.*) where the ship was half-way up the river Garonne in France, and at the time of the offence about 300 yards from the nearest shore, and this court held, the prisoner having been convicted of manslaughter, that the offence had been committed within the jurisdiction of the Admiralty and that the Central Criminal Court had jurisdiction to try the prisoner. I am unable to distinguish this case from that, but if anything *Reg.* v. *Anderson* seems an *a fortiori* case. Then,

as to the second point, whether there is anything in the personality of the prisoners which would make them not liable by the law of England. It is true that some of the Judges in *Reg.* v. *Anderson* (*ubi sup.*) place reliance upon the fact that the prisoners formed part of the crew of the vessel, but Bovill, C.J. in his judgment points out that England has always insisted on her right to legislate for persons on board her vessels in foreign ports. None of the judges suggested that their judgments would have been in any way altered if the prisoners had not in those cases formed part of the crew. I think it makes no difference whether a person is a British subject or not who comes on board a British ship where the British law reigns, and places himself under the protection which that flag confers; if he is entitled to the privileges and protection of the British ship he is liable to the disabilities which it creates for him. I am unable, therefore, to make a distinction between a passenger or stranger on board a ship and one of the crew, and it makes no difference in my mind whether the person is on board voluntarily or involuntarily; if while on board he is entitled to the protection of its flag, he is also bound by the obligations imposed by the law governing that ship. The utmost that can be said as regards the theft in this case is that the bonds may have been stolen by some one who came on board casually; it may be a foreigner who took them off the vessel at Rotterdam. Suppose the thief had not been able to get off the ship, and had been captured and brought here, could he have been tried here? In my opinion he could, for if while he was on board the ship he was entitled to the protection of the British flag, he was at the same time equally liable to the disabilities of the criminal law of this country. It appears to me that the evidence shows that the bonds were stolen within the jurisdiction of the English law, and I am of opinion that the prisoners therefore were triable at the Central Criminal Court for receiving them well knowing them to have been stolen. I think that the conviction should be affirmed.

POLLOCK, B.—I am of opinion that the conviction should be affirmed. The prisoners were convicted of the offence of feloniously receiving stolen goods, and the question is, were the prisoners within the jurisdiction of the Central Criminal Court for all purposes? The general rule of law is that a person on board an English ship is to be treated as within the dominion of the English Crown; and it is admitted that if the ship had been on the high seas, or had been moored in the middle of the river, this rule would have applied to the case. Then what distinction can there be because the ship was tethered by ropes to the shore? I think there is no distinction. She was a large ship carrying passengers and goods from Harwich to Rotterdam, and was in a tidal river at Rotterdam at a spot where great ships go. She was there for the purpose of unloading, and when unloaded would return to Harwich. I think, therefore, the conviction was right.

LOPES, J.—I think, also, that the conviction should be affirmed, As to the question of the thief not being one of the crew of the vessel, I do not think that that matters. The thief was on board an English ship at the time the bonds were stolen, and therefore came within the English law.

STEPHEN, J.—Since the time of Richard II. the jurisdiction of the Admiralty has been extended to waters where great ships go. There are many statutes which gave jurisdiction to particular courts in particular cases. But the jurisdiction of the Admiralty itself has never been defined in any other way than as laid down in the reported cases. The case of *Rex* v. *Jemot* bears on the question of local jurisdiction, and decided that the Admiralty had jurisdiction over a theft on board an English vessel in a Spanish port, and shows that the jurisdiction of the admiral was not confined to the waters outside creeks, ports, harbours, &c. *Rex* v. *Allen* (*ubi sup.*) is to the same effect. *Reg* v. *Anderson* (*ubi sup.*) goes further, and affects both the questions of place and person, the place being in a foreign river, and the person being an American subject, who had committed manslaughter on board an English ship. No doubt the prisoner was one of the crew of that ship, but it seems to me that we cannot lay down the rule in narrower terms than that the jurisdiction of the admiral extends to all tidal waters where great ships go, and to all persons on board of them whether foreigners or not. There is no reason which should induce us to lay down restrictions to the extent which has been contended by the prisoners' counsel, that the Admiralty jurisdiction extends only when the British flag is flying, and not when it is lowered. It seems to me that the protection of the British flag and the English jurisdiction are co-extensive, and that protection and obedience must co-exist. I think, therefore, that the thief in this case, if he had been captured, might have been tried at the Old Bailey.

WILLIAMS, J.—I concur.

Conviction affirmed

END OF VOL. IV.